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THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT
OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS.

VOL. LX.

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Vol. LX.

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AMERICAN STATE REPORTS.

VOL. LX.

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AMERICAN STATE REPORTS.

VOL. LX.

CASES
IN THE
COURT OF CRIMINAL APPEALS
OF
TEXAS.

SHANNON v. STATE.

[35 TEXAS CRIMINAL REPORTS, 2.]

HOMICIDE—SELF-DEFENSE—PROVOKING QUARREL.
One person may speak to another about derogatory charges or statements made or circulated by such other against him without intending to provoke a difficulty; and, knowing that such other person is armed, he may also arm himself, not to provoke a difficulty or to produce an occasion for injuring such other, but to act, if necessary, in self-defense; and if, in an attempt to adjust the trouble or reach an understanding without any provocation on his part, the insult or charge complained of is not only persisted in, but publicly repeated, and the complainant, roused to passion thereby, replies in terms equally insulting, and is immediately attacked, and finally kills his adversary in defense of his life, he is not guilty of any crime.

HOMICIDE—SELF-DEFENSE.—The fact that one person with a grievance arms himself, and seeks an interview with the man who wrongs him, is not necessarily a provocation, nor does it place the injured party necessarily in the wrong; and to deprive him of the right of self-defense, he must willingly and knowingly use language or commit acts clearly and reasonably calculated and intended to lead to an affray or deadly conflict.

Rogers & Herbst, for the appellant.

Searcy & Garrett and R. L. Henry, assistant attorney general, for the state.

"SIMKINS, J. Appellant was convicted of manslaughter, and his punishment fixed at two years in the penitentiary. Appellant and deceased were young men under nineteen years of age, living in the town of Independence, both of good character, and social position. Deceased was, perhaps, high spirited, had had some previous difficulties, and usually went armed. Appellant was exemplary in his life. This was his first difficulty, and

he borrowed the pistol used in the homicide, having none of his own. The issue in the case was whether appellant provoked the difficulty which led to the homicide, and, if so, with what intent. The charge of the court was clear, and instructed the jury that, if appellant provoked the quarrel for the purpose of killing deceased, it would be murder, though done in self-defense; if only for the purpose of inflicting a battery, it would be manslaughter. If the interview was requested in a friendly spirit, to settle a difficulty or misunderstanding, and appellant killed in defense of his life, it would be justifiable homicide. The jury having found manslaughter, the question arises, Do the facts proven to have attended the homicide show an intent or purpose on the part of appellant to provoke a difficulty? If deceased was the aggressor, without provocation on the part of appellant, the latter cannot be held responsible. There is no question that one may speak to another about derogatory charges or statements made or circulated by such other person against him, without intending or even desiring to provoke a difficulty; and, knowing such other person is armed, he may also arm himself, not to provoke a difficulty or to produce an occasion for injuring the other, but to act, if necessary, in self-defense. If, then, in an attempt to adjust the trouble or reach an understanding, without any provocation on defendant's part, the insult or charge complained of is not only persisted in, but publicly repeated, and defendant, roused to passion thereby, replies in terms equally insulting, and is immediately attacked, and finally kills, but only in defense of his life, we cannot hold him guilty of any crime. To hold otherwise would be to deny a man the right to notice any insult or interrogate the author of any charge because he would forfeit the right to defend his life if he should be attacked. The tendency of the right to abuse is no answer to the right itself. The fact that one with a grievance arms himself, and seeks an interview with the man who wrongs him, is not necessarily a provocation, nor does it place the injured party necessarily in the wrong. He must also, as said by Judge Hurt in *Cartwright v. State*, 14 Tex. Crim. App. 502, "willingly and knowingly use language or do acts reasonably calculated to lead to an affray or deadly conflict"; and, unless the acts are clearly calculated or intended to have such an effect, the right of self-defense is not compromised, even though the party armed himself and went there ⁷ for the purpose of a difficulty: *White v. State*, 23 Tex. Crim. App. 164. There is nothing in this record that shows appellant was the aggressor, or that he used language or did anything reasonably calculated to provoke a difficulty. He invited deceased to an in-

interview in a quiet and peaceful manner. They spoke in low tones, inaudible to bystanders fifteen feet away. Deceased first began the difficulty by loudly stating "that what he had said then he said now." There was no question about what he meant, for appellant instantly replied, "If you say I am a damned coward, you are a damned liar." Again deceased repeated the remark, and appellant replied, and then deceased attempted to ride him down with a large and spirited stallion upon which he was mounted, and was only prevented from doing so by appellant catching the reins near the bit. He then drew his pistol, and, holding it down by his side, a struggle ensued, deceased endeavoring to jerk his reins away and ride over appellant, both parties talking excitedly. Finally, appellant, using his pistol as a bludgeon, struck deceased, who thereupon drew his pistol and began firing, when appellant shot and killed him. In the record as presented, the deceased appears the aggressor throughout. Enough is shown in the statements of the parties to show that young Shannon had been insulted, and remarks made about him calculated to bring him into contempt among his associates, and, when he sought an explanation, he was met with a repetition and public avowal of the charge. When he replied in similar terms to the insult, he was violently attacked by an effort to ride him down. Had he killed deceased then, it would have been in self-defense; but he held the pistol down, and only when the effort was continued to ride over him did he begin to use it as a bludgeon, and finally killed, after deceased had opened fire upon him. Defendant acted on the defensive only. But it is insisted by the state that, after the homicide, appellant remarked to Dr. Burford, who told him to go on home, "that any man who ran a hog over him [appellant], or insulted him in the presence of ladies, was left"; and that such a remark was evidence of malice aforethought, and clearly shows that appellant brought on the difficulty for the purpose of killing deceased. It is to be observed that of the ten bystanders, most of whom testified for the state, but a single state's witness testified to this remark. Dr. Burford said he heard no such remark, and the jury, to whom this issue of murder was fairly presented in the charge of the court, practically say they do not believe appellant brought on the difficulty with the purpose of killing deceased; and we think the evidence clearly sustains the correctness of this finding. But, concede the remark was in fact made; it simply tends to prove that appellant had a grievance which impelled him to seek an explanation, to wit, that deceased had characterized him, in the presence of ladies, as a coward. But the vital question in the

case—whether the interview was sought for the purpose of provoking a difficulty—must be clearly shown by the facts attending it, and not alone by the remarks of an excited boy amidst the bloody circumstances of his first difficulty. We do not feel ^s satisfied with the verdict, and think a new trial should have been granted. The judgment is reversed, and cause remanded.

Judges all present and concurring.

HOMICIDE—PROVOCATION BY WORDS—SELF-DEFENSE.—To reduce a homicide from murder to manslaughter because of the use of insulting words by the deceased, the killing must take place immediately upon their utterance: *Evers v. State*, 31 Tex. Crim. Rep. 318; 37 Am. St. Rep. 811, and note. Where a difficulty is sought by the defendant with the deceased for the purpose of beating or chastising him, and, in pursuance of such purpose, defendant arms himself with a pistol to be used in case of necessity, and with it kills the deceased in pursuance of such purpose, the killing is murder, although it was necessary to use the pistol in order to save his own life or his body from great harm: *Gibson v. State*, 89 Ala. 121; 18 Am. St. Rep. 96, and note. See *People v. Button*, 106 Cal. 628; 46 Am. St. Rep. 259, and note.

ROBINSON v. STATE.

[85 TEXAS CRIMINAL REPORTS, 54.]

FORGERY—RAILROAD TICKET—VARIANCE.—If, on a trial for uttering a forged railroad ticket, it appears from the face thereof that it must be indorsed with a certain stamp on the back before it is complete and binding upon the railroad company, it must also appear that such stamped indorsement has been set out in the indictment as part of the forged instrument before evidence of such indorsement is admissible.

FORGERY OF RAILROAD TICKET—CHARGE AS TO ACCOMPLICE.—If, on a trial for passing a forged railroad ticket, it appears by the principal witness for the prosecution, who sold the ticket to the defendant, that the witness knew it was of no value unless filled out and indorsed with a certain stamp, it is essential to a conviction that the jury be charged as to accomplice testimony and the necessity for its corroboration, in relation to such witness.

FORGERY—INDICTMENT—SUFFICIENCY.—It is essential to the validity of an indictment for passing a forged railroad ticket that the character of the instrument, and in what the forgery consists be fully set out, both as to the face of the ticket and as to an indorsement on the back thereof, which alone renders the ticket binding and valuable.

B. Johnson, for the appellant.

M. Trice, assistant attorney general, for the state.

55 DAVIDSON, J. The appellant in this case was convicted of knowingly passing as true a forged instrument in writing, which is set out according to its tenor in the indictment, and his

punishment assessed at two years' confinement in the penitentiary, and from the judgment and sentence of the lower court he prosecutes this appeal. On the trial of the case, the state offered in evidence the alleged forged instrument as set out in the indictment. The appellant objected to the introduction of same, because he claimed there was a variance between the instrument as set out in the indictment and that offered in evidence, in that the instrument offered in evidence had an indorsement on the back thereof as follows, to wit: A stamp with the letters "G." "U." "R.," "Fort Worth, Texas, February 7, 1894," in the outer rim of said round stamp, the said letters being the first two and the last letter of the Gulf, Colorado, and Santa Fe R. R. Said stamp, with said letters, are not set out in the indictment as a part of the alleged forged instrument, which was a passenger ticket of the Gulf, Colorado, and Santa Fe Railway Company from Fort Worth to Galveston and return. By reference to face of the ticket as set out, and also that introduced in evidence, appears the following: "Good within ten days from date of same, as stamped on back hereof," so that it appears that the instrument in order to be a complete obligation of said company for round trip passage from Fort Worth to Galveston, required that it be stamped on the back, and such stamp is made part of said ticket from said reference contained on the face thereof. Before the stamped indorsement on the back of said ticket could be offered in evidence, it should have been set out in the indictment as a part of the alleged forged instrument, and the court should have sustained the objection to its introduction. It appears in this case that one F. M. Marple bought two genuine tickets from the agent of the Gulf, Colorado, and Santa Fe Railway Company, which were properly filled out with the points of departure and destination plainly written in the blanks on the face of the tickets, and with indorsements on the back thereof, that in tearing out said tickets from a ticket-book the agent also tore out a third ticket, not filled out or indorsed on the back, that said Marple sold said blank ticket to the defendant, who was a ticket broker in Fort Worth, receiving therefor the sum of one dollar. He evidently knew at the time that said ticket in its then shape was of no value, was not his property, and that before it could be used by the defendant, in order to make it a valid ticket, the points of departure and destination would have to be forged in the face of the ticket, and also the stamped indorsement on the back thereof. The appellant, on the trial of the case, claims that said Marple was an accomplice in the passing of the forged instrument, and that as he was an important witness in the case

for the state, the court, as to him, should have given the jury a charge on accomplice testimony. This the court did not do, and the defendant reserved an exception to the action of the court. In our opinion, the charge on this subject should have been given. In our opinion, it is also questionable whether the indictment in this case was ⁵⁶ sufficient for the passing of a forged instrument, the character of the forged instrument, and in what the forgery consisted should have been more fully set out, as to the face of said instrument, as also the indorsement on the back thereof, which has heretofore been discussed: See *Overly v. State*, 34 Tex. Crim. Rep. 500, decided at the present term of this court, and *Daud v. State*, 34 Tex. Crim. Rep. 460.

For the errors pointed out, the judgment is reversed and the cause remanded.

FORGERY—INDICTMENT—SUFFICIENCY OF—VARIANCE.—An indictment for forgery must set forth the instrument forged with literal accuracy, or show good cause for the omission to do so; and the instrument thus set forth must be shown in the proof with the same accuracy: *Luttrell v. State*, 85 Tenn. 232; 4 Am. St. Rep. 760, and note; *Hendricks v. State*, 26 Tex. App. 176; 8 Am. St. Rep. 463, and note; *State v. Potts*, 9 N. J. L. 26; 17 Am. Dec. 449, and note. Immaterial variances resulting from clerical inaccuracies in transcribing and misspelling a name forged are not necessarily fatal to the indictment: *State v. Gryder*, 44 La. Ann. 962; 32 Am. St. Rep. 358, and note. See *Hocker v. State*, 34 Tex. Crim. Rep. 359; 53 Am. St. Rep. 716. A difference or even a contradiction in the testimony of witnesses for the prosecution does not defeat an indictment: *State v. Potts*, 9 N. J. L. 26; 17 Am. Dec. 449.

CONDE v. STATE.

[35 TEXAS CRIMINAL REPORTS, 93.]

HOMICIDE—CORPUS DELICTI.—It is essential to a conviction for any degree of culpable homicide, not only that it be shown that the deceased has been killed, but also that the killing was caused by some criminal means or agency, and, unless the corpus delicti in both these respects is proved, a confession by the accused is not of itself sufficient to sustain a conviction.

HOMICIDE—CORPUS DELICTI.—On a trial for murder, evidence that a witness saw the corpse of the person alleged to have been killed, and assisted in burying it, but did not see the face, which was covered with a bloody cloth, nor did he see any wounds on the person of the deceased, nor any marks of violence, is not sufficient to establish that he came to his death by some criminal means or agency. Such evidence does not establish the corpus delicti.

HOMICIDE—GOODS OF DECEASED IN POSSESSION OF ACCOMPLICE—CHARGE LIMITING EVIDENCE.—If, on a trial for murder, evidence is admitted showing that property of the deceased, after his death, was found in the possession of one of the defendants jointly on trial, and at a time when the other defendant was

not present, and it is not shown that the latter ever had possession of the property, the evidence should be limited to the defendant in whose possession the property was found.

CONSPIRACY.—ACTS AND DECLARATIONS of a co-conspirator after the consummation of the conspiracy are admissible only against the party doing the act, or making the declaration.

HOMICIDE — FORMER JEOPARDY — ERRONEOUS CHARGE.—If, after an accused has been acquitted of murder in the first degree, he is placed on trial for murder in the second degree, it is error to charge the jury that “when an indictment charges murder upon implied malice alone, and the evidence establishes, or tends to establish, express malice as a fact, it is not to be understood that such proof would, on the one hand, be incompetent, nor, on the other, that it would create a variance from the allegations in the indictment, but such evidence, notwithstanding it shows express malice, would, in such case, be sufficient to warrant a conviction for murder in the second degree, since express malice comprises and embraces implied malice, just as murder of the first degree comprises and embraces murder of the second degree.” Such charge makes the accused liable to conviction for the crime for which he has been acquitted.

HOMICIDE — FORMER JEOPARDY — DEGREES OF CRIME.—If an accused has been put on trial for a homicide or other offense which embraces different degrees, and has been acquitted of the higher degree, he cannot again be put on trial for that degree and it is the duty of the court to so inform the jury.

M. Trice, assistant attorney general, for the state.

⁹⁹ **HENDERSON, J.** The appellants were tried and convicted at the December term, 1894, in the district court of Nueces county of the offense of murder in the second degree, and their punishment assessed at five years' confinement in the penitentiary. The indictment in this case was originally presented in the district court of Cameron county. A trial was had in said court, and the defendants convicted of murder in the second degree. An appeal was prosecuted to this court, and the case was reversed because of the failure of the court to charge on accomplice testimony, and because the court improperly admitted the opinion of a witness as to the cause of the death of the deceased: *Conde v. State*, 33 Tex. Crim. Rep. 10. After the case was sent back the venue was changed to Nueces county. A trial thereof was had in December, 1894, which resulted in the conviction of both of said defendants for murder in the second degree, and the punishment of each assessed at a term of five years in the penitentiary, and from the judgment and sentences in said case the defendants prosecute this appeal. It appears that the parties were all Mexicans, and that the defendants lived with their father, Gregoria Conde, in Cameron county, at the time of the alleged homicide, and also that the deceased, Francisco Andes, was staying at Gregoria Conde's. The last time the latter was seen alive was on the 12th of March, 1893, and within a few days

thereafter (not exceeding a week) the evidence shows that the body of said Andes was buried in a dense thicket, but a short distance from Gregoria Conde's house. The only witness upon this latter point is Celso Roman, who testified, substantially, "that he lived on a ranch not far from where the defendants lived; that about the twelfth day of March, 1893, Estevan Conde (one of the defendants) came to my house at the Prado ranch and asked me to go with him to 'Santo Teresa' (the ranch or place where defendants lived). This was about half past ten o'clock in the morning. I mounted my horse and accompanied him. After going some distance, we met Ruperto Conde (the other defendant, and who is ¹⁰⁰ a brother of Estevan). He was on foot, and coming from the direction of the Santo Teresa ranch. Ruperto asked Estevan, 'Have you got him?' Estevan answered 'Yes.' Ruperto then mounted behind Estevan. Ruperto wore a knife and Estevan a pistol. Estevan then said, 'Come on, let us go.' I asked, 'Where are you going?' Estevan answered, 'We are going somewhere.' I then demanded to know where they were going to take me. Estevan then said, 'We are going to bury Francisco Andes.' We then continued on the road we were traveling until we arrived at a place four or five hundred yards from Santo Teresa, where we turned off the road and entered a path. We traveled this till the woods became too thick for the horses to pass through. We then dismounted, tied our horses, and made our way on foot through a very thick brush until we arrived at a very small opening, where the body of Francisco Andes was lying. His head and shoulders were entirely covered with a coarse white cloth; the cloth was bloody. I did not remove the cloth, nor did I see his face. I knew it to be the body of Francisco Andes by the sandals and pantaloons. I did not see any wounds upon the body. There were besides the body a spade and an iron bar with which to dig the grave. Estevan showed me the tools and told me to dig the grave, which I did, loosening the ground with the bar, while Ruperto threw out the dirt with the spade. We dug a hole about a foot deep, whereupon Estevan and Ruperto lifted the body and placed it in the hole. I then covered the body with earth, filling the grave. When I had finished, we gathered up the tools, and returned to the place where we had left our horses. As we rode away, we met Gregoria Conde, who was on horseback. He said to Estevan, 'Have you finished the job?' Estevan answered, 'Yes.' Then Gregoria turned toward me, and placing his hand upon his pistol said, 'Be very careful about this; if anything of this becomes known, I or my boys will injure you.' I then rode away and returned to my home." This

witness, according to his testimony, four days after this occurrence rode some eighteen miles and told Mr. White, who was also a witness, what had occurred, as above stated, and in a short time thereafter he left the vicinity and went over into Mexico to visit his father, as he says. The sheriff in a few days hearing of the matter, and that Roman could tell him in regard to it, went into Mexico and sought out the witness, whom he persuaded to come across the river into Texas, and point him out the grave where they had buried Andes. The body was exhumed and an inquest held. The corpse was identified as that of Francisco Andes, but no wounds or marks of violence were discovered. And the cloth, spoken of by the witness Roman, was found upon the body, and the sheriff stated, "that it had a black substance like clotted and dried blood on it." We have thus quoted fully from the testimony of Roman, as the state's case depends upon his evidence. The questions presented for our consideration are:

1. Does the evidence in the case establish the *corpus delicti*? By this we mean the body of the offense, not only that a dead body has ¹⁰¹ found and identified, but also the fact that the deceased came to his death by some criminal means or agency. As said by Mr. Wharton (see Wharton on Homicide, sec. 641): "It is essential to a conviction for any degree of culpable homicide: 1. That the deceased should have been shown to have been killed; and 2. That this killing should have been proved to have been criminally caused. . . . Unless the *corpus delicti* in both these respects is proven, a confession by the accused is not by itself sufficient to sustain a conviction": And see *Lightfoot v. State*, 20 Tex. Crim. App. 77; *Harris v. State*, 28 Tex. Crim. App. 308; 19 Am. St. Rep. 837. The indictment in this case is in two counts; in the first it is charged that defendants killed the deceased by stabbing him with a knife; and in the second that they killed him by some means and with some weapon unknown to the grand jury. This gave the court, in trying the case, the greatest latitude in permitting evidence to show that deceased came to his death by some criminal means; but in this respect the testimony utterly fails to establish with that degree of certainty which the law requires that the deceased, Andes, came to his death by any criminal means. We have already quoted from the record all that is disclosed as to the manner or means of his death, and the most that can be gathered from it is that the corpse of Andes was seen by the witness, Roman, after his death, and he assisted in burying him. He did not see his face; he saw no wounds on his person, or other mark of violence. How long

he had been dead, whether his body was stiff and cold or not, we are not told. A coarse bloody cloth over the neck of the deceased, and the unusual circumstances attending the interment of the dead body are all the indications of violence or foul play that the testimony affords. These facts are unquestionably suspicious; but even if they came from a witness of the most unimpeachable character, could we say that the proof was plenary of the "factum propandum" in this case, to wit, that the deceased came to his death by some criminal means or agency? The bloody cloth is all that we have that would indicate violence, but this is not inconsistent with other causes that might have produced the blood. We are not informed how fresh the blood was, and it may have been from some animal, and the cloth used by the Mexicans for the purpose of interment, or it may have been the blood of the deceased coming from his mouth or his nose, and yet his death may not have been occasioned by violence, but have occurred from natural causes. And this view is strengthened when, after the body was exhumed, no marks or indications of violence were found on it; the body was then in an advanced state of decomposition, but the bones were all examined and no broken bones or marks of violence were found. In a Mississippi case, where the evidence was that the circumstances of deceased's death and the state of his body indicated poison by stramonium or Jamestown weed, but it was shown that the same symptoms might have been caused by a congestion of the brain or stomach or heart, although the defendant confessed that he had poisoned the deceased with Jamestown weed, the evidence was held not sufficient ¹⁰² to authorize a conviction: See *Pitts v. State*, 43 Miss. 472; and in our opinion, the evidence in this case was not of that character to justify the jury in finding that corpus delicti had been proven.

2. It was also objected in this case that the evidence of the sash of deceased having been found in the possession of Estevan about a week after the homicide, and also that the gun of deceased was sold by Gregoria in the presence of Estevan some time after his death, should have been limited in the charge of the court to Estevan alone, and that such evidence could not possibly affect Ruperto. The evidence does not disclose any motive for the killing of Andes, and the fact that he was living at Conde's house would leave the possession of his personal effects entirely consistent with their innocence of his murder, unless the motive for his taking off should appear to have been robbery or gain. But, conceding that the testimony was properly admitted as evidence tending to corroborate the accomplice Roman, the ques-

tion is, How could it affect Ruperto, who was not present at the time, and is not shown to have been in possession of either the sash or the gun? When this case was before us on a former appeal, we were inclined to the view that the possession of this property by one of the defendants was a criminative circumstance that could be used against both, and we so held. But, on more mature reflection, in our opinion it should only have been admitted as to the defendant, Estevan, and the court in its charge should have limited its effect to him alone. The authorities place the acts of one conspirator after the purpose or object of the conspiracy has been consummated on the same plane as his declarations, and such acts or declarations are admissible only against the party doing the act or making the declaration: *Armstead v. State*, 22 Tex. Crim. App. 51.

3. The court also, in its charge to the jury, instructed them as follows: "You are instructed where an indictment charges murder upon implied malice alone, and the evidence establishes or tends to establish express malice as a fact, it is not to be understood that such proof would on the one hand be incompetent, nor on the other that it would create a variance from the allegations in the indictment; but such evidence, notwithstanding it shows express malice, would, in such case, be sufficient to warrant a conviction for murder in the second degree, since express malice comprises and embraces implied malice, just as murder of the first degree comprises and embraces murder of the second degree. In this, while no exception was made to it, we believe that the court committed an error. We are aware that in the case of *Fuller v. State*, 30 Tex. Crim. App. 559, this court drew a distinction between that case and *Parker v. State*, 22 Tex. Crim. App. 105. In the *Parker* case, the defendant was convicted under an indictment charging him with murder of the offense of manslaughter. Defendant in that case had previously been convicted of manslaughter and a new trial granted. In his charge to the jury on the last trial, the judge fully explained murder in the first and second degrees and manslaughter, but told the jury that defendant was on trial for manslaughter, and that he could not be convicted ¹⁰³ of a higher grade of homicide than manslaughter, but that if they believed from the evidence that he was guilty of either murder of the first or second degree or of manslaughter, they would find him guilty of manslaughter. Judge Wilson denounced this as error. In speaking of the charge, he says: "Defendant had been acquitted of murder, and this acquittal was a bar to any further prosecution for that offense, and yet the jury are told that if the evidence shows the defend-

ant to be guilty of murder, that they may punish him for said offense, not by finding him guilty of murder according to the evidence, but by calling his offense manslaughter and finding him guilty of that offense. In other words, the jury are told that, although defendant has been acquitted of murder and cannot be punished of that offense eo nomine, yet, if they believe from the evidence that he did commit murder, they may call it manslaughter and punish him as for that offense. It seems to us that this doctrine, if correct, would deprive the defendant in a great measure of the benefit of his acquittal of murder. He would still be punishable for an offense of which he had been acquitted, which would be a result which the law does not contemplate or tolerate. In *Fuller v. State*, 30 Tex. Crim. App. 559, Judge White recognizes the rule laid down in *Parker v. State*, 22 Tex. Crim. App. 105, as correct, as applicable to that case, but limits the rule to a case where a party has been previously convicted of manslaughter and is again put on trial. He says: "A party charged alone of manslaughter could not be convicted upon evidence which would show murder, and not manslaughter, for though manslaughter be embraced in the charge of murder, yet they are two entire, separate, and distinct offenses. Murder is predicable upon malice, either express or implied. Malice is not a constituent element of manslaughter, and manslaughter is predicable upon there being adequate cause occasioning the voluntary homicide. In such a case as *Parker's*, it was clearly radical error for the court to charge as was done. The rule is otherwise, as between murder of the first and second degree, where the party is on trial for murder in the second degree." We are unable to see the cogency of the reason for a distinction between the character of case, as stated by the learned judge in the *Fuller* case, and an inspection of the cases cited will fail to show that the question of former acquittal was invoked in the case. Section 14 of our bill of rights provides that: "No person for the same offense shall be twice put in jeopardy of life or liberty; nor shall a person be again put on trial for the same offense, after a verdict of not guilty in a court of competent jurisdiction." And this section is alike applicable to all offenses in which life or liberty are involved. Murder of the first and second degrees have some essential elements in common, but they are none the less distinct offenses with different punishments provided. The lines between two offenses are sometimes shadowy, and so with murder of the second degree and manslaughter. They have essential elements in common, and it is sometimes exceedingly difficult to mark the distinction between the two offenses. But they are

nevertheless distinct ¹⁰⁴ offenses, and yet it is insisted that the constitutional guaranty shall be available when the prosecution is for manslaughter, after a former acquittal of murder of the first and second degrees. But if the prosecution is for murder of the second degree, after an acquittal of murder of the first degree, the constitutional guaranty is of no avail. Mr. Bishop (1 Bishop on Criminal Law, sec. 1004), in speaking of this constitutional right as involved in a grant of a new trial, says: "The waiver of the constitutional right implied in an application for a new trial is construed to extend only to the precise thing concerning which relief is sought," and he shows that where one count embraces several offenses as murder, which embraces degrees as also manslaughter, and there is a finding of a minor grade of offense, and the verdict is silent as to other grades by the weight of authority, this is an acquittal of the higher grades. Long since this has been the doctrine of the courts of our state: See *Jones v. State*, 13 Tex. 168; 62 Am. Dec. 550; *State v. Bel-den*, 33 Wis. 124; 14 Am. Rep. 748; *Brennan v. People*, 15 Ill. 518. In our opinion, this constitutional guaranty is applicable to all offenses, and where a defendant has once been put on trial for an offense which embraces different degrees, and has been acquitted by a jury of the higher degree, he cannot be again put on trial for such higher grade, and it is the duty of the court to so inform the jury.

For the errors herein discussed, the judgment of the lower court is hereby reversed and the cause remanded.

DAVIDSON, J., dissenting. I concur in that portion of the opinion holding the corpus delicti is not sufficiently proved. I dissent from that part of the opinion holding the trial court should have limited in his charge the effect of the testimony showing that Estevan Conde was in possession of deceased's sash and that Gregoria Conde, in the presence of Estevan, sold deceased's gun. Both of these facts occurred just after deceased's death, and was evidence to prove the main fact and not a collateral issue. The same evidence relied upon to connect Ruperto Conde with the death of deceased was relied on to connect Estevan and Gregoria with said death. The possession of the sash by Estevan and of the gun by Gregoria were not acts, declarations, or conduct of conspirators transpiring subsequent to the crime, but were physical facts, independent and inculpatory in their nature, and were fruits of the crime. The sash and gun were property of the deceased and in his possession just prior to his death: *Pierson v. State*, 18 Tex. Crim. App. 524; *Clark v.*

State, 28 Tex. Crim. App. 189; 19 Am. St. Rep. 817; Conde v. State, 33 Tex. Crim. Rep. 10; Pace v. State (Tex. Crim. App. Dec. 17, 1892), 20 S. W. Rep. 762. This evidence was as cogent against Ruperto as against either Estevan or Gregoria and was pertinent to prove the main fact and not a collateral issue: Same authorities; Foster v. State, 32 Tex. Crim. Rep. 39. I further dissent from that portion of the opinion overruling Fuller v. State, 30 Tex. Crim. App. 559. I cannot add anything to the reasoning of Judge White in that case, and adopt it as the reasons for my dissent on this question.

¹⁰⁵ Judge Hurt, presiding judge, concurs with the opinion of Judge Henderson in regard to the first two propositions, but not as to the latter.

HOMICIDE—PROOF OF CORPUS DELICTI—CONFESSION.—The corpus delicti in murder consists of two elements, namely, the death and the criminal agency of another in causing it: Campbell v. People, 159 Ill. 9; 50 Am. St. Rep. 134, and note; People v. Palmer, 109 N. Y. 110; 4 Am. St. Rep. 423, and note. A confession alone will not sustain a conviction of crime in the absence of corroborative proof of the corpus delicti: Willard v. State, 27 Tex. App. 386; 11 Am. St. Rep. 197, and note; monographic note to Daniels v. State, 6 Am. St. Rep. 251; Bradford v. State, 104 Ala. 68; 53 Am. St. Rep. 24, and extended note.

CONSPIRACY—EVIDENCE—ACTS AND DECLARATIONS OF CO-CONSPIRATORS.—After a conspiracy is ended, and its object has been actually reached, the declarations of one conspirator are not admissible in evidence against the others: State v. Green, 40 S. C. 328; 42 Am. St. Rep. 872; but only against himself: McKenzie v. State, 32 Tex. Crim. Rep. 568; 40 Am. St. Rep. 795, and note.

FORMER JEOPARDY—EFFECT OF OBTAINING A NEW TRIAL.—Where a person indicted for murder in the first degree was convicted of murder in the second degree and obtained a new trial, it was held that on the second trial he could not be tried for or convicted of a higher crime than murder in the second degree: Johnson v. State, 29 Ark. 31; 21 Am. Rep. 154; extended note to People v. Bentley; 11 Am. St. Rep. 229. This holding is supported by the preponderance of authority, although there are many respectable authorities holding to the contrary, reasoning that the effect of granting a new trial is to set aside the whole verdict, and leave the case in the same condition as if it had never been rendered: Monographic note to Commonwealth v. Arnold, 4 Am. St. Rep. 117-120.

WADE v. STATE.

[35 TEXAS CRIMINAL REPORTS, 170.]

JURY AND JURORS—QUALIFICATIONS.—If a juror on his voir dire examination in a criminal case states that he has formed an opinion with reference to the guilt or innocence of the accused from general talk and rumor, and that he has also talked with a witness in the case, but that he could give the accused as fair and impartial a trial as if he had never heard of the case, he is competent, in the absence of a showing that the witness talked with was a material one in the case and that the conversation was a factor in the opinion formed.

INDICTMENT—ROBBERY—DESCRIPTION OF FOREIGN MONEY.—An indictment for robbery describing the property taken as "one doliar in Mexican money of the value of fifty cents" is insufficient, for the reason that the court can take no judicial cognizance of foreign money, and that, in describing it in the indictment, it must be treated as property merely, and not money, and described by name, kind, quantity, and ownership, as directed by statute.

Burgess & Hopkins, A. B. Story, W. A. H. Miller, and W. F. Ramsey, for the appellant.

M. Trice, assistant attorney general, for the state.

171 HENDERSON, J. Appellant in this case was tried in the court below on an indictment charging him with robbery, was convicted, and his punishment assessed at ten years' confinement in the penitentiary, and from the judgment and sentence of the lower court he prosecutes this appeal. The appellant assigns as error the overruling of his motion for a continuance. No such error appears as would authorize a reversal of this case on that account. Inasmuch, however, as this matter is not likely to come up in this shape again, it is unnecessary to discuss it. Appellant also assigns as error the overruling of his challenge for cause to the jurors Young and Carraway. Both of said jurors on their **172** voir dire examination stated that they had formed an opinion with reference to the guilt or innocence of appellant. It is stated that they had formed such an opinion from general talk and rumor afloat in the county, and that they had a talk with a witness in the case, but that they could go into the jury box, and give appellant a fair and impartial trial, as if they had never heard of the case. The appellant challenged said jurors for cause, and then challenged them peremptorily, and afterward exhausted his challenges, and was compelled to take a juror obnoxious to him, and he now assigns the action of the court in overruling his challenge for cause as error. In the case of *Suit v. State*, 30 Tex. Crim. App. 319, the juror stated that he had formed an opinion, that it would require evidence to remove his opinion, but that it would not influence him in rendering a

verdict, and that he could render a fair and impartial verdict upon the evidence as testified to on the trial, and the law as given by the court, uninfluenced by his present opinion. His opinion, it seems, was formed from rumor, and not from having heard any evidence in the case, or from having talked with any witness about the case. In that case it was held that he was a competent juror. In *Shannon v. State*, 34 Tex. Crim. Rep. 5, the juror answered that he had formed an opinion which it would require evidence to remove, but that he could give defendant a fair and impartial trial according to law and the evidence. It was further disclosed that the juror had formed his opinion from having heard the evidence in the case at a former trial. The learned judge, in deciding the question as to the competency of said juror, draws a distinction between the former case of *Suit v. State*, 30 Tex. Crim. App. 319, and the case of *Shannon v. State*, 34 Tex. Crim. Rep. 5, and predicates the distinction upon the fact that in the first case the juror had formed his opinion merely from hearsay and rumor, while in the latter case he had formed his opinion from having heard the evidence in the case; and it was held in the latter case that, under such circumstances, notwithstanding the juror qualified under the rule previously laid down in the *Suit* case, yet it could not be said that he was a fair and impartial juror, his opinion being formed from having heard the sworn testimony in the case. In the case now before us, it is disclosed that the jurors had talked with a witness in the case, but it is not disclosed what witness, whether he was a material witness in the case or not, or whether the conversation with such witness entered, in any respect, as a factor in the opinion formed by the juror. In our opinion, it was the duty of the appellant to have pushed the investigation further, and to have shown that the opinion so formed was, in part at least, formed from having talked with a witness about the facts in the case.

The other question presented in this case for our consideration is whether the allegation in the indictment descriptive of the property charged to have been taken by means of the robbery, is sufficiently set out. The allegation in the indictment in this regard is in the following language: "That the defendant by means . . . did then and there take from the possession of him, the said Whitfield, one dollar in ¹⁷³ silver coin, the same being current and lawful money of the United States of America, and then and there of the value of one dollar, and one dollar in Mexican money, then and there of the value of fifty cents." On the trial, the proof showed that the allegation as to the dollar in silver coin of the United States was not proven, so that the con-

viction of the appellant depends entirely upon the question whether or not the allegation, "one dollar in Mexican money, of the value of fifty cents," is a good and sufficient description of the property taken. There appears to be, with reference to the description of money of the United States of America, in the decisions of our court, some inconsistency, which it is now not necessary to attempt to reconcile. It will be found that the later cases allow greater latitude in the description of money of the United States, which is attributable to the two articles on the subject: Code Crim. Proc., arts. 427, 428 i; *Bryant v. State*, 16 Tex. Crim. App. 144; *Dukes v. State*, 22 Tex. Crim. App. 192; *Lewis v. State*, 28 Tex. Crim. App. 140. Formerly, an allegation for the theft of money, describing the same in general terms, without giving some further description as to the kind and denomination of such money, would not have been sufficient, but the rule would have been as at common law. And to the same effect see the decisions of other states: *State v. Longbottoms*, 11 Humph. 40; *People v. Ball*, 14 Cal. 101; 73 Am. Dec. 631; *Leftwich v. Commonwealth*, 20 Gratt. 716. It will be observed, however, that we are not now discussing money of the United States of America, but what is alleged to be money in Mexico, or Mexican money. So far as we are advised, our courts take no judicial cognizance of Mexican money, and we have no statute on the subject; so that in the description of the alleged money of a foreign country, it will be treated as property under article 427 of the Code of Criminal Procedure, which reads as follows: "When it becomes necessary to describe property of any kind in an indictment, a general description of same by name, kind, quantity, number, and ownership, if known, shall be sufficient." The description of property in this indictment, as has heretofore been stated, is "one dollar in Mexican money." If the same terms were employed as to American money, we would not be informed as to the name of any specific coin, as to its kind, whether gold or silver, or as to its quantity, whether the dollar would consist of one or more coins; and applying the same rule the indictment fails to disclose the kind of Mexican money, the name of the coin, or how many pieces it took to constitute the dollar. If, however, the indictment had been drawn for the theft of coin of the United States of America, it might have been sufficient under article 428 i, but the description of the property in this indictment, which was money of a foreign nation, is of such a general character that appellant was not apprised of the specific charge against him, and could not anticipate the proof that might be offered on the part of the state.

If the allegation had been "a one dollar silver coin, of the denomination and value of one dollar of the republic of Mexico," we might deem the description sufficient: See 2 Bishop on Criminal Procedure, sec. 703; but such ¹⁷⁴ is not the charge in the indictment in this case. We are aware that this court, Judge Willson rendering the opinion, in *Bravo v. State*, 20 Tex. Crim. App. 177, held a description of Mexican coin substantially similar to that contained in this indictment sufficient; but his attention does not seem to have been called to the fact that it was Mexican money, and the learned judge said in that case: "We cannot commend the description given in the indictment of the property, but still we think it must be regarded as sufficient." We cannot agree with Judge Willson in holding that the indictment in the *Bravo* case described the Mexican money, which we hold to be simply property, by its name, kind, quantity, and number. The number was not given. The allegation, "twenty-seven and sixty one-hundredths dollars in Mexican money," does not attempt to define the number of pieces stolen; and while this might be a sufficient allegation for the theft of legal tender money of the United States, it does not suffice when applied to property generally, as is the case with foreign money. Because the indictment in this case does not sufficiently describe the property alleged to have been taken, the judgment of the lower court is reversed and the cause remanded.

Davidson, J., absent.

TRIAL—COMPETENCY OF JURORS—QUALIFIED OPINIONS. The right to unbiased or unprejudiced jurors is an inseparable and inalienable part of the right of trial by jury: Monographic note to *Commonwealth v. Brown*, 9 Am. St. Rep. 744. But a juror is not disqualified who states on his voir dire that he has read in the newspapers what purported to be the facts of the case, and had formed and expressed some opinion therefrom upon the merits, but that it was not fixed and would not influence his verdict: *State v. Kelly*, 28 Or. 225; 52 Am. St. Rep. 777, and note; *State v. Van Wye*, 136 Mo. 227; 58 Am. St. Rep. 627, and note. But, if he has formed a decided opinion from a conversation with the prosecuting witness, he is incompetent: *Armistead v. Commonwealth*, 11 Leigh, 657; 37 Am. Dec. 633, and note. But see *Thomson v. People*, 24 Ill. 60; 76 Am. Dec. 733, and note.

ROBBERY—INDICTMENT—SUFFICIENCY OF.—An indictment for robbery is sufficient without averment of the value of the property taken: *State v. Perley*, 86 Me. 427; 41 Am. St. Rep. 564, and note. But it must allege ownership of the property taken to be in the party alleged to have been robbed: *State v. Lawler*, 130 Mo. 366; 51 Am. St. Rep. 575, and note.

EVIDENCE—JUDICIAL NOTICE—FOREIGN COINS.—The current coins of a country, whether established by statute or custom, will be noticed judicially, but the value of Canada currency, or the

rate of Canadian interest, are not properly cognizable by courts of this country: Monographic note to *Lanfear v. Mestier*, 89 Am. Dec. 695, on judicial notice.

STEWART v. STATE.

[35 TEXAS CRIMINAL REPORTS, 174.]

INCEST—FORMER JEOPARDY.—An acquittal for rape does not bar a prosecution for incest with the same party growing out of the same transaction. The offenses are distinct, each requiring a different character of proof.

EVIDENCE—COURT RECORDS.—The best evidence of the contents of a court record is a certified copy thereof, under the hand and seal of the clerk of the court, and it is error to admit parol evidence thereof.

APPELLATE PRACTICE.—THE ADMISSION OF INADMISSIBLE EVIDENCE, if harmless, is not ground for reversal of the judgment.

INCEST—ACCOMPLICE.—If, on a trial for incest, the evidence tends to show that the prosecuting witness consented to the commission of the offense charged, she should be treated as an accomplice; and the jury should be instructed that before they can convict her testimony must be corroborated.

Cunningham & Cunningham, for the appellant.

M. Trice, assistant attorney general, for the state.

177 **HENDERSON, J.** Appellant in this case was tried in the court below on a charge of incest, was convicted, and his punishment assessed at five years' confinement in the penitentiary, and from the judgment and sentence of the lower court he prosecutes this appeal. The appellant in this case filed a plea of former jeopardy. Said plea set up an indictment for rape by the appellant on the person of the prosecutrix in this case, and a verdict and judgment of acquittal in said cause. Appellant alleged that they were one and the same transaction, and set the same up in bar of this prosecution. On motion of the district attorney, the court struck out said plea, to which action of the court appellant excepted. In this there was no error. While the testimony might show that it was one and the same transaction, yet the offenses are distinct, and each requires a different character of proof. The same person might be innocent of the charge of rape, while in the same transaction he might be guilty of incest, and an acquittal for the rape does not bar a prosecution for the incest. There was no error in the delay of the court in sending for witnesses to prove the divorce of appellant from his former wife, of which appellant can complain. Appellant insists that the court committed an error in allowing the witness, Dean, to

state before the jury that he had examined the index-book and records of the district court of Henderson county, Texas, and found the case indexed as follows: "W. Tannehill v. Annie Tannehill. Judgment. Minute Book H." This, in our opinion, was not the best evidence, but a certified copy of the entry, under the hand and seal of the district clerk of Henderson county, should have been produced. Appellant also assigns as error the fact that the court permitted the district attorney, on cross-examination of the wife of appellant, to ask her if she did not, at a certain time and place named, state to J. W. Taylor, in the presence of J. N. Gallagher, that her daughter, ¹⁷⁸ Mamie, had told her of the way the appellant had treated her. This testimony, we think, was rendered legitimate on cross-examination by the testimony of the witness given on her direct examination. At any rate the witness answered "no," and her testimony was thus rendered harmless. Subsequently, the state contradicted her by the witness, Gallagher; this contradiction was properly limited in the charge of the court.

The appellant complains in this case and assigns as error the failure of the court to charge the jury on accomplice testimony. An examination of the statement of facts in this case discloses that the state's case was made out by the witness, Mamie Tannehill, the stepdaughter of the appellant, and it also discloses that the said Mamie Tannehill occupies, in relation to the case, such an attitude as, in our opinion, rendered it necessary for the court to have given such a charge. Her evidence shows that the acts of copulation occurred in the same bed with her mother; that there were three such acts, and while she says that she resisted, and did all she could to prevent it, yet that he succeeded each time, and that her mother, who was lying by her side, was not disturbed. Her mother also testifies that she knew nothing of the transactions, and that she never had heard of them until the arrest of her husband. Other witnesses were in the adjoining rooms and close by, and they heard no disturbance. If the proof was clear that Mamie Tannehill was forced against her will to carnal intercourse, and there was no contrary proof, then she would not stand as an accomplice, would require no corroboration, and it would not be necessary, in such a case, for the court to charge on accomplice testimony; but this is not such a case, and, at most, she stands in such a dubious attitude as consenting to the acts of copulation as, in our opinion, required the court to submit to the jury a charge on accomplice testimony. In this case, if there is such corroborative evidence, it is certainly of a weak character, and this rendered it the more imperative on the

part of the court to have charged the jury that if they believed she was an accomplice, they must find that she was corroborated before they could convict the defendant. This was not done, and for this error, if for no other, the judgment in this case must be reversed, and it is accordingly ordered that this case be reversed and remanded: *Watson v. State*, 9 Tex. Crim. App. 237; *Freeman v. State*, 11 Tex. Crim. App. 92; 40 Am. Rep. 787; *Mercer v. State*, 17 Tex. Crim. App. 452; *Shelly v. State*, 95 Tenn. 152; 49 Am. St. Rep. 926.

Reversed and remanded.

Davidson, J., absent.

FORMER JEOPARDY—PLEA OF—WHEN SUSTAINABLE.—A plea of former acquittal is good wherever the facts charged in the indictment would, if proved, have procured a conviction on a prior indictment under which the prisoner has been acquitted: *Durham v. People*, 4 Scam. 172; 39 Am. Dec. 407, and note; *Dominick v. State*, 40 Ala. 680; 91 Am. Dec. 496. The decisive test is, Will the same evidence support both charges? *State v. Johnson*, 12 Ala. 840; 46 Am. Dec. 283. See extended note to *State v. Nash*, 41 Am. Rep. 475-477.

APPEAL—ADMISSION OF IMPROPER EVIDENCE.—The admission of irrelevant and immaterial evidence not affecting the result is not reversible error: *Cronfeldt v. Arrol*, 50 Minn. 327; 36 Am. St. Rep. 648, and note; *Chicago etc. R. R. Co. v. Wolcott*, 141 Ind. 267; 50 Am. St. Rep. 320.

INCEST—ACCOMPLICE—TESTIMONY OF.—A woman who consents to the crime of incest knowingly, voluntarily, and with the same intent which actuated the man is his accomplice, and a conviction cannot be sustained if based upon her uncorroborated testimony: *Shelly v. State*, 95 Tenn. 152; 49 Am. St. Rep. 926, and note. But if the crime of incest is committed through fear or force, the person against whom such fear and force were employed is not an accomplice, and her testimony does not require corroboration: *Smith v. State*, 108 Ala. 1; 54 Am. St. Rep. 140, and note.

DILL v. STATE.

[35 TEXAS CRIMINAL REPORTS, 240.]

INDICTMENT—COUNTS—"SAME OFFENSE."—Under the Texas statute, an indictment may contain as many counts charging the same offense as it may be deemed necessary to insert. The words "same offense" mean the same criminal transaction.

INDICTMENT—JOINDER OF OFFENSES.—Burglary and conspiracy to commit burglary may be joined in separate counts in the same indictment; and, if the evidence shows that only one criminal transaction is involved, the court need not restrict the prosecution to any particular count.

INDICTMENT—JOINDER OF COUNTS.—Counts may be joined in the same indictment to meet the various aspects in which the evidence may present itself; and, if it appears from the evidence that only one criminal transaction is involved, the court need not restrict the prosecution to a particular count.

CRIMINAL LAW—EVIDENCE—PRELIMINARY EXAMINATION.—If an accused voluntarily testifies for himself at his preliminary examination, his statements then made are admissible against him on a subsequent trial, whether he was or was not under arrest and cautioned; and the examining court is not required to inform the accused that he can testify if he wishes, but that he does not have to testify; and the failure of the court to so inform him is no objection to the admission of his voluntary testimony on a subsequent trial.

BURGLARY—CONSPIRACY TO COMMIT.—If a person enters in a conspiracy by positive agreement to commit a burglary, he may be convicted of the conspiracy, although he subsequently withdraws and takes no part in the commission of the burglary.

M. Trice, assistant attorney general, for the state.

242 HURT, P. J. The indictment in this case contains two counts; the first for burglary, the second for conspiracy to commit the same burglary. Appellant was convicted for the conspiracy. After the state had closed its evidence, counsel for appellant moved the court to compel the district attorney to elect upon which count the state would prosecute. This motion was denied, and appellant excepted, reserving a bill. The evidence disclosed that the conspiracy or agreement was to commit the burglary charged in the first count. Now, while it is true that the offense called "conspiracy" was complete when the positive agreement was made between appellant and W. D. Dill to commit the burglary, and it is also true that the burglary and the conspiracy to commit the same are distinct offenses, still they may constitute but one criminal transaction. Our statute (Code Crim. Proc., art. 433) provides that an indictment or information may contain as many counts charging the same offense as the attorney who prepares it may think necessary to insert. If the statute means when it says "the same offense" that the offenses must be technically the same, then theft and swindling cannot be inserted in the same indictment, in separate counts, nor can theft and receiving the stolen property, nor rape and incest, because, technically, they are separate and distinct offenses. We understand the meaning of the word "offense," as used in this statute, to be the same criminal transaction. This being so, the rule is that counts may be joined in the same indictment to meet the various aspects in which the evidence may present itself. And if it appears, after the case of the state is presented on the trial of the prisoner, that there is no more than one criminal transaction involved, the court will not restrict the prosecution to particular counts: *People v. Austin*, 1 Park. C. C. 154. Of course, the rule that the court shall give in charge to the jury the law applicable to the case would restrict the court (if there was no evidence

tending to support a count or counts) to that count or counts which have support in the evidence. There was an examination into this criminal transaction before a justice of the peace. The appellant was asked if he desired to make a statement. He answered that he did not. After the testimony for the state was in, the justice asked the appellant if he wished to take the stand in his own behalf. He said he did. He was then sworn, and testified in the case. Over the appellant's objection, the state proved by the justice and others the statements made in his evidence before the examining court. The objections urged to the admission in evidence of the testimony given by appellant before the justice were: "1. Because the appellant was in custody, and was not cautioned; 2. Because his statements were not voluntary, he not being told that he could testify if he wished, but that he did not have to testify unless he desired to do so." To the first objection, if the accused voluntarily testifies for himself, his statements are admissible against him on a subsequent trial, whether he was or was not in arrest or cautioned. If, however, he did not make a statement or testify voluntarily, neither the statement nor the testimony is evidence ²⁴³ against him. We are not aware of any rule requiring the magistrate or the court to inform the prisoner that he could testify if he wished, but that he did not have to testify unless he desired to do so. As to whether appellant became a witness voluntarily, or did so because the magistrate told him to do so, there is some conflict in the testimony. The court, however, submitted this matter to the jury, telling them, in effect, not to use as evidence against the prisoner his testimony given before the magistrate, unless they believed that he voluntarily became a witness for himself. Counsel for appellant requested the court to give to the jury this charge: "If you believe from the evidence that the defendant, Steve Dill, agreed and conspired with W. D. Dill to burglarize the store of R. J. Waters, but before the defendant or W. D. Dill did any act to carry out said agreement, Steve Dill revoked and abandoned his part of the agreement, and told said W. D. Dill that he (Steve Dill) would have nothing to do with said contemplated burglary, then the defendant, in that case, would not be guilty." If this instruction was intended to be applied to the burglary, then the refusal worked no injury to appellant, because he was acquitted of that offense. If it had reference to the conspiracy, then it did not contain the law, because, when the appellant and W. D. Dill entered into a positive agreement to commit the burglary, the offense—namely, conspiracy—was complete,

and a withdrawal therefrom is no atonement for the offense consummated.

The judgment is affirmed.

INDICTMENT—JOINDER OF OFFENSES—ELECTION.—At common law, several felonies or misdemeanors could be joined in several counts of the same indictment, but a felony and a misdemeanor could not be joined: *State v. Fitzsimon*, 18 R. I. 236; 49 Am. St. Rep. 766, and extended note. Where the same indictment contains two counts, both founded on the same transaction, and intended to meet the different legal aspects which the evidence may give the cause, the trial court may, in the exercise of its discretion, decline to compel the prosecution to elect upon which it will proceed: *Porath v. State*, 90 Wis. 527; 48 Am. St. Rep. 954, and note.

WITNESSES—IMPEACHMENT—PRELIMINARY EXAMINATION.—A defendant testifying in his own behalf is to be treated as any other witness, and his testimony taken at a preliminary examination, and totally at variance with his evidence as given at the final trial, is admissible for the purpose of impeaching him, although he denies the correctness of the record of the testimony first taken, denounces it as false, and states that he never read it, and that if he had read it he would not have signed it: *Jackson v. State*, 33 Tex. Crim. Rep. 281; 47 Am. St. Rep. 30, and note. See monographic note to *Allen v. State*, 73 Am. Dec. 762-770.

CONSPIRACY—WHAT CONSTITUTES.—In conspiracy the gist of the offense is the unlawful combination or agreement. The object need not be attained nor need anything be done in pursuance of the agreement. No overt act need be proved; it is an offense complete and consummate in itself: Monographic note to *People v. Richards*, 51 Am. Dec. 82, on conspiracy; *State v. Buchanan*, 5 Har. & J. 317; 9 Am. Dec. 534.

HARKREADER v. STATE.

[35 TEXAS CRIMINAL REPORTS, 243.]

PERJURY—EVIDENCE.—On a prosecution for perjury in falsely swearing to the age of a female minor in order to procure a marriage license, evidence that the father and mother of such minor objected to her marriage with the defendant, is admissible, especially when the false affidavit on which the perjury is based states that there are no legal objections to the marriage, and such affidavit is traversed by the indictment.

PERJURY—EVIDENCE.—On a prosecution for perjury in falsely swearing to the age of a female minor in order to procure a marriage license, evidence on behalf of defendant to show that, during his engagement to such minor, he had made her many presents, which she still retained in her possession with the knowledge and consent of her parents, is immaterial and inadmissible to prove that they did not object to the marriage with the defendant, a fact which he in effect stated in the alleged false affidavit, and which is traversed in the indictment, and is an essential element in the perjury charged.

OFFICERS—MINOR DEPUTY.—In the absence of constitutional provision or statute prescribing the qualifications of a deputy county clerk, a minor is eligible to appointment to such deputyship,

and he is competent to perform all ministerial duties for his principal, and also to administer oaths and take affidavits, and perform all such like official acts as may be legally performed by his principal in person.

OFFICERS—MINOR AS DEPUTY.—Under the Texas statute, the duties of a county clerk and of his deputy are purely ministerial in their nature, and a minor can receive the appointment and perform the duties required of such deputy, including the administering of oaths and the taking of affidavits of like validity as if such acts were performed by the clerk in person.

OFFICERS—DEPUTY CLERK—MINISTERIAL ACT.—The act of a deputy county clerk in taking an affidavit of an applicant, and in granting a marriage license, although he has the right to inquire into the status of the parties and their eligibility to intermarry, is purely ministerial and not judicial in its character.

Poindexter & Padelford, for the appellant.

M. Trice, assistant attorney general, for the state.

250 HENDERSON, J. The appellant was convicted in the court below on a charge of false swearing, and his punishment assessed at two **251** years in the penitentiary. From the judgment and sentence of the lower court he prosecutes this appeal. The charge under which the indictment for false swearing was predicated in this case was that appellant made a voluntary affidavit in writing before O. L. Bishop, deputy county clerk of Johnson county, Texas, that one Miss Ruby Lee Porter was eighteen years of age, and that there existed no legal objections to the marriage of said Miss Porter to affiant. The first assignment of error calls in question the ruling of the court in allowing the state to prove that the father and mother of Miss Porter objected to her marriage with appellant. It is contended by appellant that said testimony is wholly immaterial, and that the indictment did not allege the objection of her parents to the marriage. The indictment in this case does charge that there were no legal objections to said marriage, and the father and mother were the only persons who could have objected to said marriage; and, although their daughter might have been under age, they could have legalized the marriage by giving their consent thereto. The affidavit on which the perjury was based also contains the allegation that there were no legal objections to said marriage, and this particular affidavit was also traversed by the indictment; so that it would appear that this was an element of the perjury assigned. But, conceding that said testimony was not material, yet we fail to see how the admission thereof could have injured the appellant. The appellant offered to prove that he presented Miss Porter with a number of presents, some of said presents being useful for housekeeping, and that she still retained all of

said property in her possession, with the knowledge and consent of her parents. Appellant claims that this testimony was admissible for the purpose of showing that her parents were consenting to said marriage. The court, in explaining this bill of exceptions, shows that no proof was offered by appellant tending to show that he had given Miss Porter any presents during the month previous to making the affidavit, and that he only offered to prove generally that, pending their engagement, he had given her presents. It does not occur to us that this testimony was material, or that the court erred in excluding the same. The principal ground of contention on the part of appellant why this case should be reversed is because the deputy clerk, O. L. Bishop, before whom said affidavit was made, was not at the time twenty-one years of age; that he was at said date only twenty years old. The grounds urged by appellant are: 1. Because it appeared that O. L. Bishop, the party who administered said oath as deputy county clerk, was at said time a minor, under twenty-one years of age, and could not act as deputy county clerk, and that the affidavit was therefore void; 2. Because, said affidavit not being one required to be taken by the county clerk in the discharge of his official duty, the deputy could not take the same for the county clerk. Our statute defining perjury and false swearing requires that the oath shall be taken before an officer authorized to administer oaths, and if a minor, under the laws of this state, can be appointed a deputy county clerk, then it follows that he is such an officer as can administer an oath. Our ²⁵² statutes with reference to county clerks, and the appointment of deputies, so far as they bear upon this question, are as follows: Article 1142 of Sayles' Civil Statutes provides that there shall be a county clerk for each county, who shall be elected at a general election for members of the legislature by the qualified voters of such county, who shall hold his office for two years, and until his successor shall have duly qualified. Article 1144 indicates the form of bond and oath required. Article 1145 authorizes the clerk of the county court to appoint one or more deputies, by written appointment under his hand and seal of court, which appointment shall be recorded in the office of such clerk of the county court, and shall be deposited in the office of the clerk of the district court. Article 1146 is as follows: "Such deputies shall take the oath of office prescribed by the constitution. They shall act in the name of their principal, and may do and perform all such official acts as may be lawfully done and performed by such clerk in person." Article 1149 says that such clerk shall be authorized to issue all marriage licenses, to admin-

ister all oaths and affirmations, and to take affidavits and depositions to be used as provided by law in any of the courts. There is no statute defining the qualifications of deputy clerks, or what character of persons may be appointed to said office. Article 2471 of Sayles' Civil Statutes defines who are minors, making all male persons under twenty-one years of age minors. Article 3361 a et seq. of Sayles' Civil Statutes regulates the removal of the disabilities of minors, and authorizes the district courts, on petitions setting up sufficient grounds, to remove the disabilities of minors over the age of nineteen years; and provides that after such adjudication the minor shall be deemed of full age for all legal purposes, except that he shall not have the right to vote. We have examined the decisions of our own courts, but we can find but one bearing upon the subject now under consideration: *Steusoff v. State*, 80 Tex. 429. Looking into the decisions of the courts of other states as to this and kindred subjects, we find the rule stated to be this: If the office is ministerial, such as calls for the exercise of skill and diligence only, minors may legally hold the same, and execute the duties thereof; but if the office is a judicial one, or one which concerns the administration of justice, on account of their inexperience, and want of judgment and learning, they cannot be appointed to same. In *Golding's case*, 57 N. H. 146, 24 Am. Rep. 66, which is relied on by counsel for appellant, the rule is stated as above. In that case, however, it was held that a minor could not hold the office of justice of the peace, the same being a judicial office. In the case of *United States v. Bixby*, 9 Fed. Rep. 78, the indictment charged that the defendant committed perjury in swearing to the truth of a quarterly report as assignee in bankruptcy, before Aretus W. Hatch, a notary public. The defendant set up that the said Hatch was a minor under twenty-one years of age, and could not hold the office of notary public, and so the oath taken before him was not before an officer authorized to administer oaths. The court held in that case that there ²⁵³ was nothing in the statutes of Indiana inhibiting minors from holding the office of notary public; that, the notarial office being ministerial, and not judicial, the rule at common law would govern. The court further says: "Unlike most of the states, Indiana has not declared, in her constitution or statutes, that only those who have attained the age of twenty-one years shall be eligible to any public or civil office. While at common law persons are not admitted to the full enjoyment of political and civil rights until they have attained the age of twenty-one years, yet infants are capable of executing mere powers and, as agents, of making binding contracts with

others. In England they are allowed to hold the offices of park-keepers, foresters, jailer, and mayor of a town; and in both England and this country they are capable of holding and discharging the duties of such mere ministerial offices as call for the exercise of skill and diligence only. They are not eligible to the offices which concern the administration of justice, on account of their inexperience and want of judgment and learning": Referring to *Rex v. Dilliston*, 3 Mod. 222; *Tyler on Infancy*, sec. 78. In *Wilson v. Newton*, 87 Mich. 493, 24 Am. St. Rep. 173, the question was whether a woman could be appointed to the office of deputy county clerk. The statutes of that state in regard to the qualifications of clerks and deputies are very similar to our own statutes on the subject. The court holds in that case that the office of county clerk is wholly ministerial, and when the law provides that a ministerial officer may appoint a deputy, for whose acts he and his sureties are responsible, and does not limit or restrict him as to whom he appoints, he has authority to appoint whomsoever he pleases. The person appointed acts for him; or, in other words, he acts through his deputy. His choice is not confined to any race, sex, age, or color. In the case of *Jeffries v. Harrington*, 11 Colo. 191, cited in the above case, the supreme court of the state of Colorado held that, under a provision of the constitution of said state, which provided that "no person except a qualified elector shall be elected or appointed to any civil or military office in this state," the word "office," as used therein, did not include deputy clerkships of county courts, and women may hold such deputy clerkships. These authorities seem to stand upon correct legal principle. Our own supreme court, in the case of *Steusoff v. State*, 80 Tex. 429, already cited, held that a citizen of the state moving from Harris to Liberty county, within so short a time before the election as not to be a qualified voter at such election in the latter county, still was eligible to election, and could hold the office of tax assessor in Liberty county. In discussing the question the court quotes with approval from *Barker v. People*, 3 Cow. 703, 15 Am. Dec. 322, as follows: "Eligibility to office is not declared as a right or principle by any express terms of the constitution [of New York], but it rests as a just deduction from the express powers and provisions of the system. The basis of the principle is the absolute liberty of the electors and the appointing authorities to choose and appoint any person who is not made ineligible by the constitution. Eligibility to office, therefore, belongs not exclusively or specially to ²⁵⁴ electors enjoying the right of suffrage. It belongs equally to all persons whom-

soever not excluded by the constitution." Our supreme court then proceeds to dispose of the question in the following language: "When a constitution has been framed which contains no provision defining in terms who shall be eligible to office, there is strength in the argument that the intention was to confide the selection to the untrammelled will of the electors. Experience teaches us that in popular elections those only are elected who are in sympathy with the people, both in thought and aspirations; and that no law is needed to secure the election of those only who reside in the county or district in which their functions are to be performed. The constitution of 1869 contained the provision 'that no person shall be eligible to any office, state, county, or municipal, who is not a registered voter in the state': Const. 1869, art. 3, sec. 14. The omission of a similar article in our present constitution is not without significance."

It is to be observed, as before stated, that neither our constitution nor laws on the subject, prescribe any qualification such as would render a minor ineligible or disqualified from holding the office of deputy county clerk. As to the clerk himself, there might be some question, as he is required to execute a bond, which might involve the capacity to so contract, but there is no such requirement as to deputy county clerks. The authorities cited establish the doctrine that if the duties of deputy county clerk, under the provisions of our statute, are ministerial, a minor can receive the appointment, and execute the duties required of said deputy. The duties of county clerks in our state are regulated by statute, and they appear to be purely ministerial; and, in addition to their other functions, as has been seen, they have the general power to administer all oaths and affirmations, and to take affidavits and depositions to be used, as provided by law, in any of the courts: Sayles' Civ. Stats., art. 1149. Deputies are authorized to act in the name of their principal, and to do and perform all such official acts as may be legally done and performed by such clerk in person. By virtue of his office, the county clerk is empowered to administer oaths and affidavits generally. This power appertains to his office, and belongs to his official duties, and his deputy, in this regard, has such power and authority as he can exercise; and, in our opinion, the appointment of O. L. Bishop, by the clerk of the county court of Johnson county, as his deputy, was a legal and valid appointment. Appellant, however, contends that the act of said deputy in granting the license in this case was a judicial act, inasmuch as said deputy, if authorized to issue a license for his principal, was thereby authorized to inquire as to the status of the parties

desiring to procure a marriage license; that is, whether they were eligible and authorized by law to intermarry. We do not think that his functions in this regard were any more judicial than the registration and recording of a deed, for in such case he would have to pass upon the legality of the acknowledgment, to ascertain and determine whether or not the acknowledgment was such as authorized a registration of the deed. The ²⁵⁵ act itself is only one requiring the exercise of such skill and diligence as appertains to a ministerial office, and we think it clearly comes within the definition given in *Rains v. Simpson*, 50 Tex. 501, cited by counsel. In our opinion, O. L. Bishop, the officer before whom appellant made the affidavit in question, was authorized to administer the same as the deputy county clerk of Johnson county. Said affidavit was regular in form, and was voluntarily made by the appellant, and the evidence abundantly shows that the same was false, and that he knew it was false when he made it.

There being no error in the record, the judgment and sentence of the lower court is affirmed.

PERJURY—PROOF OF—VALIDITY OF OATH.—At the common law, perjury is limited exclusively to oaths administered in some judicial proceeding: *State v. Dayton*, 27 N. J. L. 49; 53 Am. Dec. 270. But, as modified by statute, it may be more accurately defined to be the willful and corrupt assertion of a falsehood, under oath or affirmation, by authority of law, in a material matter: Monographic note to *State v. Shupe*, 85 Am. Dec. 488, on perjury. As to the evidence admissible under an indictment for perjury, see *Heflin v. State*, 88 Ga. 151; 30 Am. St. Rep. 147; monographic note to *State v. Shupe*, 85 Am. Dec. 499. The oath, if nonjudicial, must have been taken before an officer having competent authority to administer it, and it is prima facie sufficient to show that the oath was administered by an authorized deputy or acting magistrate: Note to *State v. Shupe*, 85 Am. Dec. 490.

JUDICIAL AND MINISTERIAL ACTS are discussed and distinguished in the monographic note to *Flournoy v. Jeffersonville*, 79 Am. Dec. 472-477.

KINNARD v. STATE.

[35 TEXAS CRIMINAL REPORTS, 276.]

INDICTMENT—SUFFICIENCY—ASSAULT.—An information charging an aggravated assault committed by an adult upon a child, with switches, is sufficient, and the only effect of the allegation as to the means used, is to confine the prosecution to proof of such means.

ASSAULT—TEACHER AND PUPIL—EVIDENCE.—If a school teacher charged with aggravated assault upon one of his pupils defends, on his right to chastise such pupil, evidence that the chastisement was so severe as to cause blood to flow is admissible, to enable the jury to regulate the punishment to be inflicted upon the teacher.

ASSAULT—TEACHER AND PUPIL—RES GESTAE.—Declarations by a school teacher relative to his chastisement of a pupil, made half an hour thereafter, and after he had engaged in other employment, are not *res gestae*, but self-serving and inadmissible.

ASSAULT—TEACHER AND PUPIL—EVIDENCE OF INTENT.—On the trial of a school teacher for an aggravated assault upon his pupil, evidence of his intent and purpose in inflicting the punishment is admissible in his behalf, and he is competent to testify thereto.

De Graffenried & Young, for the appellant.

M. Trice, assistant attorney general, for the state.

278 **HENDERSON, J.** The appellant was convicted of an aggravated assault, and his punishment assessed at a fine of twenty-five dollars, and from the judgment of the lower court he prosecutes this appeal. There is nothing in appellant's motion to quash the information, and the court did not err in overruling same. The information, in proper terms, charged an aggravated assault, the alleged aggravation consisting in an assault by an adult male upon a child; and the allegation that it was committed with switches is a charge of the means used, and the only effect of this was to confine the state to the proof of the means so charged. The objection urged by appellant that the state could not prove that the assault was so severe as to cause the blood to flow from the assaulted party appears to us to be frivolous. The severity of the assault, and the injuries inflicted by appellant, properly went before the jury, in order to enable them to graduate the punishment which they might inflict. And such evidence became exceedingly pertinent and necessary, in view of the defense set up, to wit, that appellant was a school teacher, and had a right to chastise the prosecutor, who was his pupil. What appellant told J. S. Abbott in regard to the whipping of the prosecutor was some thirty minutes after said whipping, and the appellant had in the meantime engaged in other employment, and such statements were no part of the *res gestae*,

but were self-serving, and were properly excluded. In the face of the proof in this case, which was overwhelming as to the severity of the whipping inflicted by appellant—some of the witnesses stating that appellant cut the blood out of as many as nine places on the prosecutor's legs—we fail to see how proof of the appellant's intention, which he proposed to prove, would have availed him: See Pen. Code, art. 50. Under the evidence in this case, it occurs to us that the jury was exceedingly lenient, as they only fined the appellant twenty-five dollars for having inflicted a most outrageous whipping on a small boy, who is not shown to have offered the least resistance, or done anything at the time calculated to cause appellant to forget his duty and use more force than the law warranted, in exercising moderate restraint and correction over his scholars.

There appearing no error in the record, the judgment is affirmed.

Davidson, J., absent.

ON REHEARING.

HENDERSON, J. At a former day of this term this case was affirmed, and it now comes before us on motion for rehearing. We have carefully considered the grounds set up in the motion, and in our opinion none of them are tenable, except that which is set up in appellant's ninth bill of exceptions. Said bill brings in review the refusal of the ²⁷⁰ court to permit the appellant to testify as to his intention at the time of inflicting the corporal punishment upon Owen Plummer, who was his pupil, the appellant proposing to show by his own testimony that it was not his intention to whip Plummer severely, but that his object was merely to inflict moderate corporal punishment. In the opinion heretofore rendered in this case, we held that, in view of the testimony in the case, it was immaterial what his intention was. Upon a more critical examination of the question, however, we believe we were in error in so holding. The appellant was entitled to this testimony, in view of the peculiar facts of this case; and, whether it was worth much or little, he had a right to have the court consider his testimony as to his intention at the time. As a school teacher, he had the right to inflict moderate corporal punishment upon the prosecutor, Owen Plummer, for sufficient cause, and his intent and purpose in inflicting such punishment were material. The authorities hold that he could testify as to such intent: *Berry v. State*, 30 Tex. Crim. App. 423; 9 Crim. Law Mag. 166, and authorities there cited.

For the error committed by the court in rejecting this testimony, a rehearing is granted, and the cause is reversed and remanded.

SCHOOLS—RIGHT OF TEACHER TO DISCIPLINE PUPIL—ASSAULT.—A teacher has the presumption of having done his duty, in support of his defense, in addition to the general presumption of his innocence, in a prosecution against him for assault and battery in inflicting corporal punishment upon a pupil: *Vanvactor v. State*, 113 Ind. 276; 3 Am. St. Rep. 645, and note. He is not liable in such an action for having chastised, in moderation, a disobedient pupil: *State v. Mizner*, 45 Iowa, 248; 24 Am. Rep. 769, and note; but he exceeds the limits of his authority when he inflicts lasting injury: *Boyd v. State*, 88 Ala. 169; 16 Am. St. Rep. 31, and note. See extended notes to *State v. Pendergrass*, 31 Am. Dec. 419, and *Lander v. Seaver*, 76 Am. Dec. 164-167.

EVIDENCE—RES GESTAE.—To make declarations part of the *res gestae*, they must be contemporaneous with the main fact, but they need not be precisely concurrent in point of time. If they spring out of the transaction, elucidate it, and are made at a time so near to it as reasonably to preclude the idea of deliberate design, then they are to be regarded as contemporaneous: *State v. Arnold*, 47 S. C. 9; 58 Am. St. Rep. 867, and note.

PEEL v. STATE.

[35 TEXAS CRIMINAL REPORTS, 308.]

FORGERY—PROCURING SIGNATURE OF THIRD PERSON.—One who procures another, in his presence, to sign to an appeal bond the name of a third person, who resides in another county, but whose name is identical with that of the signer, and also procures such signer to add to the bond the name of such other county, and then utters the bond as having been signed by such third person, is guilty of forgery.

FORGERY—PROCURING SIGNATURE OF THIRD PERSON.—One who procures another to sign an appeal bond with intent, subsequently consummated, to pass such a signature as the signature of a third person of the same name as the signer, is guilty of forgery.

Walton & Hill, for the appellant.

M. Trice, assistant attorney general, for the state.

312 HURT, P. J. This appellant was convicted of forgery, and given two years in the penitentiary. From the judgment and sentence of the lower court he prosecutes this appeal. There are two theories in this case. If either be true, appellant is guilty of forgery as charged. 1. That appellant procured T. J. Peel of San Marcos, Hays county, Texas, to sign the name of T. J. Peel of Montgomery county to an appeal bond in a civil case; 2. That the appellant, with fraudulent intent, procured T. J. Peel of Hays county to sign the bond, and subsequently passed

it as the signature of T. J. Peel of Montgomery county. If the testimony of T. J. Peel of Hays county is true, then appellant procured him to sign the name of T. J. Peel of Montgomery county to said bond, and it matters not whether Peel of Hays county was guilty of forgery or not. The appellant was not only guilty, but guilty as a principal; for he was present at the time the signature of T. J. Peel of Montgomery county was signed to the bond by T. J. Peel of Hays county, requesting him to sign the same. If Peel of Hays county signed the bond as a surety thereto, with full knowledge of its contents and purpose, appellant, nevertheless, was guilty of forgery, because the facts in the record show that he intended to pass the bond upon the clerk of the district court of Travis county, Texas, as having been signed as a surety by T. J. Peel of Montgomery county. The first theory needs no citation of authority. In support of the second we cite the following: *Hocker v. State*, 34 Tex. Crim. Rep. 359; 53 Am. St. Rep. 716; *Commonwealth v. Stevens*, 10 Mass. 181; *Commonwealth v. Foster*, 114 Mass. 317; 19 Am. Rep. 353; *Barfield v. State*, 29 Ga. 127; 74 Am. Dec. 49; *United States v. Turner*, 7 Pet. 132; *Regina v. Mitchell*, 1 Den. C. C. 282; *Regina v. Blenkinsop*, 1 Den. C. C. 276; *Rex v. Webb*, Russ. & R. C. C. 405. The first theory, namely, that Peel of Hays county was induced by appellant to sign the name of Peel of Montgomery county to the bond, is most cogently supported by the letters and conduct of appellant, and the testimony of other witnesses, separate and apart from the testimony of Peels of Hays county. It is remarkable, indeed, that the certificate to the solvency of Peel of Montgomery county should have been procured by the appellant without intending to use his name upon the bond. We are of the opinion that the testimony of the accomplice—concede him to be such, for the argument—³¹³ is most amply supported by the conduct of the appellant and other testimony in the case. In fact, the testimony of the appellant contributes very cogently to the support of the first theory. Conceding, for the argument, that the accomplice was not supported in regard to the first theory, still the second remains amply sustained by the testimony of Mr. Hart, the district clerk of Travis county, and the other evidence in the case that he (Hart) was induced to receive the bond because the name of T. J. Peel of Montgomery county was signed thereto; in other words, that appellant passed the bond upon the clerk, with the name of T. J. Peel to it, intending that the clerk should understand and believe that that name had reference to the Peel of Montgomery county. Under either state of case appellant would be guilty of forgery. The charge of the

court was a correct application of the law to the case. There was no exception to it at the time, and, if there had been, we believe it unobjectionable. This case is bristling with chicanery and fraud, and it clearly appears that it was the intention of appellant to commit a fraud.

The judgment is affirmed.

FORGERY.—The essential element of forgery consists in the intent, when making the signature or procuring it to be made, even though the name affixed is that actually borne by the person affixing it, to pass it fraudulently as the signature of another than the one who actually makes it: *State v. Wheeler*, 20 Or. 192; 23 Am. St. Rep. 119, and note. One who, with intent fraudulently to utter a promissory note of a person other than the signer, procures to it the signature of an innocent party, who does not thereby intend to bind himself, is guilty of forgery: *Commonwealth v. Foster*, 114 Mass. 311; 19 Am. Rep. 353. See, also, *Gregory v. State*, 26 Ohio St. 510; 20 Am. Rep. 774, and monographic note to *Arnold v. Cost*, 22 Am. Dec. 309, as to when procuring a genuine signature is a false making.

GONZALES v. STATE.

[35 TEXAS CRIMINAL REPORTS, 339.]

JUDGMENTS—ENTRY NUNC PRO TUNC.—The trial court may enter sentence nunc pro tunc when it has the indictment, verdict, and judgment before it, and has personal knowledge that sentence has been pronounced, without requiring or having any record evidence of the latter fact.

JUDGMENTS—ENTRY NUNC PRO TUNC.—Proof, to authorize the entry of a judgment or sentence nunc pro tunc, may as well be made by parol as by record evidence.

APPELLATE PRACTICE—OBJECTION FIRST MADE ON APPEAL.—Objection to a charge of a court in a criminal case may be first made and considered on appeal, if such charge is calculated to injure the rights of the accused, but, unless so calculated, is not ground for reversal of the judgment.

Lane & Hicks, for the appellant.

M. Trice, assistant attorney general, for the state.

341 HURT, P. J. Appellant in this case was convicted of murder in the first degree, for the killing of one Charles Dykes, and his punishment assessed at confinement in the state penitentiary for life. This case was before us at the last term of court at this place: *Gonzales v. State* (Tex. Crim. App., Dec. 15, 1894), 28 S. W. Rep. 947. The appeal was dismissed, because the appellant had not been sentenced. Upon motion of the district attorney, after proper notice to appellant and his counsel, the court entered the sentence upon the record. Appellant objected to this proceeding because there was no memoranda upon

the judge's minutes or the records to the effect that a sentence had been pronounced against him. The learned judge below states that he had personal knowledge of the fact. The question involved is this: Can the sentence be entered of record without some written memoranda in the judge's notes or his docket, or some other record of the court, which tend to prove that sentence had been pronounced? We answer that the tendency of modern authority is to hold that it can. The indictment, the verdict of the jury, and the judgment were all before the court. But one sentence could have been pronounced, and that must follow the judgment, and we see no good reason requiring some record evidence to authorize entering the sentence. Where it is proposed to enter a judgment *nunc pro tunc*, there must be proof that such judgment was theretofore rendered. This proof may be made as well by parol as by record evidence. Now, a great many facts were introduced in evidence which were clearly inadmissible. These facts, however, were elicited by appellant, and there was no objection to the admission of any evidence. We cannot interfere. The charge of the court is complained of. There was no exception made to the charge at the time of its delivery, and none in motion for a new trial but what is so general that it cannot be considered. But, notwithstanding this, if the charge is calculated to injure the rights of the accused, it can be urged for the first time before this court. The complaint is that the charge permitted the jury to convict appellant, if they believed he was present at the homicide, whether he did anything or not. When the charge is considered as a whole, and viewed in the light of the testimony, no such impression was likely to be made upon the minds of the jurors. There were eyewitnesses to the transaction, and they not only show appellant present, but an active participant in the crime which was committed in the perpetration of robbery. We do not think the error complained of was calculated, under the circumstances of this case, to injuriously affect the rights of appellant. The evidence is amply sufficient to support the verdict.

The judgment is affirmed.

JUDGMENT NUNC PRO TUNC—UPON WHAT EVIDENCE MAY BE ENTERED.—There exists a difference of judicial opinion as to the evidence upon which an entry of judgment *nunc pro tunc* may properly be based. The question is discussed in the monographic note to *Ninde v. Clark*, 4 Am. St. Rep. 831-833. See *Graham v. Lynn*, 4 B. Mon. 17; 39 Am. Dec. 493; *Draughan v. Tombeckbee Bank*, 1 Stew. 66; 18 Am. Dec. 38.

APPEAL IN CRIMINAL CASES—OBJECTIONS NOT RAISED AT TRIAL.—In general, an objection not raised at the trial will not

be considered on appeal: *People v. Barker*, 60 Mich. 277; 1 Am. St. Rep. 501. But erroneous statements of the law or improper comments upon the facts or evidence bearing upon them may be reviewed and corrected on appeal in a capital case without any exception, when it can be seen that they may have operated to the prejudice of the accused: *People v. Barberi*, 149 N. Y. 256; 52 Am. St. Rep. 717.

CASTLEBERRY v. STATE.

[85 TEXAS CRIMINAL REPORTS, 382.]

RECEIVING STOLEN PROPERTY.—The bare fact, standing alone, that an accused received stolen property, is not sufficient proof to establish that he knew that the property was stolen when he received it, and does not authorize a conviction for receiving stolen property knowing it to have been stolen.

383 **DAVIDSON, J.** The appellant in this case was convicted under an indictment charging him with receiving stolen property, over the value of fifty dollars, knowing the same to have been so acquired, and his punishment assessed at two years in the penitentiary, and from the judgment and sentence of the lower court he prosecutes this appeal. The only question that is necessary to be considered by us in this case is the sufficiency of the evidence to sustain the verdict of the jury. The proof was substantially as follows: It was proven that one Hutchinson lost some jewelry, to wit, a watch and a finger ring, and that one Jim Hunter was guilty of the theft thereof. After Hunter's arrest, on demand being made of him for the property, he carried the policeman to the defendant's house where said Hunter boarded. When they arrived at the house, Hunter said to defendant, in the presence of the policeman, "Give us those things I left with you." Defendant said, "The watch and ring?" and then went into the house, got the watch, and handed it to the policeman; then took his pocketbook from his pocket, and took therefrom a gold ring, and also gave that to the policeman. This property was identified as the stolen property. These were all of the facts and circumstances in this case bearing upon the guilty knowledge of the defendant. This is not a case of theft, but a case of receiving stolen property, knowing the same to have been stolen. The possession of property recently stolen, under certain circumstances, is sufficient to sustain a conviction for theft. In this case the record renders it evident that Hunter stole the watch and ring, and not the defendant. Now, then, will the bare fact that the accused received the stolen property be sufficient proof, standing alone, that he knew the property

was stolen when he received it? It will not. Mr. Bishop says upon this point (after discussing the subject): "But from these principles it is perceived the result follows that the mere naked possession of stolen goods, not aided by other proof, is no evidence of the defendant's having received them, knowing them to be stolen": 2 Bishop's Criminal Procedure, sec. 909; *Durant v. People*, 13 Mich. 351-353. Just what circumstances will be sufficient to establish guilty knowledge we do not undertake to name. Each case must depend upon its own facts. But we do hold that the bare fact of receiving stolen goods is not sufficient to show guilty knowledge. As the case is presented to us, the conduct of the defendant was ³⁸⁴ entirely consistent with his innocence. It would be a dangerous doctrine to hold every citizen guilty of receiving stolen property, and send him to the penitentiary, because he was found in possession thereof.

The judgment is reversed and the cause remanded.

RECEIVING STOLEN GOODS—EVIDENCE—WHAT WILL CONVICT.—To convict of buying stolen property for gain when the buying is admitted, the state must prove the guilty knowledge of the accused that the property was stolen at the time of the purchase: *Huggins v. People*, 135 Ill. 243; 25 Am. St. Rep. 357, and note. Mere possession of the stolen property is insufficient even as corroboration of the thief's testimony: Extended note to *Wright v. State*, 26 Am. Dec. 261. See *People v. Levison*, 16 Cal. 98, 76 Am. Dec. 505, for various matters of evidence held insufficient to sustain a conviction. See, also, *Cooper v. State*, 29 Tex. App. 8; 25 Am. St. Rep. 712.

EX PARTE REYNOLDS.

[35 TEXAS CRIMINAL REPORTS, 47.]

INDICTMENT AND SENTENCE—ILLEGAL GRAND JURY—DUE PROCESS OF LAW.—An indictment found and returned by a grand jury composed of more men than is required to constitute a legal grand jury, as well as a conviction and sentence under such indictment, is without due process of law and absolutely void.

HABEAS CORPUS—VOID INDICTMENT.—A person who has been convicted and sentenced under an indictment found and returned by a grand jury composed of more men than is required to constitute a legal grand jury is entitled to be released from custody upon a writ of habeas corpus, for the reason that he is restrained of his liberty by an indictment and sentence which are absolutely void.

Makemson & Fisher, for the relator.

M. Trice, assistant attorney general, for the respondent.

⁴³⁸ **DAVIDSON, J.** This is an original application for a writ of habeas corpus, now before this court for trial. The applicant sued out a writ of habeas corpus before us, alleging that

he was illegally restrained ⁴³⁹ of his liberty, because, he says, the indictment under which he was convicted and sentenced to the penitentiary was found by a body composed of fourteen persons. We have examined the evidence in the case, all being of record, and find that it is true, as alleged, that the indictment on which the applicant was tried, convicted, and sentenced to the penitentiary was returned into court by a body composed of fourteen men. The only question for our decision is, Can the applicant obtain relief from imprisonment under the above state of case by a writ of habeas corpus? Section 10 of the bill of rights provides, as a part thereof, that "no person shall be held to answer for a criminal offense, unless on indictment by a grand jury, except in cases where the punishment is by fine," etc. Section 13, article 5, of the constitution provides that "grand and petit juries, in the district courts, shall be composed of twelve men." This court has held, and we see no reason for changing our opinion, that a body composed of more than twelve men is not a grand jury: See *Lott v. State*, 18 Tex. Crim. App. 627; *McNeese v. State*, 19 Tex. Crim. App. 48; *Smith v. State*, 19 Tex. Crim. App. 95; *Ex parte Swain*, 19 Tex. Crim. App. 323; *Rainey v. State*, 19 Tex. Crim. App. 479; *Wells v. State*, 21 Tex. Crim. App. 594; *Harrell v. State*, 22 Tex. Crim. App. 692. The district court, in felony cases, does not obtain jurisdiction of the offense, unless by indictment. There must first be the act of a grand jury before the court's jurisdiction can attach in such cases. A prosecution for a felony, without indictment by a grand jury, is not due process of law, in this state. There can be no indictment unless there was a grand jury. The verdict and judgment, without an indictment, in a felony case, are absolute nullities, and cannot be the basis or warrant for any commitment. Let us suppose that the applicant had been tried upon an information—could it be contended that the jurisdiction of the court attaches to that case? We think not. Let it be supposed that there was neither information nor indictment—could it be contended that the verdict of a jury, and judgment of the court thereon, would not be absolutely void? We think not. In this case, the court's jurisdiction not having attached, the court therefore had no jurisdiction of the subject matter. The conviction being without due process of law, and in violation of the plain requirements of the constitution, the warrant for the imprisonment of the applicant is therefore void, not voidable merely. We are not to be understood as holding that the applicant could obtain relief by habeas corpus because of a defective indictment, or an indictment that seeks to charge the of-

fense for which he has been convicted, but in substance is defective; but we do hold, in a felony case, that he can obtain relief by habeas corpus, where there has been no indictment. We are not passing on the other question, as to defective indictments. This view of this question is in conflict with the proposition laid down in the headnotes in *Ex parte Fuller*, 19 Tex. Crim. App. 241, but is in exact accord and is supported by the reasoning of the court in *Lott v. State*, 18 Tex. Crim. App. 627, and subsequent cases. We believe the reasoning of Judge Willson unanswerable, and the conclusion that a ⁴⁴⁰ judgment without an indictment is absolutely void, and that the party can obtain relief by habeas corpus. It being understood between the assistant attorney general and counsel for applicant that this record contains the facts, and that the state has nothing further to offer why the applicant should not be discharged, it is therefore ordered and decreed that the applicant be discharged from custody, and that the clerk forward a certified copy of this opinion to the officer in charge of the applicant, Larkin Reynolds, and that said applicant be at once discharged from custody.

INDICTMENT—WHEN RENDERED VOID BY IRREGULARITIES IN IMPANELING GRAND JURY.—The number of men required to constitute a grand jury varies in the different states. In Massachusetts, the rule is not less than thirteen nor more than twenty-three, but the summoning of a greater number is not fatal to an indictment found by the legal number. In Texas, an indictment found by thirteen grand jurors is a nullity: Monographic note to *Commonwealth v. Green*, 12 Am. St. Rep. 904. In Mississippi, where a statute made the maximum number of grand jurors eighteen, a grand jury of nineteen jurors was held illegal: *Miller v. State*, 33 Miss. 356; 69 Am. Dec. 351. See, also, *State v. Hamlin*, 47 Conn. 95; 36 Am. Rep. 54. Where a grand jury which found an indictment appears from the record to have been illegally constituted a motion in arrest of judgment on this ground should be granted: *Miller v. State*, 33 Miss. 356; 69 Am. Dec. 351.

HABEAS CORPUS—VOID JUDGMENT.—If, from the record, it appears that the defendant was convicted by a jury of eleven persons only, the verdict and judgment must be treated as void on habeas corpus: *Scott v. State*, 70 Miss. 247; 35 Am. St. Rep. 649, and note. But it has been held that the objection that the indictment upon which a prisoner was convicted was not found by a legal grand jury will not be considered on habeas corpus, the indictment being regular on its face: Monographic note to *Commonwealth v. Lecky*, 26 Am. Dec. 48.

REDDICK v. STATE.

[35 TEXAS CRIMINAL REPORTS, 463.]

RAPE—EVIDENCE—COMPLAINT OF PROSECUTRIX.—On a trial for rape, the prosecution may show by the prosecutrix, or other witnesses, that she made complaint of the outrage recently after its commission, and when, where, and to whom it was made; but the prosecution is not allowed in that way to prove the name of the person charged with the crime, nor the particulars as narrated by

the prosecutrix, the practice being merely to ask whether she made the complaint that such an outrage had been perpetrated upon her and to receive in answer only yes or no. Such statement or complaint is admitted only to corroborate her testimony, and is not evidence of the fact upon which the jury can find the accused guilty, and, when she is not a witness in the case, such statement or complaint is wholly inadmissible in evidence.

RAPE—EVIDENCE—COMPLAINT OF PROSECUTRIX.—

Unless a party accused of rape attempts to prove that the prosecutrix charged some one else with the crime, or that she said that she did not know who was the guilty party, or that her testimony as to his being the man has been recently fabricated, or that improper influences have been brought to bear upon her, or on any other witness, to accuse him of the crime, it is not competent for the prosecution to prove that soon after the perpetration of the outrage the prosecutrix had complained of and charged the accused as the party who committed the crime.

RAPE—EVIDENCE—COMPLAINT OF PROSECUTRIX—

IDENTIFICATION.—On a trial for rape, testimony that a sheriff, after the arrest of the accused, placed him and several others in line, and then produced the son of the prosecutrix, who identified and pointed out the accused as the man who had raped his mother, and that the prosecutrix, at the same time and place also identified and pointed out the accused as the man who had raped her, and that she then fainted, is not admissible as original evidence to prove the crime, but only in corroboration of the testimony of the prosecutrix, and, standing alone, is not sufficient to warrant a conviction.

Ford & Nall, for the appellant.

M. Trice, assistant attorney general, for the state.

460 HURT, P. J. Appellant was convicted of rape, and his punishment assessed at death, and he prosecutes this appeal. Upon the trial, over the objection of the appellant, the state was permitted to prove the following facts, by T. C. Nunn, sheriff of Brazos county: **467** that on Monday, after the alleged rape of Fannie Polazo, and after defendant had been arrested for said offense, he placed defendant and eight other negroes in a line in the jail of Brazos county, and then brought Charley Polazo into said jail, and that he identified and pointed out defendant as the man who had committed the rape upon Fannie Polazo. The state was also permitted to prove by Sheriff Nunn that at the same time and place, and under the same circumstances, Fannie Polazo, the prosecutrix, was carried into the jail, and she identified and pointed out the defendant as the man who had raped her and bit her thumb; and that the said Fannie fainted, and would have fallen had she not been caught and held up by others. These facts were introduced in evidence as original testimony. Were they admissible as original testimony? On the next morning after the rape, the prosecutrix related what had occurred to her brother in law, Joe Polazo, and his wife. Some of the details were permitted to be proven by Polazo and wife. To this there was no objection. If an objection had been inter-

posed, we might revise the action of the court in permitting the state to introduce as original testimony any of the details attending the rape; the rule being that, as original testimony, the prosecution can prove that the woman charged to have been outraged complained of the outrage. This is admissible, whether *res gestae* or not, as a part of the state's case. A very clear statement will be found in *Thompson v. State*, 38 Ind. 40, which states: "That the prosecution may show by the testimony of the prosecuting witness, or that of other witnesses, that she made complaint of the outrage recently after its commission, and when, where, and to whom it was made. That the prosecution will not be allowed to prove the name of the person charged with the crime, or the particulars as narrated by her, the practice being merely to ask whether she made the complaint that such an outrage had been perpetrated upon her, and to receive in answer only, simply, yes or no. That such statement is only corroborative of her testimony, and is not evidence of the fact upon which the jury can find the defendant guilty; and, when she is not a witness in the case, it is wholly inadmissible": See *Bishop's Criminal Procedure*, sec. 912; *Regina v. Osborne*, Car. & M. 622; *Regina v. Megson*, 9 Car. & P. 420; *Regina v. Alexander*, 2 Craw. & D. 126; *People v. McGee*, 1 Denio, 19; *Stephen v. State*, 11 Ga. 225; *Johnson v. State*, 17 Ohio, 593; *Laughlin v. State*, 18 Ohio, 99; 51 Am. Dec. 444; *Weldon v. State*, 32 Ind. 81; *Roscoe on Criminal Evidence*, 24. Mr. Greenleaf says: "Though a prosecutrix may be asked whether she made complaint of the injury, and when and to whom, and the person to whom she complained is usually called to prove that fact, yet the particular facts which she stated are not admissible in evidence, except when elicited on cross-examination, or by way of confirming her testimony after it had been impeached. On the direct examination the practice has been merely to ask her whether she made complaint that such an outrage had been perpetrated upon her, and to receive only, simply, yes or no. Indeed, the complaint constitutes no part of the *res gestae*. It is only a fact corroborative of the testimony of the complainant. Where she is ⁴⁶⁸ not a witness in the case, it is wholly inadmissible": See 3 *Greenleaf on Evidence*, 15th ed., sec. 213. Mr. Taylor, in his work on Evidence, says: "That in no case can the particulars of the complaint be disclosed by witnesses for the crown, either as original or confirmatory evidence, but the details of the statement can only be elicited by the prisoner's counsel on cross-examination": Citing *Regina v. Walker*, 2 Moody & R. 212; *Regina v. Osborne*, Car. & M. 622; *Regina v. Quigley*, Ir. Cir. 677. Mr. Phillips (1 *Phillips on Evidence*, 149, Cowen & Hill's & Edwards' Notes)

says: "In prosecutions for rape or for assault with intent to commit rape, proof of the fact that the prosecutrix made complaint soon after the commission of the alleged crime is admissible, and indeed is generally required; but the particulars of the complaint made cannot be admitted in evidence as to the truth of her statement. The particulars stated, as to the violence used or the person who committed the violence, cannot be received. The evidence should be confined to the bare proof of the fact that the complaint of personal violence was made, and that an individual was charged, without mentioning his name": Citing *Regina v. Walker*, 2 Moody & R. 212; *Rex v. Wink*, 6 Car. & P. 397; *Regina v. Megson*, 9 Car. & P. 420; *Regina v. Osborne*, 2 Car. & M. 622; *Regina v. Nicholas*, 2 Car. & K. 248. This precise question came up in *Pefferling v. State*, 40 Tex. 487; and the supreme court of this state reversed the judgment upon the ground that the brother of the prosecutrix was permitted to swear to a detailed statement made by the prosecutrix (his sister). Judge Moore, speaking for the court says: "It is, we think, well established by reason, as well as the great weight of authority, that proof of the particulars of the complaint and the detailed statement of the alleged facts and circumstances connected with it, as was permitted in this case in the court below, cannot be admitted as original evidence to prove the truth of the statement testified to by the injured party, or to establish the charge made against the prisoner." What was said by this court in *Ruston v. State*, 4 Tex. Crim. App. 432, *Fulcher v. State*, 28 Tex. Crim. App. 471, *Ripley v. State*, 29 Tex. Crim. App. 38, and *Bruce v. State*, 31 Tex. Crim. Rep. 590, in so far as they antagonize the rule here laid down, is expressly overruled. We deem these citations amply sufficient to support the proposition that, as original testimony, nothing but the complaint and the parties to whom related, as stated in the Indiana case above, are admissible. We are not to be understood as holding that the state will not have the right to prove as original testimony that the prosecutrix complained of the outrage, to whom she made complaint, and that she, of course, charged some one with the crime; but we are to be understood as holding that the name of the party charged cannot be given, and that the circumstances of violence cannot be proven in this way. But, when a certain character of attack is made upon the testimony of the prosecutrix by the defense, the particulars of the offense may be proven by the state. If the defendant attempts to prove that she charged somebody else with the crime, or that she said that she did not know who was the guilty ⁴⁶⁹ party, the state would have the right to show that, soon after the transaction, she charged the defendant with being

the person. If the defendant attempts to prove that her testimony has been recently fabricated, as to defendant being the man, the state would have the right to show that she had stated, soon after the transaction, that the defendant was the man. If the defendant attempts to show that improper influences have been brought to bear upon the prosecutrix, or any other witness, to accuse the defendant of the crime, the state would have the right to prove that, before these influences were applied, she told the same tale as she swears to now upon the trial. Except as to the right to prove her complaint, the prosecutrix in a rape case stands precisely on the same ground, and no better, than a witness in any other case: See *Bailey v. State*, 9 Tex. Crim. App. 98; *Williams v. State*, 24 Tex. Crim. App. 637; *Dicker v. State* (Tex. Crim. App., Oct. 23, 1895), 32 S. W. Rep. 541. Now, as we have above stated, the prosecutrix complained of the outrage to her brother in law on the next morning after the alleged rape. Some of the details were proven, but there was no objection. This was more than the state had a right to do, until she was attacked. If appellant had objected to the introduction of the details in this matter, reserving his bill, then we would have held that there was error in admitting them. The conduct of the sheriff, the fact that the prosecutrix and the boy, in the jail, identified the defendant as the man who committed the crime, were not a statement or complaint of the prosecutrix soon after the transaction, which had already been made; and, if it had been the first time that she had recognized the defendant, it would have been clearly inadmissible. All that could have been proven was that she complained of the outrage. These remarks apply to the prosecutrix. We are not aware of any authority that will admit in evidence the fact that the boy recognized the defendant. Certainly, no law permits his complaints to be admitted in evidence. Of course, if his testimony had been attacked in the manner above indicated, the state could prove that he recognized the defendant soon after the transaction. We are not aware of any authority to admit in evidence such conduct as is described in this bill of exception. The circumstances under which the identification was made, the fact that the prosecutrix fainted—if there be any authority for such testimony, we have found it in no book, except in *Bruce v. State*, 31 Tex. Crim. Rep. 590. The defendant upon the trial below made no attack such as above described upon either of the witnesses. There was no effort to show that she had charged somebody else with the crime. There was no offer to show that her testimony was recently fabricated, and none to show that she testified under the influence of improper motives. And, unless this was shown, this

testimony could not have been introduced for the purpose of supporting the witnesses. The great weight of authority holds that the admission of the statement of the prosecutrix, made soon after the outrage, is only for the purpose of corroborating or sustaining her testimony. We are of opinion that there was error in this matter of a very material character. A number of witnesses swore to facts which, ⁴⁷⁰ if true, tended very cogently to show that the defendant was not present at the time the rape was charged to have been committed. The only issue in this case was as to the identity of the party who committed the offense. Hence the reception of this testimony was calculated very powerfully to induce the jury to believe that, because the prosecutrix fainted on recognizing the defendant one or two days afterward, therefore he must have been the man.

For the error above discussed, the judgment is reversed, and the cause remanded.

RAPE—EVIDENCE—COMPLAINT BY PROSECUTRIX.—A witness to whom complaint has been made by the victim of a rape, or attempt to rape, is not, at the trial, permitted to repeat on direct examination, all the details of the outrage, and the name of the ravisher as subsequently reported to such witness, but can only testify to the fact that the complaint was made, and as to the condition of the victim when making the complaint: *State v. Langford*, 45 La. Ann. 1177; 40 Am. St. Rep. 277, and note; *Oleson v. State*, 11 Neb. 276; 38 Am. Rep. 366, and extended note; *State v. Robertson*, 38 La. Ann. 618; 58 Am. Rep. 201. This rule has, however, been held not an inflexible one where the circumstances of the case make it inapplicable: *People v. Gage*, 62 Mich. 271; 4 Am. St. Rep. 854. As to the evidence admissible in a prosecution for rape, see monographic note to *Smith v. State*, 80 Am. Dec. 369-372.

McADOO v. STATE.

[35 TEXAS CRIMINAL REPORTS, 603.]

RAPE—ATTEMPT TO COMMIT—FORCE NECESSARY.—To constitute the crime of attempt to commit rape the same character of force is necessary as is required to constitute rape, or assault with intent to commit rape; and the accused must have intended, at the time, to accomplish his purpose by the use of such force, namely, such force as was reasonably necessary to overcome all resistance on the part of the woman, taking into consideration the relative strength of the parties, and the other circumstances in the case.

RAPE—ATTEMPT TO COMMIT—FORCE NECESSARY.—If the degree or amount of force used is not such as to constitute an assault with intent to rape, but the offense is an endeavor to rape carried beyond mere preparation, then, to constitute the crime of an attempt to rape the accused must have intended to use, if necessary, such force as is necessary in an assault with intent to rape, namely such force as was reasonably calculated to overcome all resistance on the part of the woman, taking into consideration the relative strength of the parties, and the other circumstances in the case.

Carrigan & Montgomery, for the appellant.

M. Trice, assistant attorney general, for the state.

⁶⁰³ HURT, P. J. Appellant was convicted under an indictment charging him with rape, of an attempt to commit rape, and given two years in the penitentiary, and prosecutes this appeal. Appellant reserved several bills of exceptions to the charge of the court on rape, and assault with intent to commit rape; but, as the jury found the appellant guilty of an attempt to rape, it will not be necessary to notice the charges of the court, as presented in said exceptions, save as they may have a bearing on the offense of which the appellant was convicted. Appellant's third bill of exceptions brings in review the charge of the court on an attempt to commit the offense of rape. Said portion of the charge objected to is as follows: "If it appear on the trial of an indictment for rape that the offense, though not committed, was attempted by the use of force, but not such as brings the offense within the definition of an 'assault with intent to commit rape,' the jury may find the defendant guilty of an attempt to commit the offense of rape. An 'attempt' is an endeavor to accomplish a crime, carried beyond mere preparation, but falling short of the ultimate design in any part of it." "If you fail to find the defendant guilty of rape, or of an assault with intent to commit rape, and find and believe from the evidence, beyond a reasonable doubt, that the defendant, John McAdoo, in Wichita county, Texas, in the month of July, A. D. 1895, by the use of force, but not such force as to bring the offense within the definition of an assault with intent to commit rape, attempted to commit rape upon Maggie Cook, then you will find ⁶⁰⁴ the defendant guilty of an attempt to commit rape." Appellant objected for the following reasons: 1. Because said charges are not applicable to the case as made by the evidence, in that there is no proof of an attempt to commit rape, as distinguished from an assault with intent to commit rape; the evidence for the state showing a violent assault and an actual rape, or at least a violent assault with intent to rape; 2. Because there is no evidence authorizing a charge on attempt to commit rape; 3. Because said charge fails to define the offense of assault with intent to commit rape, and fails to tell the jury what facts they must find in order to convict of such attempt; 4. Said charge fails to tell the jury what degree of force the defendant must have intended to use, and fails to tell the jury that he must have intended to use such force as was reasonably calculated to overcome all resistance on the part of the woman, taking into consideration the relative strength of the parties, and the other circumstances of the case,

and, in effect, tells the jury that, even if defendant did not intend to use such force as was necessary to overcome resistance, they might still convict him of an attempt to rape."

The evidence on the part of the state showed that the prosecutrix, a girl about fifteen years old, and her little sister, about ten years of age, and her little brother, about eight years of age, had been out hunting grapes, and they came to a vacant house, and stopped to rest and get some water, and after they had been there a short time the defendant came up. The prosecutrix testifies that she had seen the defendant once before, about a month before that time. He was about nineteen years old, and lived in the neighborhood. The defendant came in the house, went into the room where there was an old mattress lying on the floor, called the prosecutrix's little brother to him, and told him to tell his sister to come there. She came to the door, and the defendant caught her by the arm, as she testifies, pulling her in. He asked her what she was good for, and jerked her, and hit her on the head and back, and threw her down on the mattress. As he was doing this she screamed once. He then pulled up her clothes, unbuttoned his drawers, put his finger in her privates, and then put his male organ into her privates, jobbed up and down on her, stayed on her about five minutes, and then got off. She was crying while he was doing this. When she got up her brother and sister were gone, and she saw them about a half mile on their way toward home, and she followed and caught up with them. She told her mother that evening that the defendant beat and bruised her. It does not appear that she spoke of the rape at that time. The little sister of the prosecutrix testified to seeing the defendant pull her sister into the room, and heard him throw her down on the mattress, and that she went around the house and peeped into the room through a crack, and saw him on top of her sister, jobbing up and down, and her sister was crying at the time. An older brother of the prosecutrix testified that after she came home crying, and told her mother that the defendant had beaten her, he got on his horse that evening and went over to the defendant's and asked him if it was true that he had beat and abused his ⁶⁰⁵ sister Maggie. The defendant replied: "No; but I can tell you what I did do. I tried for a little." That he then went down and made complaint against the defendant for assault with intent to rape. Charley Keys testified that he was county attorney of Wichita county; that A. C. Cook made complaint against the appellant for assault with intent to rape on the same day, which was July 5, 1895, and on the next day Maggie Cook and her mother came to his office, and he asked her about the affair, and she told him that the defendant

pulled up her dress and put his male organ into her. Two physicians testified that on the evening of July 6th they examined the private parts of Maggie Cook, and found no laceration whatever of the parts, and found no evidence of the deposit of semen about the drawers or clothing, and that the hymen was intact. This is, in substance, the entire evidence in the case.

If the testimony of the prosecutrix is to be credited, nothing short of rape was committed upon her. If her testimony and that of her little sister are taken in connection with the testimony of the physicians, there may have been rape—that is, the very slightest penetration of the parts—or an assault with intent to commit rape, and nothing less than that. As we understand it, the statute requires the same character of force, and the same intent to use the same amount of force, to constitute an attempt to rape that it takes to constitute an assault with intent to rape—that is, the character of force to be used in either is the same force as is applicable to assault and battery; and it must have been such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties, and the other circumstances of the case. Article 640 of the New Revised Criminal Code, under which this conviction was had, provides: “If it appear on the trial of an indictment for rape that the offense, though not committed, was attempted by the use of any of the means spoken of in articles 634, 635, and 636, but not such as to bring the offense within the definition of an assault with intent to commit rape, the jury may find the defendant guilty of an attempt to commit the offense,” etc. The learned judge, in trying this case below, in the charge before quoted, and excepted to by appellant, appears to give this article, in substance, to the jury. The contention of the appellant, however, is that he should have more specifically told the jury what degree of force the defendant must have intended to use, and that they must believe that at the time of the attempt he intended to use such force as was reasonably calculated to overcome all resistance on the part of the woman, taking into consideration the relative strength of the parties, and other circumstances of the case, before they would be authorized to convict him. To our minds, a proper construction of the statute in question means that, at the time of the alleged attempt, it was the intent of the party to use the same force as would make him guilty of rape, or of an assault with intent to rape, but in the actual attempt he fell short in the use or application of such force as would bring the offense up to an assault with intent to rape; for when the force used amounts to an assault, then it

ceases to be a mere attempt, but would be ⁶⁰⁰ an assault with intent to commit rape—that is, the two offenses come together; when the attempt ceases, the assault begins, and takes its place; and, if the force actually used is such as to constitute the offense an assault with intent to rape, then it is no longer a mere attempt. The court, following the statute, charged the jury “that if they believed the defendant, by the use of force, but not such as to bring the offense within the definition of an assault with intent to commit rape, attempted to commit rape upon Maggie Cook, then find him guilty of an attempt to rape.” By this charge the jury might be inclined to believe (especially when we look at the facts of the case) that an attempt to commit rape could be accomplished by the use of less force than is required to constitute an assault with intent to commit rape. While this may be true in one sense, judged by the degree of the assault, yet the question as to force directly appertains to the intent of the party at the time he makes the attempt, and he must have in his mind at that time the purpose and intent to use the same character and the same degree of force, as stated before, necessary to accomplish the purpose of either rape or assault with intent to commit rape. And in this case, if the judge was authorized to submit to the jury the issue of an attempt at all (which is very doubtful), he should have distinctly stated to them the character of force that should be used, and that it must be the same character of force required to constitute rape, or an assault with intent to rape, and that the party must have intended at the time to accomplish his purpose by the use of such force, and that if the degree or amount of force used was not such as to constitute the offense an assault with intent to rape, but it was an endeavor on his part to rape the prosecutrix, and he carried the same beyond mere preparation, then to find him guilty of an attempt to commit rape. This was not done, and for the failure of the court to present this issue in a clear and distinct manner the judgment of the lower court is reversed, and the cause remanded.

RAPE—ATTEMPT TO COMMIT—FORCE NECESSARY.—To render a man guilty of the crime of an attempt to commit rape, it is not enough that he intended to use the force necessary to accomplish his purpose notwithstanding the woman's resistance; he must, in addition to this, have done some act which in connection with this intent constitutes the attempt: *State v. Lung*, 21 Nev. 209; 37 Am. St. Rep. 505, and note. A specific intent to rape is an absolutely essential ingredient to an attempt to rape, and must accompany the means used to effect the crime: *Reagan v. State*, 28 Tex. App. 227; 19 Am. St. Rep. 833. See further as to what constitutes an attempt to rape, *State v. Dowell*, 106 N. C. 722; 19 Am. St. Rep. 568; *People v. Woodward*, 45 Cal. 293; 13 Am. Rep. 176.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

ERDMAN v. ILLINOIS STEEL COMPANY.

[95 WISCONSIN, 6.]

MASTER AND SERVANT—SPECIAL DANGER AND PROMISE TO REMOVE IT—CONTRIBUTORY NEGLIGENCE.—It is a general rule that a protest by an employé against continuing in the employment of the master because of some special risk attending it, a promise by the employer to remove the danger within a reasonable time, and a continuance of the employment in consideration of such promise, will relieve the employé from the charge of contributory negligence, if he is injured because of the danger within such time. This rule does not apply where the risk is so obvious, immediate, and constant that serious bodily injury is likely to occur from a continuance of the work, for it is then negligence to rely upon such promise.

MASTER AND SERVANT—DEFECTIVE MACHINERY—ASSUMPTION OF RISK.—If a man employed to assist in sawing and shearing heated bars and plates of iron in a mill where such work is done, and which bars and plates are cut by a circular saw about four feet in diameter, has had large experience with machinery, has worked fourteen years in the mill, and four years in operating the machine, where an accident occurs to him, and notices, before going to work on the day of the accident, that the saw is cracked for two or three inches from the outside, and asks the acting foreman if he is going to change it, who promises to do so after one heat is run off, he must be presumed to have assumed the risk of going to work with the saw in that condition, notwithstanding his own testimony that he went to work because the foreman said it was not dangerous, especially where it is plain that the employé was the most experienced man in the crew, and knew more about the danger than the foreman, and where the clear inference from all the evidence is that he did not rely upon the judgment of anybody that it was safe to proceed with the work.

MASTER AND SERVANT—DEFECTIVE MACHINERY—NEGLIGENCE OF EMPLOYE IN CONTINUING AT WORK AFTER PROMISE TO REPAIR.—A man with fourteen years of experience about machinery, and who is employed to assist in sawing and shearing heated bars and plates of iron in a mill where such

work is done, is guilty of negligence, to the point of recklessness, in working with a saw, four feet in diameter, having a crack in it from the rim two or three inches in length, and running at a speed of seventeen hundred revolutions a minute, where he, having knowledge of the defect and notwithstanding the master's promise to remedy it, lets the saw down upon large bars or plates of iron with sufficient force to cut them in two; for the danger of the saw flying to pieces is so obvious, immediate, and constant that the employé is negligent in relying upon such promise. Therefore, the unsupported testimony of such an employé that he did not know of the existence of the danger is not sufficient to support a finding of the jury that he neither knew nor ought to have known of it.

Action to recover damages for personal injuries. The complaint alleged, in substance, that on February 22, 1894, the plaintiff was in defendant's employ as a shear man; that his duties were to assist in sawing and shearing heated bars and plates of iron by the use of a large circular saw, about four feet in diameter; that the saw was set in a frame and so adjusted that, when in motion, it could be, by pressing on a lever, lowered down upon the iron placed under it to be cut; that before operations commenced on the day of the injury, the foreman's attention was directed to the fact that the saw was cracked, defective, and unfit for use; that the plaintiff and his coemployés protested against working with the defective saw, but, being assured by the foreman that it was safe, and that he would furnish a new one after they had worked off one heat, they went to work; that soon afterward the saw broke, by reason of its defective condition, while the plaintiff, in the exercise of due care, was engaged at his regular duties; that the shaft upon which the saw run left its bearings; and that fragments of the saw and shaft struck the plaintiff upon the body, by reason whereof he was wounded and bruised, his left leg shattered, and his body otherwise severely injured. The injuries were set forth in detail, and damages claimed to the amount of fifty thousand dollars. The allegations as to employment and injury were admitted by the answer, but it put in issue all other allegations, and charged contributory negligence. There was rendered a special verdict upon which judgment was entered for the plaintiff, and the defendant appealed. The errors relied on were those raised by exceptions preserved in the record and noticed in the opinion.

Van Dyke & Van Dyke & Carter, for the appellant.

C. J. Faber and Austin & Fehr, for the respondent.

⁸ MARSHALL, J. The jury found specially, among other things, that the saw was defective to the knowledge of John Blank, who was charged with the duty of seeing that it was kept in proper condition; that John Arndt was the acting foreman;

that such foreman, with knowledge of such defect, directed plaintiff and his associates to run one heat, informing them that he would then have the saw changed; that plaintiff went to work relying upon such promise; that defendant was guilty of negligence which proximately contributed to the injury; that plaintiff was not guilty of any such negligence; and that he did not have sufficient knowledge and experience to enable him to know the risk of working with the defective saw prior to his injury. The verdict was challenged as contrary to the evidence, and the ruling of the circuit court in that regard, among others, is before us for review.

That the saw was cracked and defective, to the knowledge of plaintiff, appears clearly from the evidence, and is alleged in the complaint. The proof shows that he was a man of large experience with such machinery, and that he had worked fourteen years in the mill where he was injured, and four years in operating the machine where the accident occurred. His evidence bearing on his knowledge of the danger, and his justification for working notwithstanding such danger, is substantially as follows: "There were small rollers to carry the iron under the saw. Then the saw was pulled down onto the iron. I had to stand alongside of the framework. The frame was even with the plate. I had to shove the iron under the saw. I was about two feet from the saw when the thing happened. When I came to the mill that morning, Fred Glaesner said to me: 'The saw is cracked. Look at it.' John Arndt, the foreman, was standing there. I said: 'John Arndt, will you change the saw?' He said: 'No; you will have to work one heat with it. It will take till about 10 o'clock.' I relied on that, and went to work. He did not say whether it was dangerous or not, that I know of. He said it was not dangerous. When they started, I was holding one end of the bar to be cut, Blank was holding the other, and Norton was handling the lever." On cross-examination he said: "I had worked in the mill fourteen years, and four years with the saw. There were four men at work with the saw besides Blank, the foreman. There was no one in the crew that had worked with the saw longer than I had, and only one as long. I looked at the saw after Glaesner said it was cracked. The crack was about two or three inches long. Nobody told me it was dangerous, or not dangerous, or said anything about that. The reason I asked Arndt if he was going to change the saw was, I saw a crack in it. I asked it because I wanted to change my coat, and I knew if he was going to make the change I would have time. I went to work because the foreman said it was not dangerous. I don't know

that he had ever worked with the saw. I don't know as I objected to going to work. I don't think I did. I worked by the ton; so, if I had not gone right to work, I would have lost part of a day's wages." John Norton testified, in substance, as follows: Before we started up, Erdman told me the saw was cracked. I said to Arndt, "I think we ought to have another saw." He said, "You will have to try and work the heat off." That is all he said. The saw had started, but we had not commenced cutting. Erdman showed me the crack. ¹⁰ It was about three inches long. It was open at the teeth. Erdman called my attention to it, and told me to bear down as gently on the lever as I could. I am sure of that. That is just as we were ready to saw the first bar. No one said anything in my hearing about its being dangerous, nothing of the sort. No one, that I know of, made any objection to going to work. John Sanowa testified as follows: "Arndt, the foreman, said the saw should be changed when the heat was out. He said we should work that heat; that is all. I was there till the saw was started, and heard all that was said. Did not hear Erdman say anything to Arndt, or Arndt to Erdman." Julius Blank testified as follows: "I told Arndt, before we started that the saw was cracked. He said, when the first heat is out, we will change it. He did not say anything further." There was considerable other evidence on the subject, but nothing to vary the above, on which the jury found, in effect, that plaintiff neither knew nor ought to have known of the risk of working with the defective saw.

A person thirty-five years of age, and of fourteen years' experience with machinery, circumstanced as plaintiff was, must be presumed to know the operation of natural laws and the dangers which such a defect as the one in question would naturally suggest to a person of ordinary intelligence: *Walsh v. St. Paul etc. R. R. Co.*, 27 Minn. 367. Otherwise, the risk that would attend the employment of labor in many manufacturing industries would be so great as to render it impracticable to carry them on. This presumption is too strong to be rebutted, so as to warrant a verdict to the contrary, merely by the evidence of the person whose knowledge is in question that he did not know of the existence of a danger which was obvious to a person of ordinary intelligence, even though not an expert.

But the verdict of the jury is not only wrong, tested by the rule above stated, but the evidence affirmatively shows, ¹¹ very clearly, that plaintiff was the most experienced man in the crew; that he knew more about the danger than Arndt; that the talk about changing the saw was, partly at least, the result of a con-

sciousness of such danger; and that after such conversation was over and the saw was started, plaintiff directed that it should be let down onto the iron with great care, on account of its condition. From all the evidence and circumstances but one inference can reasonably be drawn, and that is that plaintiff knew of the danger as well as Arndt, and did not rely upon the judgment of anybody that it was safe to proceed with the work. The verdict of the jury in this regard is practically without any evidence to support it. There is no evidence but that of plaintiff that Arndt said the saw was not dangerous, and he contradicted himself respecting the matter in such a manner that the finding based on his evidence cannot be sustained. It follows that the plaintiff knew of the defect and of the danger as well as any one did, or could reasonably be expected to know. Therefore, he must be presumed to have assumed the risk, unless the case comes within some exception to the general rule on the subject: *Stephenson v. Duncan*, 73 Wis. 404; 9 Am. St. Rep. 806; *Heath v. Whitebreast etc. Co.*, 65 Iowa, 737; *Anderson v. H. C. Akeley etc. Co.*, 47 Minn. 128; *Showalter v. Fairbanks*, 88 Wis. 376; *Peterson v. Sherry etc. Co.*, 90 Wis. 83; *Hazen v. West Superior etc. Co.*, 91 Wis. 208; *Gibson v. Erie Ry. Co.*, 63 N. Y. 449; 20 Am. Rep. 552; *De Graff v. New York Cent. etc. R. R. Co.*, 76 N. Y. 125; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548; *Olson v. McMullen*, 34 Minn. 94; *Devlin v. Wabash etc. R. R. Co.*, 87 Mo. 545.

But it is said plaintiff did not assume the risk because the jury found that he protested against working with the defective saw, and was induced to continue his employment by the promise of Arndt to change it as soon as one heat was worked off. The general doctrine is well established that if an employé continues in the employment of the ¹² master with knowledge of any special or extraordinary risk attending the same, or under such circumstances that he is chargeable with such knowledge, he cannot recover of the master for any injuries received by reason of such risk. But to such general doctrine there is the exception for which counsel for plaintiff contends; that is, that when an employé notifies the master of a special risk, and objects to continuing the work under the existing conditions, and is induced to continue such work by a promise to remove the danger within a reasonable time, then for such time the employé is not presumed to assume such risk. Such exception has been often recognized by this court: *Stephenson v. Duncan*, 73 Wis. 404; 9 Am. St. Rep. 806; *Sweet v. Ohio Coal Co.*, 78 Wis. 127; *Corcoran v. Milwaukee etc. Co.*, 81 Wis. 191. Does this case come within the exception? We will discuss that phase of the matter, assum-

ing that there was a promise made to remove the danger, binding on the master, though that is open to serious question. Did plaintiff commence work, on the morning in question, relying on the promise to change the saw when the first heat was run out? He said he did; but that was his conclusion on a question of fact to be found by the jury, and it is entitled to little, if any, weight, under the circumstances. At the threshold of this question there is the essential element of protest or objection to proceed with the work on account of the danger. We fail to find any evidence of such objection or protest. Plaintiff's evidence on that subject is: "I said, 'John Arndt, will you change the saw?'" "I asked John Arndt if he was going to change the saw." "I do not know as I objected to going to work." "I don't know as any one did." "I was paid by the ton." "If I had not gone to work at 6 o'clock, I would have lost part of my wages." "I asked him [Arndt] if he was going to change the saw, because it was pretty cold and I wanted to change coats, and, if he was going to change the saw, then I would have time to go and put on the coat." From ¹³ this it is apparent that plaintiff did not object to working with the defective saw, and did not work with it temporarily in consideration of the promise to change it when the heat was off. He was anxious to commence work on time and put in a full day. It was not very material to the employer whether the work commenced at 6 o'clock or was delayed till 10 o'clock, when the saw could have been changed, because the pay was by the ton, not by the day. The attitude of plaintiff and his associates respecting the matter was merely one of inquiry, whether they were going to be delayed or not, instead of one of objection to or protest against proceeding with the defective saw. So we conclude that the finding, to the effect that plaintiff continued the work in consideration of a promise to remove a danger which he was unwilling to assume the risk of, is without evidence to support it.

But, if the finding of the jury last reviewed could be sustained, the doctrine that an employé can rely upon the master's promise to repair within a reasonable time, to rebut a charge that such employé assumed the risk, is by no means without limitation. If the risk is so obvious and immediate that serious injury may probably result from a continuance of the work, then the doctrine that the employé can proceed, relying upon the promise to repair or to remove the danger, does not apply: *Rothenberger v. North Western etc. Co.*, 57 Minn. 461. This exception to the exception, if we may call it such, is supported by several good reasons, among which are that it is not consistent with reasonable

prudence for one to submit himself voluntarily to imminent danger of probable immediate serious injury, relying upon a mere promise on the part of anybody that such danger will be removed after a time; and further, that when such danger exists, there is no such thing as a reasonable time to repair, other than presently and before the work proceeds further. To be sure, there are respectable authorities that go so far ¹⁴ as to hold that a promise by the employer to repair relieves the employé of the consequences of the risk, though the danger be constant, immediate, and serious; but the weight of authority and the doctrine of this court are the other way: *Showalter v. Fairbanks*, 88 Wis. 376. The true rule is well stated in the opinion by Mr. Justice Elliott in *Indianapolis etc. R. R. Co. v. Watson*, 114 Ind. 20, 5 Am. St. Rep. 578, as follows: "If the services cannot be continued without constant and immediate danger, and the danger and its character are fully known to the employé, he assumes the risk if he continues the employment." Discussing the subject, Justice Elliott says further, in effect, it is a fundamental principle in this branch of jurisprudence that one who voluntarily incurs a known and immediate danger is guilty of contributory negligence, and we are unable to see why a promise should relieve a party from his own contributory fault. If the danger is not great and constant, then such promise may well be deemed to relieve him; but when it is great and immediate, and of such a nature that a prudent man would not ordinarily incur it, a promise does not nullify or excuse the contributory negligence. To the same effect are *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240; 14 Am. Rep. 598; *Hough v. Railway Co.*, 100 U. S. 214; *Indianapolis etc. Ry. Co. v. Ott*, 11 Ind. App. 564; *Chicago etc. Foundry Co. v. Van Dam*, 149 Ill. 337; *Rothenberger v. North Western etc. Co.*, 57 Minn. 461; *Atchison etc. Ry. Co. v. Midgett*, 1 Kan. App. 138.

It follows, from the foregoing, that in order to bring a case within the exception to the general rule, that the employé, by continuing in the employment of the master with knowledge of defects in machinery at which he is employed, assumes the risk attending such employment, it must be shown, not only that he called the master's attention to such defects and in some way objected to assuming the risk, but that the master expressly or by implication promised the employé to remedy the same within a reasonable time, and ¹⁵ that the employé continued in the employer's service relying upon such promise. That will rebut the presumption of contributory negligence and assumption of risk on the part of the employé, and create a presumption that, for the reasonable length of time requisite to enable the employer to

remove the danger, the former does not assume the risk, and may prudently continue the work. But if the evidence shows that the danger is immediate, constant, and great, so that a reasonably prudent person ought not to subject himself to it, then the latter presumption is overcome, and the employé has no right of action, in case of an injury because of such danger, on account of his contributory negligence.

It follows, from the foregoing, that if the finding of the jury respecting the agreement to change the saw, and the continuance of the work by plaintiff relying thereon, could be sustained, if the danger was obvious, immediate, constant, and the probable consequences the infliction of serious bodily injury upon plaintiff, it was negligence upon his part to rely upon such agreement. That such was the situation is too plain to admit of serious discussion. It does not require an expert, even, to understand that a saw four feet in diameter, running at a speed of seventeen hundred revolutions a minute, cracked three inches from the outside, when let down upon a large iron plate or bar and operated with sufficient force to cut it in two, is in danger of flying to pieces and seriously injuring all who may be in the vicinity. That a person of plaintiff's experience with such a machine did not know of such danger is beyond comprehension. It was negligent to the point of recklessness to work with such a defective saw at all, under the circumstances. That brings the case clearly within the exception to the rule that a protest by the employé to continuing in the employment of the master because of the existence of some special risk attending it, a promise by the employer to remove the danger within a reasonable time, and a continuance of such employment in consideration ^{1a} of such promise, relieves such employé from the charge of contributory negligence, if injured because of such danger within such time. It follows that the finding of the jury in respect to plaintiff's contributory negligence is without any evidence to support it on any theory of the case.

There are several errors assigned, not referred to, but the conclusion to which we have arrived renders it unnecessary to consider them.

By the Court. The judgment of the circuit court is reversed, and the cause remanded for a new trial.

MASTER AND SERVANT—DANGEROUS MACHINERY—PROMISE TO REPAIR—CONTRIBUTORY NEGLIGENCE.—If a servant is engaged in a dangerous service in which the machinery is defective, and has knowledge thereof, makes objection thereto, and is induced to remain in the master's employment, by promise or assurance of its repair, and, not having waived the objection, is in-

jured by reason of such defect, without contributory negligence on his part, he is entitled to recover. But greater care is required of him than if he had not known of the defect: Meador v. Lake Shore etc. Ry. Co., 138 Ind. 290; 46 Am. St. Rep. 384; note to Cheeney v. Ocean S. S. Co., 44 Am. St. Rep. 119; Breckinridge Co. v. Hicks, 94 Ky. 362; 42 Am. St. Rep. 361; Roux v. Blodgett etc. Lumber Co., 85 Mich. 519; 24 Am. St. Rep. 102, and note; Gulf etc. Ry. Co. v. Donnelly, 70 Tex. 371; 8 Am. St. Rep. 608; Brownfield v. Hughes, 123 Pa. St. 194; 15 Am. St. Rep. 667; extended notes to Gulf etc. Ry. Co. v. Brentford, 23 Am. St. Rep. 386; Buzzell v. Laconia Mfg. Co., 77 Am. Dec. 222.

MASTER AND SERVANT—APPARENT DANGER—ASSUMPTION OF RISK NOTWITHSTANDING PROMISE TO REPAIR—NEGLIGENCE.—While assumption of risks will not be imputed to the servant unless he has knowledge of them, such knowledge will be presumed to exist where the risks are apparent to ordinary observation: Note to Boss v. Northern Pac. R. R. Co., 33 Am. St. Rep. 766. If an employé's service cannot be continued without constant and immediate danger, which is so great that a reasonably prudent man would not assume it, and its character, as well as the danger itself, is fully known to the employé, he assumes the risk if he continues in the service, although his employer had promised to remedy the defect: Indianapolis etc. Ry. Co. v. Watson, 114 Ind. 20; 5 Am. St. Rep. 578, and note. See, also, Stephenson v. Duncan, 73 Wis. 404; 9 Am. St. Rep. 806; note to Cheeney v. Ocean S. S. Co., 44 Am. St. Rep. 119.

WRIGHT v. MILWAUKEE ELECTRIC RAILWAY AND LIGHT COMPANY.

[95 WISCONSIN, 29.]

STREET RAILWAYS—ALIENATION OF FRANCHISE.—A franchise or right to operate a street railway is inalienable, but a sale and transfer thereof may be authorized by statute, and such authority has been granted by the statutes of Wisconsin.

STREET RAILWAYS—NATURE OF FRANCHISE.—A franchise by a city or right given by it to operate a street railway is something more than a mere easement to use the street for the time, in the manner, and under the conditions specified in the ordinance, and something more than a contract between the public, acting through the city council on the one hand, and the railway company on the other, where the ordinance has been accepted and acted upon by the grantee. It is also a grant from the state which, when accepted by the grantee, imposes upon it the duty of serving the public, and it cannot lay this burden down at will, nor emancipate itself by merely ceasing to operate its cars.

STREET RAILWAYS—WHAT NONUSER DOES NOT AMOUNT TO AN ABANDONMENT OF THEIR FRANCHISES.—If a street railway company has a franchise or right to operate a street railway over two certain blocks of a city, but fails to exercise its right for about four years and eight months, during a period of great industrial depression and of extraordinary financial difficulties on the part of its successive owners, during which time the track is taken up with the knowledge and consent of the company, and the street paved, but changes in roadbed at this time are made necessary by the introduction of electricity as a motive power, thus

rendering the old track practically worthless and an entire reconstruction necessary, it cannot be held that the nonuser has existed for such a length of time, or under such circumstances, that an abandonment or surrender of the franchise, and acceptance thereof by the public, can be presumed, especially where the company has, by its officials, expressly denied any intention of abandoning its rights in the road, and has expressed an intention to operate the road over such blocks in the near future.

Action in equity brought by Wright and two other property owners, owning lots abutting upon Twenty-seventh street, otherwise called Washington avenue, in the city of Milwaukee, to obtain a permanent injunction against the Milwaukee Electric Railway and Light Company, enjoining it from laying street railway tracks through said street in front of the plaintiff's property. The city passed an ordinance, on June 1, 1874, granting to John H. Tesch and others, and their successors and assigns, the right to lay street railway tracks upon certain streets named in the ordinance, and to maintain and operate a horse railway thereon until July 1, 1924. The street in question was not included within the ordinance. The ordinance provided that the grantees and their assigns should complete and operate two miles of railway within two years from July 1, 1874, and all of the remainder of the lines within ten years from that date. The only provision in the ordinance as to forfeiture of the rights granted by nonuser was that "upon the failure to complete and operate the said railway as above provided, then all rights hereby granted and vested shall cease and determine." A street railway was constructed, under this ordinance, upon all the streets named in it, and within the time required, but in August, 1886, it passed into the hands of the West Side Street Railway Company, by purchase and assignment. At this time it was proposed to hold a state fair upon certain grounds in the city of Milwaukee, about four blocks north of Wells street; and it was made a condition upon which the holding of the fair in Milwaukee depended that a street railway line should be completed by the West Side Street Railway Company to the proposed fair grounds. The company was willing to construct said line from Wells street north, on Twenty-seventh street, to Chestnut street, a distance of four blocks, if the city would give it and its assigns a franchise therefor. The city did this by ordinance, on August 2, 1886, which was granted under and subject to the same conditions as were contained in the ordinance to Tesch and others, and the company laid a double horse railway track in said street and operated it during the holding of the state fair, in September, 1886. The railway was operated upon said street from this time until, and including, the fall of 1891, during the holding of the state fair

in each year, and at other irregular intervals when circuses were held upon the fair grounds, but, in the intervals, the road along these four blocks was not operated. By virtue of another ordinance, the lines of the railway company, including the line upon the four blocks in question, were operated by electricity in 1890. The lines and franchises of the West Side Street Railway Company, in September, 1891, came by purchase and assignment into the ownership of the West Side Street Railroad Company, and, in that month, a contract was made for the sale of all the stock of the said last-named company to the North American Company, in the interest of a new corporation, called the Milwaukee Street Railway Company, the contract being made to the North American Company pending payment of the purchase price. At the time this contract was made, it was apparently expected that the possession of the North American Company was to be only temporary, but, owing to financial difficulties no conveyance was made to the Milwaukee Street Railway Company, until January, 1894. It was ascertained, in the mean time, that the ordinary horse railway track was too lightly constructed for the purposes of an electric railroad, and that new and heavier rails would have to be laid before the road could be continuously operated by electricity. Two of the four blocks on Washington avenue or Twenty-seventh street, covered by the franchise, were not paved until the fall of 1895, when they were paved with cedar blocks, and, at the same time, the railway thereon was reconstructed with an appropriate electric roadbed and rails. The line on these two blocks was operated continuously at all times after the adoption of electricity as a motive power, in 1889. The other two blocks, however, on said avenue, being the two blocks in question here, were paved with cedar blocks by the city, in 1892, at the expense of the adjoining property owners, and the rails of the street railway company were taken up, but the electric poles and wires, except the trolley wire, were left in place. These two blocks remained in this condition until May 24, 1896. In January, 1894, the Milwaukee Street Railway Company had acquired, by conveyance, all of the street railway property in Milwaukee, including the franchise in controversy, and had mortgaged its property and franchises to the Central Trust Company of New York. In May, 1895, a foreclosure of this mortgage had been commenced. In December, 1895, there had been introduced in the common council an ordinance repealing certain street railway franchises, including the one for the two blocks in controversy, which ordinance was referred to the railway committee. In January, 1896, a sale was made, under a final decree in fore-

closure, which had been previously entered, of all the street railway properties of the Milwaukee Street Railway Company, and such properties were conveyed to the defendant in this action, the Milwaukee Electric Railway and Light Company. The president of the new company appeared before the railway committee of the common council in the winter of 1896, and objected to the forfeiture of the franchise upon the two blocks in question, on the ground that the company intended to reconstruct and operate the line in the following spring. The objection prevailed and the clause of the ordinance forfeiting the franchise for the two blocks in question was stricken out. The ordinance with this clause omitted, was then passed. On Sunday, May 24, 1896, the defendant, soon after midnight, commenced to reconstruct its track on Washington avenue between Wells and State streets, with a large force of men. After the work had progressed to a considerable extent, and the street had been greatly torn up and part of the tracks laid, this action was commenced, about noon of the same day, for a permanent injunction, on the ground that the franchise had been forfeited and abandoned. A temporary injunctional order was made *pendente lite*, and the defendant appealed.

Miller, Noyes, Miller & Wahl, for the appellant.

W. J. Turner, for the respondents.

³⁵ WINSLOW, J. The question presented is, whether the right and duty to operate a street railway over the two blocks in front of the plaintiffs' lots had been extinguished at the time of the commencement of this action. The power to grant the right in question was conferred upon the city by the provisions of section 1862 of the Revised Statutes of 1878, as amended by chapter 219 of the Laws of 1881. At common law, such a franchise or right was undoubtedly inalienable: *State v. Anderson*, 90 Wis. 550. A sale and transfer thereof may, however, be authorized by statute: *Chapman Valve Mfg. Co. v. Oconto etc. Co.*, 89 Wis. 264; 46 Am. St. Rep. 830. Such authority has been granted by the statutes of this state: Laws 1883, c. 221, as amended by Laws 1891, c. 127. The statute also authorizes a corporation to mortgage its franchises: *Rev. Stats. 1878, sec. 1748, subd. 7*. So it would seem that there can be no question but that the various conveyances and assignments by which the franchise in question has finally come into the ownership of the present defendant are valid and operative. Such being the case, it will be necessary to consider the legal nature of the right to lay tracks and operate a street railroad in a public street.

Such a right necessarily includes an easement to use the street for the time, in the manner, and under the conditions specified in the ordinance. The ordinance, when accepted and acted upon by the grantee, becomes also a contract between the public, acting through the city council on the one hand and the railway company on the other; the consideration for the partial surrender of the street being the advantages to the public arising from inexpensive and rapid transit, and the assumption by the company of the duty of ³⁶ continuing to furnish such transit during the life of the ordinance. But the right under consideration is something more than an easement, and more than a mere contract right. It is also a franchise granted by the state, acting through the common council of the city, to the railroad company. It becomes, when owned by a corporation, one of its corporate franchises, for failure to exercise which an action may be brought by the attorney general, in the name of the state, to vacate its charter, under section 3241 of the Revised Statutes of 1878. This was held in the case of *State v. Madison Street Ry. Co.*, 72 Wis. 612, and has been affirmed in principle in numerous later decisions: *Ashland v. Wheeler*, 88 Wis. 607; *State v. Anderson*, 90 Wis. 550; *State v. Janesville Water Co.*, 92 Wis. 496.

By the acceptance of the terms of the ordinance, the railroad company assumed a public trust. It undertook to serve the public by affording it rapid transit; and it became its duty to continue that service, not simply because it had contracted so to do, but because it had become charged with such duty by legislative grant. It could not lay down the burden when it chose, nor emancipate itself by merely ceasing to operate its cars. In case of attempt on its part to so shirk its duty as to a part of its road, it could, doubtless, be compelled, in proper proceeding, to resume its operation, and carry out the public duty which it voluntarily assumed: *Attorney General v. West Wisconsin Ry. Co.*, 36 Wis. 466-497. Certainly, in such case, action could be brought under section 3241 of the Revised Statutes, by the state to forfeit its franchises and vacate its charter, for failure to exercise its public powers and perform its duties.

Coming now to the question whether the franchise has been extinguished in the case before us, it is quite apparent that there are only four ways in which it can be claimed that such extinguishment could take place, viz: 1. By operation of some self-executing forfeiture clause in the grant; ³⁷ 2. By surrender of the franchise, and acceptance of such surrender on the part of the state; 3. By the decree of a court of competent jurisdiction, in an action brought for the purpose; 4. By abandonment or

nonuser for so long a period that a surrender and acceptance will be presumed. There are no facts in the case upon which it can be claimed that the franchise has been extinguished in either of the first three ways above mentioned. There was no self-acting forfeiture clause in the ordinance which granted the franchise. There has been no surrender thereof, and acceptance of such surrender by the state, and no action has been brought to declare and enforce the forfeiture. There remains, then, for consideration, only the question whether it has been wiped out by nonuser for more than four years. It is argued that from this fact an abandonment of the franchise has resulted. It is evident that the term "abandonment," as applied to a corporate franchise of this kind, is a misnomer. A mere privilege or right may, perhaps, be properly said to be abandoned in a proper case, although even in that case there must be something more than mere nonuser to constitute such abandonment. There must also be an act clearly indicating an intention to abandon: Washburn on Easements, 3d ed., 661. But, while a mere easement or right may be abandoned, the word is plainly inapplicable to a duty owing to the state. A public duty is not to be laid down at will. In the case of a mere easement there is but one party interested, and he may voluntarily abandon his right; but in case of a public duty there are two parties beneficially interested—i. e., the party who owes the duty, and the state to which the duty is owing. The necessary result must be that, in order to extinguish the duty, there must be concurrence on the part of the state. It has been held that a total nonuser of the franchises of a corporation may exist for so long a period and under such circumstances that a surrender of its franchises by the corporation, and ³⁸ acceptance of such surrender on the part of the state, will be presumed. The cases holding this doctrine are cited in *Combes v. Keyes*, 89 Wis. 297, 46 Am. St. Rep. 839, and *Attorney General v. Superior etc. R. R. Co.*, 93 Wis. 604. The doctrine cannot be said to have been adopted by this court, however. In *Combes v. Keyes*, 89 Wis. 297, 46 Am. St. Rep. 839, which approaches nearest to it, there had been complete nonuser for twenty-six years, and legislative acts impliedly accepting the surrender; and it was held that the corporation had passed out of existence. Similar is the case of *Henderson v. Central Pass. Ry. Co.*, 21 Fed. Rep. 358, where nonuse of a street-car franchise for ten years, followed by a repeal of the franchise and a legislative grant of the same right to another company, was held to extinguish the first franchise. The present case, however, is not such a case. The period of nonuse here was about four years and eight months.

It was period of great industrial depression, and of extraordinary financial difficulties on the part of the various corporations which successively owned the franchise. The old track became, by reason of the change in means of locomotion, practically worthless, and its entire reconstruction a necessity. It appears by affidavits of officials of the roads that it was always the intention to resume operation of these two blocks as soon as the financial atmosphere cleared. An ordinance declaring this franchise, with others, forfeited was introduced in the common council; but, upon representation by the company that it was the intention of the new company to operate the road over these blocks in the near future, the clause forfeiting the franchise on the two blocks in question was stricken out. The only fact which can be claimed to indicate an intention to abandon the franchise is the fact that in 1892 the street was paved with wooden blocks, at the expense of the adjoining property owners, and that the old rails and ties were then taken up, with the knowledge and consent of the company. This fact, however, loses much of its apparent significance in view of the ³⁰ changes in roadbed made necessary by the introduction of electricity, and in view, also, of the other facts just referred to.

This, then, is the situation: There has been no cesser to use, accompanied by any act clearly indicating an intention to abandon the right. Even if it could be said that there was any such act, there has been no consent on the part of the public to such abandonment, nor acceptance of a surrender. The nonuse has not existed for such a length of time, or under such circumstances, that a surrender and acceptance of the franchise can be presumed. It follows that, when the plaintiffs commenced their action, the franchise was still in existence, and consequently the injunctive order was erroneous.

By the Court. Order reversed, and action remanded for further proceedings according to law.

PUBLIC FRANCHISES—RIGHT TO TRANSFER.—A corporation, in the absence of statutory authority, has no right to sell or transfer its franchise: *Fletsam v. Hay*, 122 Ill. 293; 3 Am. St. Rep. 492; *Chicago Gas Light Co. v. People's Gas Light Co.*, 121 Ill. 530; 2 Am. St. Rep. 124; but there may be a transfer of its franchise under legislative authority: See monographic note to *Brunswick etc. Co. v. United Gas etc. Co.*, 35 Am. St. Rep. 390, 396, on right to transfer public franchises.

PUBLIC FRANCHISES—FORFEITURE FOR MISUSER OR NONUSER.—A corporation may forfeit its charter or franchise for misuser or nonuser: See monographic note to *Atchison Street Ry. Co. v. Nave*, 5 Am. St. Rep. 804, on whether a judicial act declaring a forfeiture is necessary for the nonperformance of a condition in a

grant or franchise. The mere fact, however, that a corporation has been without officers or organization, and has performed no corporate acts during a number of years, does not put an end to its franchises, though this may be a good ground for declaring them forfeited by judicial proceedings: *Higgins v. Downward*, 8 *Houst.* 227; 40 *Am. St. Rep.* 141.

MILWAUKEE ELECTRIC RAILWAY AND LIGHT COMPANY v. MILWAUKEE.

[95 WISCONSIN, 39.]

STREET RAILWAYS—ACTION TO FORFEIT FRANCHISE—PROPER PARTY PLAINTIFF.—The authority of a city to act for the state, and on its behalf, in granting franchises to build and operate street railways, where such authority has been delegated to it, does not include the power to institute and maintain actions to forfeit such franchises for misuse or abuse. They must be brought in the name of the state, and cannot be maintained in the name of the city by a bill in equity.

Action in equity, brought by the plaintiff railway and light company, to enjoin the city of Milwaukee from tearing up or removing the tracks which it had commenced to lay on May 24, 1896, on two blocks of Washington avenue, or Twenty-seventh street, in said city, between Wells and Chestnut streets. The same blocks were involved in *Wright v. Milwaukee etc. Light Co.*, 95 *Wis.* 29, ante, p. 74, and this action was a branch of the same contest. After the preliminary injunctive order in *Wright v. Milwaukee etc. Light Co.*, 95 *Wis.* 29, ante, p. 74, had been issued and served, and which prevented the railway company from completing its tracks on the blocks in question, the board of public works of Milwaukee, on May 25, 1896, made, and served upon the railway company, a written order directing it to repave and restore the street and to remove all the railway tracks, ties, and other obstructions therefrom within twenty-four hours from the service of the order. The railway company commenced this action on May 26, 1896; and, upon a verified complaint setting forth its rights in the street, as well as the action of the board of public works, obtained an order to show cause why that board should not be restrained, during the pendency of the action, from taking up the plaintiff's tracks and ties, and from interfering with the plaintiff in the construction of the tracks. A temporary restraining order was granted until a hearing could be had. The city of Milwaukee then appeared and served an answer setting up the nonuse of the street by the plaintiff company for more than four years as a defense to the action. The same facts, practically, as to nonuse and abandonment of

the street were also set up by the city by way of counterclaim. The city, therefore, prayed for a perpetual injunction against the railway company preventing it from constructing its lines or operating its cars upon the street in question. The plaintiff's application for an injunction pendente lite was denied upon the hearing of the order to show cause, and the temporary restraining order was dissolved. The city's motion, based upon the counterclaim, restraining the plaintiff, pendente lite, from constructing its line or operating cars over the street in controversy, was subsequently granted. Afterward, the plaintiff served a general demurrer to the defendant's counterclaim, which was, upon its hearing, overruled. The plaintiff appealed from these three orders.

Miller, Noyes, Miller & Wahl, for the appellant.

Charles H. Hamilton, city attorney, and Howard Van Wyck, assistant city attorney, for the respondent.

⁴¹ WINSLOW, J. It was held in the case of *Wright v. Milwaukee etc. Co.*, 95 Wis. 29, ante, p. 74, that the street railway's franchise to operate a street railway upon the street in question had not lapsed or been lost at the time it commenced to relay its tracks. We shall not go over the ground again in the present case. Practically, the only question remaining in the present case is, whether the city can successfully maintain an action in equity to prevent the relaying of the tracks on account of the nonuse of the street for nearly five years. It will be readily seen that, if it can do so, the action will be practically an action brought to declare a forfeiture of the franchise to operate a railway upon that piece of street. This question can be answered logically in but one way, and that is in the negative. The franchise was the grant of the state. It was granted through the medium of the city, but, in making the grant, the city exercised the power of the state and acted on its behalf. While the state has delegated to the city the authority to grant franchises of this character, it has not granted to the city the power to institute and maintain an action to forfeit the franchise for misuse or abuse. It has reserved to itself, acting through its attorney general and by leave of this court first ⁴² obtained, this very important and delicate right and duty. This is the clear purpose and effect of the provisions of section 3241 of the Revised Statutes and the decisions made thereunder. Such leave is a necessary prerequisite to the bringing of the action, and the granting or refusing thereof lies in the sound discretion of the court: *State v. Janesville Water Co.*, 92 Wis. 496.

These considerations seem amply sufficient to dispose of this case. The franchise exists. It had not been lost by nonuser, or forfeited by surrender, or by judgment of the court; and, if it is to be forfeited, it must be done in the way pointed out by the statute. It follows that all the orders appealed from must be reversed. The company had a right to rebuild its track and resume the performance of its public duty, and it was therefore entitled to an order restraining interference with such right.

The converse of the proposition necessarily follows, namely, that the city had no right to an order preventing the company from relaying its tracks. The counterclaim stated no cause of action, because a forfeiture cannot be declared by bill in equity brought by the city. It must be done by action in the name of the state, under section 3241 of the Revised Statutes.

By the Court. Orders reversed, and action remanded for further proceedings according to law.

ACTION TO FORFEIT PUBLIC FRANCHISE for misuser or nonuser must be brought in the name of the state or sovereign power: See monographic note to *State v. Atchison etc. R. R. Co.*, 8 Am. St. Rep. 193, on forfeiture of corporate franchises.

BROWN v. COHN.

[95 WISCONSIN, 90.]

LIS PENDENS.—THE OBJECT of lis pendens is not, primarily, notice, but to hold the subject of the suit, the res, within the power of the court, so as to enable it to pronounce judgment upon it.

LIS PENDENS.—THE PURCHASER OF A TAX CERTIFICATE, pending a suit to annul it, to which the vendor is a party, is bound by the judgment therein, although no notice of lis pendens was filed.

LIS PENDENS—COMMON LAW AND STATUTORY.—The common law of lis pendens governs in all cases not covered by a statute upon that subject, which statute is clearly intended to be supplemental to the common law and not to repeal it.

LIS PENDENS—FILING OF, WHEN UNNECESSARY—TAX CERTIFICATE OR TITLE—BONA FIDE PURCHASER.—The filing of a notice of lis pendens is not necessary where the subsequent purchaser has actual notice, or where he is not a bona fide purchaser; and the purchaser of a tax certificate or a tax title is not a bona fide purchaser, but takes the title subject to its infirmities, especially where he takes it without legal assignment.

Ejectment. The plaintiff, Brown, claimed under a United States patent issued to him in 1873. The defendants, Cohn and another, claimed under a tax deed issued by Lincoln county to one C. J. Winton, November 10, 1883, on the tax of 1879 and

sale of 1880. At the tax sale, the land had been bid in for the county and the certificates of sale were issued to the county. These certificates were sold by the county to one John Comstock. There was no assignment of the certificates to him, but simply a delivery thereof, with the name of the county treasurer indorsed without designation of his official character. In 1881, while Comstock yet owned the certificates, Brown brought an action in the circuit court for Lincoln county against Lincoln county, its county clerk, John Comstock, and others, to set aside the tax for 1879 on the land in controversy, to cancel the certificates, and to restrain the county and county clerk from issuing tax deeds upon the certificates. There was issued and served a temporary injunction forbidding the issuance of tax deeds, but no written notice of *lis pendens* was filed in the action. In that action, there was a judgment rendered in March, 1892, substantially for the relief asked. But on November 10, 1883, Winton procured to be issued to himself the tax deed under which the defendants claimed, and which was based upon certificates which John Comstock owned at the time of the commencement of the action. Winton at once placed his tax deed upon record, and for more than three years after it was recorded the land was vacant and unoccupied. The tax title came to the defendants by sundry mesne conveyances by quitclaim deeds. Upon the trial of the ejectment suit, the court found as a fact that the certificates were owned by Comstock when the suit was commenced, and were transferred by him during the pendency of the action; that the judgment in *Brown v. Lincoln county*, above mentioned, annulling the tax and tax certificates on which defendants' tax deeds were based, was binding and conclusive upon all parties claiming thereunder; and that the tax deed was void, and would not support the three years' statute of limitations. Hence, judgment was given for the plaintiff, and the defendants appealed.

Brown & Pradt and H. C. Hetzel, for the appellants.

Raymond, Lamoreux & Park and Alban & Barnes, for the respondent.

⁹² NEWMAN, J. The question principally argued on this appeal, and which seems to be decisive of it, is whether defendants' title under the tax deeds is concluded by the judgment in *Brown v. Lincoln County et al.* The claim of the plaintiff is that they are so concluded, while the defendants claim ⁹³ that they are not concluded by the pendency of the action at the time of the purchase of their predecessor's title, because no notice of *lis pendens* was filed in that action. This, then, is the question,

whether the mere fact of the pendency of the action, without the actual filing of a notice of lis pendens, brings the case within the doctrine of lis pendens. The object of lis pendens is not, primarily, notice, but to hold the subject of the suit, the res, within the power of the court, so as to enable it to pronounce judgment upon it. It is deemed that every person is bound to know the law, and to take notice of what is transpiring in the courts, from the time when the process is served and the complaint filed until the final judgment is entered. The purchaser pendente lite is deemed to be represented in the litigation by his vendor, and the purchaser is just as much bound by the final judgment rendered as is the party whose right he purchases: 13 Am. & Eng. Ency. of Law, 868 et seq; *Murphy v. Farwell*, 9 Wis. 102-106. This is, in effect, the law of lis pendens as applicable to this case, unless the common-law rules relating to the subject have been abrogated and superseded by the statute: Rev. Stats., sec. 3187. But that statute, evidently, was intended to apply to only a part of the cases to which the doctrine of lis pendens applies. It has no negative words or repealing clause. It was evidently intended to be supplemental to the common law, and not to repeal it. So the common law will govern in all cases not covered by the statute. It has been held by this court that the object of that statute is to conclude subsequent bona fide purchasers or encumbrancers, pendente lite, by a constructive notice. The filing of the notice is not necessary where the subsequent purchaser has actual notice, or where he is not a bona fide purchaser: *Coe v. Manseau*, 62 Wis. 81-90; *Wisconsin Cent. R. R. Co. v. Wisconsin River Land Co.*, 71 Wis. 94-107. The purchaser of a tax certificate or a tax title is not a bona fide purchaser.⁹⁴ He buys under the rule caveat emptor. He takes the title subject to its infirmities. He knows that such a title grows out of proceedings hostile to the real owner, by which it is sought to divest him, in invitum, of his title, and that such a title is liable to be defeated by whatever irregularities or omissions may be in the proceedings: *Cooley on Taxation*, 2d ed., 475, 476; *Hixon v. Oneida Co.*, 82 Wis. 515-530.

Nor can one be a bona fide purchaser of tax certificates who takes them without legal assignment. He does not get legal title to them. It seems clear that the purchasers of these certificates were not such parties as the statute was enacted to protect, but that, on the contrary, they were parties who bought at their peril, who were bound to take notice of the pending action, in which the validity of the certificates and the tax proceedings on which they were based was in the process of adjudication. And the defendants must be held to be bound by that adjudication.

The judgment in *Brown v. Lincoln County et al.* swept away all foundation from under the tax deeds, and left them without support in previous proceedings. They were issued entirely without the authority of the law, and in defiance of the power of the court. They are utterly without authority. They are not tax deeds, under the statute, and are utterly incapable of supporting the statute of limitations. The effect of the judgment on this tax title is the same as it would have been if John Comstock had taken the tax deed, instead of Winton. A purchaser from him could get no better title than he had. *Lis pendens* binds both parties and privies. A purchaser pendente lite is assumed to have notice of the proceedings, because he is bound to take notice of the proceedings of the courts. If Comstock had taken the deed, no defense of the statute of limitations would have been available by him; for the action was already commenced and pending, in which his tax title and the previous proceedings ⁹⁵ were annulled. The defendants are in no better predicament.

By the Court. The judgment of the circuit court is affirmed.

LIS PENDENS.—It is sometimes said that the office of a *lis pendens* is merely to charge subsequent purchasers with notice of the pendency of the action: *Jewett v. Iowa Land Co.*, 64 Minn. 531; 58 Am. St. Rep. 555; but it approaches more closely to the truth to say that the law of *lis pendens* is not founded upon notice but upon necessity, to keep the property subject to the *lis pendens* within the power of the court pending the litigation: See monographic note to *Stout v. Phillippi Mfg. etc. Co.*, 56 Am. St. Rep. 853, 854, on the law of *lis pendens*; note to *Parker v. Conner*, 45 Am. Rep. 187. The common-law rule of *lis pendens* must be regarded as in effect in each state except in so far as it has been modified by statute: Note to *Stout v. Phillippi Mfg. etc. Co.*, 56 Am. St. Rep. 855.

WISCONSIN MARINE & FIRE INSURANCE COMPANY *BANK v. WILKIN.*

[95 WISCONSIN, 111.]

CONTRACTS—CONFLICTING CLAUSES—CONSTRUCTION.
If two clauses of a contract are in conflict, the first governs rather than the last.

GUARANTY—CONFLICTING CLAUSES—CONSTRUCTION.
Certain persons, all but two of whom were stockholders in a certain manufacturing company, signed an instrument which expressed a consideration and recited that the company mentioned was indebted to a bank named in a certain sum and might thereafter become indebted in additional amounts. Following this were four clauses; the first was a joint and several agreement to pay the whole indebtedness of the manufacturing company to the bank; the second was a waiver of notice; the third declared the contract to be a continuing guaranty; and the fourth read as follows: "It is understood that we

are to pay any sums which may accrue hereunder in the proportion which the amount of stock now held by each of us in said company bears to the whole amount of capital paid in by said company." The court, in construing such guaranty, in an action thereon, held that the first clause expressed the agreement between the parties, and that the last one could have only the effect of fixing a rule of contribution between the members of the manufacturing company.

Action on a contract of guaranty, brought by the Wisconsin Marine & Fire Insurance Company Bank against Wilkin and others, constituting the Wilkin Manufacturing Company of Milwaukee. The agreement between the company and the bank, after reciting that the company was indebted to the bank in a given sum, and that it might thereafter become indebted in additional amounts, and after expressing a consideration, had four clauses. The first clause read: "We and each of us do hereby agree upon demand to pay, or cause to be paid," to said bank, "all loans, drafts, overdrafts, indorsements, accounts, checks, notes, interest, demands, and liabilities, of every kind and description, now owing, or which may hereafter become due or owing," by said company to the said bank. The second clause was a waiver of notice. The third clause declared the contract to be a "continuing guaranty." The fourth clause read: "It is understood that we are to pay any sums which may accrue hereunder in the proportion which the amount of stock now held by each of us in said company bears to the whole amount of capital paid in by said company." This instrument was signed by all of the defendants. Their answer set forth the amount of paid-up stock of each defendant in the company, and the total amount of paid-up stock of the company at the date of the execution of the contract. The case was tried by the court and judgment was rendered against each defendant for such proportion of the company to the bank as the amount of stock of such defendant in such company bore to the whole amount of its paid-up stock at the date of the contract, except as to the two defendants, Morris and Wilkin, who were found not to be the owners of stock at all, and hence, under the views of the trial court, were not liable on the contract. The plaintiff appealed.

Miller, Noyes, Miller & Wahl, and Fish & Cary, for the appellant.

Stark & Hanson and Winkler, Flanders, Smith, Bottum & Vilas, for the respondents.

¹¹⁴ MARSHALL, J. This case turns on the construction of the contract of guaranty. The learned trial judge held that, by the terms of the contract, there was created a several, not a joint, liability; that each of the defendants who signed as guar-

antor became liable only for such portion of the indebtedness of the Wilkin Manufacturing Company as the amount of stock held by him in such company, at the date of the contract, bore to the whole amount of capital then paid in to said company. It is claimed on the part of plaintiff that the contract is a joint and several obligation; that each of the signers is liable to the plaintiff for the whole indebtedness of their principal; and that the last clause of the agreement, which the defendants contend limits the liability of each of the guarantors to the proportion of the debts of the manufacturing company which such guarantor's stock, at the date of the contract, bore to the total paid-up stock of the ¹¹⁵ corporation, has no other effect than to furnish a rule for contribution between the several guarantors. Considerable evidence was received, under objection, respecting the transactions leading up to the signing of the contract, and numerous errors are assigned on the rulings of the court in that regard; but the view we take of the case renders it unnecessary to consider such alleged errors.

The rules that govern the judicial construction of contracts, rightly understood and properly applied, will leave no reasonable doubt respecting the legal effect of the one in question. It must be borne in mind that the office of judicial construction is not to make contracts or to reform them, but to determine what the parties contracted to do; not necessarily what they intended to agree to, but what, in a legal sense, they did agree to, as evidenced by the language they saw fit to use. If the meaning of the language is ambiguous, the construction may be aided by resort to proof of the situation of the parties, their acts, and of the subject matter: *Nilson v. Morse*, 52 Wis. 240; *Sigerson v. Cushing*, 14 Wis. 527. It is said that the intention of the parties is to be sought for in the instrument itself, and that particular words and sentences must be construed so as to subserve such intention: *Weiseger v. Wheeler*, 14 Wis. 101; *Johnson v. Northwestern Nat. Ins. Co.*, 39 Wis. 87; but that must be taken in connection with the proviso that no intention, however manifest, can be effectuated unless it is consistent with a meaning that may reasonably be attributed to the language of the contract. So, after all, judicial construction comes down to this: What did the parties mean by the language they used? *Weiseger v. Wheeler*, 14 Wis. 101; *Johnson v. North Western etc. Ins. Co.*, 39 Wis. 87; *T. B. Scott Lumber Co. v. Hafner-Lothman Mfg. Co.*, 91 Wis. 667; *Jacobs v. Spalding*, 71 Wis. 177; *Braun v. Wisconsin Rendering Co.*, 92 Wis. 245; *Gibbons v. Grinsel*, 79 Wis. 365. Nevertheless, while what the parties themselves meant is a test, it is not the only test

of what a contract ¹¹⁶ is in legal effect, for there is a limit, as indicated, beyond which the courts cannot go in that regard, expressed by standard text-writers, and substantially all judicial authority, in the language of Parsons on Contracts, volume 2, page 494, as follows: "Courts cannot adopt a construction of any legal instrument which shall do violence to the rules of language or the rules of law": Parkhurst v. Smith, Willes, 332. "If we go beyond this," says Chief Baron Eyre, in Gibson v. Minet, 1 H. Black. 569, "we no longer construe men's deeds, but we make deeds for them." In short, that meaning cannot be given to a contract which cannot be reasonably drawn from its language, for the purpose of carrying out the intention of the parties thereto, however clearly established. It follows from the foregoing that, if a contract is so worded that it cannot be construed so as to carry out fully the intention of the parties, a court of law is powerless to do more than to enforce it so far as possible, within the principles indicated. Stating the rule in the language of Parsons on Contracts, volume 2, page 494: "The rules of judicial construction do not require that the court should always construe a contract to mean what the parties meant, but that it should give to the contract such construction as will bring it as near the actual meaning of the parties, as the words they saw fit to employ, when properly construed, and the rules of law, will permit." There is another familiar rule that should be observed in the construction of this contract. That is that effect should be given, if possible, to all its parts. To that end, no part of the agreement should be rejected as void for uncertainty, or otherwise, if it will admit of any reasonable construction so as to sustain it as an essential part of the contract.

It is only left in this case to apply the foregoing principles. The first clause of the agreement contains the following: "We and each of us do hereby agree upon demand to pay, or cause to be paid, to said Wisconsin Marine & Fire ¹¹⁷ Insurance Company Bank, all loans . . . and liabilities, of every kind and description, now owing, or which may hereafter become due or owing, by said Wilkin Manufacturing Company to said Wisconsin Marine & Fire Insurance Company Bank." It cannot be, and is not, contended but that this language, by itself, constitutes a plain joint and several obligation. The rules for judicial construction cannot be properly resorted to to vary or explain such language so as to mean anything else, for the words are not susceptible of any other meaning. The learned trial court, in effect, destroyed this plain agreement, by holding that it was controlled or modified by the last clause, providing that the signers should

pay in the proportion which their several holdings of stock bore to the total paid-up stock of the company at the date of the contract. That clearly violated the rule that effect should be given, if possible, to every part of the contract, as it let out Wilkin and Morris entirely, they not being stockholders at the time of the execution of the agreement, notwithstanding they severally agreed to pay all the liabilities of their principal. It violated the rule that effect cannot be given to the intention of the parties which violates the rules of language. It destroyed the effect of the plain, absolute agreement for joint and several liability of the signers for all the indebtedness, made in the first part of the agreement. Looking to the steps which led up to the making of the contract, the court came to the conclusion that the parties intended to incur a several liability proportionate to their respective holdings of stock, as compared with the whole paid-up stock of the principal, and gave effect to that intention by violating the rule that courts can only go to the extent of giving effect to the intention, so far as to bring the contract as near thereto as the language contained therein, when properly construed, and the rules of law will permit. Lastly, the court overlooked the rule that when two clauses of a contract are in ¹¹⁸ conflict, the first governs, rather than the last: *Green Bay etc. Co. v. Hewitt*, 55 Wis. 96; 42 Am. Rep. 701; 2 *Parsons on Contracts*, 513; *Hartung v. Witte*, 59 Wis. 285, cited by appellant's counsel. This is based on a very long and well-established rule stated by Blackstone, in book 2 of his *Commentaries*, page 381, thus: "If there be two clauses so totally repugnant that they cannot stand together, the first will be received, and the last rejected." To the same effect are *Chitty on Contracts*, 11th Am. ed., 128, and *Straus v. Wanamaker*, 175 Pa. St. 213. In the last citation, the contract contained a distinct guaranty of fifty per cent profit on a transaction between the parties, followed by a clause the literal effect of which was to limit or partially destroy such guaranty. The court said: "The obvious method of construing such a contract is to hold that the parties clearly stated their purpose in the beginning."

The law is so well settled on the subject that it cannot be contended but that if the last clause of the contract is so repugnant to the first that both cannot stand, the first must be taken as expressing the contract between the parties. But it is contended that a proviso merely limiting a previous clause of a contract, without destroying it, is not void, but must be considered as incorporated into and forming a part of the clause which it limits. On this, *Williams v. Hathaway*, L. R. 6 Ch. Div. 544, is cited,

and to that may be added *Chase v. Bradley*, 26 Me. 538; *Jackson v. Ireland*, 3 Wend. 99; *Butterfield v. Cooper*, 6 Cow. 481. Indeed, that is elementary: *Wharton on Contracts*, sec. 673; 1 *Addison on Contracts*, *186; *Story on Contracts*, sec. 810. "But," says Judge Story, "if the subsequent stipulation of the contract should restrict what was distinctly stated and constitutes a principal inducement to the contract, it will be of no effect." That is really what is decided in *Williams v. Hathaway*, L. R. 6 Ch. Div. 544. "The distinction," says Jessel, M. R., "has always been taken between a proviso which is repugnant to the covenant and therefore void, and a proviso which can be incorporated into the covenant ¹¹⁹ and be consistent with it." He limits the rule that a proviso limiting a previous covenant may stand as an essential part of the contract, to such as may reasonably be considered as incorporated into and forming a part of the covenant, hence not repugnant to it. That is in perfect accord with the rule laid down by Judge Story, to the effect that "if the subsequent clause contradicts what was distinctly stated and constitutes a principal part of the contract, it has no effect upon it." It is also in accord with the holdings of this court on the subject in *Green Bay etc. Co. v. Hewett*, 55 Wis. 96; 42 Am. Rep. 701; *Hartung v. Witte*, 59 Wis. 289. Testing the contract in question by the rule last discussed, it is clearly apparent that the last clause cannot affect the obligation which precedes it. The words whereby each of the signers agreed to "pay all of the liabilities" of their principal are distinct and unmistakable. The effect which defendants claim for the last clause, and which the court gave to it, contradicts, restricts, and destroys the first provision entirely as to two of the signers; and it also entirely destroys such clause so far as it creates a joint and several liability for the whole indebtedness of the principal. That is not permissible according to any authority to which our attention has been called, or any which we have been able to discover.

As bearing on the question under discussion, counsel for defendants confidently cite *Gibbons v. Grinsel*, 79 Wis. 365, and other cases in this and other courts, involving the construction of subscription contracts for the payment of the cost of constructing creameries, each subscriber to have an interest in the property corresponding to the amount of his subscription. Those cases are plainly distinguishable from this. In *Gibbons v. Grinsel*, 79 Wis. 365, which is a fair type of all of them, the subscribers agreed to pay six thousand dollars. It was provided that a corporation might be formed, and each take stock to the amount of his subscription, which should be the limit of ¹²⁰ his

liability. Each "pledged himself to the performance of his part of the agreement." At the foot of the contract, each subscribed his name, placing the amount of his subscription opposite thereto. The court held that each subscriber only bound himself to pay the amount of his subscription, and that all in the aggregate bound themselves to pay the full amount of six thousand dollars; that such was the manifest intention of the parties; and that it was consistent with the language used. By this construction, the agreement of all to pay six thousand dollars was merely explained, but not impaired, by the subsequent provisions. If the contracts in the creamery cases provided that the subscribers, and each of them, would pay the full sum of six thousand dollars, obviously a very different question would have been presented, and a very different conclusion respecting the character of the contract might have been reached.

It follows from the foregoing that, whatever was the intention of the parties as shown by their acts preceding the signing of the contract, none other can be given effect to under the contract than that they jointly and severally bound themselves to the plaintiff for the entire indebtedness of the Wilkin Manufacturing Company to plaintiff, mentioned in the complaint. The language of the contract does not admit of any other reasonable construction without violating both the rules of language and of law. The foregoing does not necessarily require the rejection of any part of the contract. The effect of our reasoning is, that the first paragraph of the agreement proper contains a joint and several agreement to pay the whole indebtedness of the Wilkin Manufacturing Company to the plaintiff, and that it must stand as expressing the agreement between plaintiff and defendants. The last clause, if intended to refer to the obligation which precedes it, so restricts and destroys it that it cannot be enforced as against the plaintiff, whatever the actual intention of the parties was. Such last clause, however, may be given the ¹²¹ full effect that can be legitimately attributed to it as fixing a rule of contribution between the defendants. That will give to the agreement a construction as near the actual meaning of the parties as the language they used to express their intention, when properly construed, and the rules of law, will permit. The court cannot go further.

By the Court. Judgment of the circuit court is reversed, and the cause remanded with directions to render judgment in accordance with this opinion.

Repugnant Clauses in a Contract which Shall Pre-⁷vail.

Ordinarily, a written contract must be construed by the court: See monographic note to *Fagin v. Connolly*, 69 Am. Dec. 454, on when construction of a writing is a question for the court, and when for the jury; but if its terms are ambiguous, the meaning thereof should be left to the jury: *Illges v. Dexter*, 77 Ga. 36. In construing a contract, effect must be given, if possible, to every expression in it. Every word and clause should be considered, for the intention of the parties is to be collected from the whole instrument, and must be carried into effect, if possible, although a literal construction of a single clause, considered without reference to the others, would lead to a different result: *Ward v. Whitney*, 8 N. Y. 442, 446; *Chase v. Bradley*, 26 Me. 531; *Staton v. Mullis*, 92 N. C. 623; *Jacobs v. Spalding*, 71 Wis. 177; *Moore v. Griffin*, 22 Me. 350; *Heywood v. Perrin*, 10 Pick. 228; 20 Am. Dec. 518; *Morey v. Homan*, 10 Vt. 565; *Bell v. Woodward*, 46 N. H. 315; *Knower v. Emerson*, 9 Pick. 422, 424; *Evans v. Sanders*, 8 Port. 497; 33 Am. Dec. 297; *Morancy v. Dumesnil*, 3 La. Ann. 363; *Steinspring v. Bennett*, 16 La. Ann. 201; *Hunter v. Anthony*, 8 Jones, 385; 80 Am. Dec. 333; *Wheelock v. Freeman*, 13 Pick. 165; 23 Am. Dec. 674; *Warren v. Merrifield*, 8 Met. 93, 95; *Butler v. Moses*, 43 Ohio St. 166; *Cleaveland v. Smith*, 2 Story, 278, 287; *Holmes v. Hubbard*, 60 N. Y. 183; *Gibson v. Tyson*, 5 Watts, 34, 41.

If descriptive words in deeds and other written instruments are, with reference to the actual facts, repugnant, or inconsistent with each other, and yet the intention of the parties can be ascertained, the misdescription will not vitiate the instrument, but it will yield to the clearly ascertained intention: *Cleaveland v. Smith*, 2 Story, 278, 287. No part of a description will be rejected, unless found to be repugnant to the manifest purposes of the grant: *Bell v. Woodward*, 46 N. H. 315. If the habendum and warranty clause of a deed are joined, and the intention to convey a fee is clear, the words of inheritance will be so transposed as to connect them with the conveying terms, and thus secure the intended effect of the instrument: *Staton v. Mullis*, 92 N. C. 623, 627. So, although the latter part of a contract is irreconcilable with the former upon any reasonable construction, it ought to aid in the construction of the whole, even if inconsistent therewith: *Knower v. Emerson*, 9 Pick. 422, 423. But senseless words may be rejected, as in construing the condition of a bond, so as to give effect to the intention of the parties: *Gully v. Gully*, 1 Hawks, 20. Words, however, which have a meaning must be considered in ascertaining the intention of the parties: *Decorah v. Kesselmeier*, 45 Iowa, 166.

It is laid down as elementary law, that, if two clauses of a contract are so totally repugnant to each other that they cannot stand together, the first shall be received and the latter rejected: See principal case; *Straus v. Wanamaker*, 175 Pa. St. 213, 226. A proviso, totally repugnant to a contract of which it is a part, is void: *Benjamin v. McConnell*, 4 Gilm. 536; 46 Am. Dec. 474. The premises in a deed must control when the habendum clause is inconsistent with it: *Jackson v. Ireland*, 3 Wend. 99, 102. A condition subsequent, so repugnant to a grant as to utterly defeat it, is void: *Hartung v.*

Witte, 59 Wis. 285, 293. While, to give effect to the intention of the parties, general words may be restrained by a particular recital which follows them, when such recital is used by way of limitation or restriction, this is not true where the particular recital is not so used, but is used by way of reiteration and affirmation only of the preceding general words. In such a case, the recital will not diminish the grant made by the general words: *Moore v. Griffin*, 22 Me. 350. In construing a deed containing inconsistent clauses, courts will consider the whole instrument and the intentions of the maker, subject to the rules of law; and, if all its parts cannot stand, those opposed to the maker's intentions will be rejected: *Waterman v. Andrews*, 14 R. I. 589.

It is only when the language of a clause, with reference to the actual facts, involves such fatal errors, and mistakes, as leave the court without reasonable means of ascertaining the real intention that the clause will be rejected: *Cleaveland v. Smith*, 2 Story, 278, 287. It is obvious that the elementary rule above stated, that when two clauses of a contract are in conflict, the first governs, rather than the last, may not always apply, as worded, unless the instrument is formally and systematically drawn, as in the case of deeds, which are construed by the same rules as simple contracts. The rule probably originated in the construction of deeds, which, as a rule, are drawn with more care and order of arrangement than ordinary contracts, in which the last clause, repugnant to a preceding clause, may be the all-important one. It is, therefore, probably more in consonance with authority to say that, if clauses of a contract are repugnant, that one which expresses the chief object and purpose of the contract must prevail, while clauses containing provisions subordinate to the chief object and purpose of the contract must give way. Thus, a provision in a grading contract that the contractors shall "proceed with such diligence and with such force of laborers as the executive committee of said company may direct to perform the work," etc., has been held subordinate to, and qualified by, a provision directly following it, requiring the work to be completed by a day named, and intended to enable the company to compel the completion by the day specified: *Grand Rapids etc. R. R. Co. v. Van Deusen*, 29 Mich. 431, 441. Neither does the preamble to a general and unlimited agreement conferring the right to manufacture and sell certain patented articles, which preamble recites that such articles are "now manufactured and sold by the party of the first part in and throughout the United States and territories," limit a promise to pay royalties to domestic business. "It seems," said the court, in such a case, "that these more important parts of the contract—the very promises that each party made to the other—should be given prevailing force and effect in the interpretation of the agreement, rather than a matter that is stated by mere way of recital in a preamble": *Dick Co. v. Sherwood Letter File Co.*, 157 Ill. 325, 337.

If the grantor, in the granting clause of a deed, expresses an intention to convey his whole interest in the land, but in a subsequent clause expresses an intention to convey only an undivided half of his

Interest therein, the two clauses are, of course, inconsistent, and the granting clause, passing the whole interest in the land, must prevail: *Green Bay etc. Canal Co. v. Hewett*, 55 Wis. 96; 42 Am. Rep. 701. So, if an agreement is to convey "the Hawkins place, containing one hundred acres," and a surveyor, in locating the purchase, finds that it contains one hundred and six acres, the clause "containing one hundred acres" should be rejected as surplusage, and the purchaser takes the whole tract: *Butterfield v. Cooper*, 6 Cow. 481. And if a contract to convey property contains two descriptions thereof, one correct and the other false in fact, the correct one must prevail, and the other be rejected as surplusage: *Woods v. Hart*, Nebraska, Feb., 1897. If two parts of a deed are totally inconsistent, the former prevails; but if two parts of a will are totally inconsistent, the latter prevails: *Doe v. Biggs*, 2 Taunt. 109; *Constantine v. Constantine*, 6 Ves. 100.

If a covenant creating a personal liability is followed by a proviso that the covenantor shall not be personally liable under the covenant, the proviso is repugnant and void: *Williams v. Hathaway*, L. R. 6 Ch. Div. 544. If the condition of a bond is repugnant, the obligation of the bond is single: *Wells v. Ferguson*, 11 Mod. 191. "A nonsensical or repugnant condition will not affect an obligation, even though the entire condition be incongruous or uncertain; a fortiori, an uncertain or repugnant stipulation, or expression in a condition, consistent and certain in other respects, cannot change or materially affect the import and effect of the contract. Thus, if the condition of a bond be that if the obligor do not pay, the bond shall be void, the obligation will be understood to be single, or as if there had been no condition; 'for when the condition recites a debt, and after lays an obligation not to pay it, it is in that repugnant and void': *Stockton v. Turner*, 7 J. J. Marsh. 192. Compare *Henschel v. Mahler*, 3 Denio, 428; 3 Hill, 132, as to when repugnant and absurd phraseology in an instrument evidently designed as a bill of exchange should be rejected as surplusage.

If it is apparent from an agreement that it was the purpose to sell the right to maintain a dam to the height of certain iron bolts, but in making the conveyance, after a grant of that right, there is also a license to raise the water to the height of such bolts, the latter clause cannot be construed as a limitation of the height of the dam, but the grantee acquires the right to maintain a dam of that height, and to use it in the ordinary way, although it may sometimes raise the water above the bolts: *Salmon Falls Mfg. Co. v. Portsmouth Co.*, 46 N. H. 249, 255. Any words written on the back of an instrument, such as a promise not to compel the payment of a promissory note, and which qualify and restrain the terms of the instrument, constitute a part of the contract: *Barnard v. Cushing*, 4 Met. 230; 38 Am. Dec. 362. At the present day, the occupation of a pharmacist and that of a physician are essentially distinct. Hence, an agreement not to engage in the one does not preclude the party from engaging in the other, so long as the one is not used as a cover for the operations of the other: *Greenfield v. Gilman*, 140 N. Y. 168, 175.

If an agreement is partly written and partly printed, preference

is given, in case of repugnancy, to the writing: *Summers v. Hibbard*, 153 Ill. 102; 46 Am. St. Rep. 872; *Loveless v. Thomas*, 152 Ill. 479; *Murray v. Pillsbury*, 59 Minn. 85; especially where the printed matter is in the heading where it is not likely to be noticed: *Summers v. Hibbard*, 153 Ill. 102; 46 Am. St. Rep. 872. Printed matter in a letterhead does not form any part of the letter written on the sheet, and cannot qualify an absolute contract resulting from an acceptance of an offer by letter: *Summers v. Hibbard*, 153 Ill. 102; 46 Am. St. Rep. 872. So, if the written portion of a deed describes a particular interest, distinct from a homestead, as being conveyed, the writing will be given effect, over an un erased printed clause waiving the homestead: *Loveless v. Thomas*, 152 Ill. 479. And the written part of a policy of insurance must prevail over that which is printed where there is a repugnancy: *Benedict v. Ocean Ins. Co.*, 31 N. Y. 389; *Harper v. New York etc. Ins. Co.*, 22 N. Y. 441. The rule, however, that a written clause in a contract prevails over a printed one which is repugnant to it, is resorted to only in case of necessity. It is only when there is an inconsistency or repugnancy between them, which is irreconcilable, that the written parts of an agreement prevail over the printed ones: *Barhydt v. Ellis*, 45 N. Y. 107; *Miller v. Hannibal etc. R. R. Co.*, 90 N. Y. 430; 43 Am. Rep. 179; *Michaels v. Wolf*, 136 Ill. 68.

It is well understood that several different instruments concerning the same transaction may, under some circumstances, be construed as one contract, especially where one refers to the other: *Palmer v. Palmer*, 150 N. Y. 139; 55 Am. St. Rep. 653; *Byrne v. Marshall*, 44 Ala. 355; *Wichita University v. Schweiter*, 50 Kan. 672; and the rule of construction, in a proper case, is the same as if only one instrument were considered: *Sewall v. Henry*, 9 Ala. 24. The court will give such priority in their execution as will best effect the intent of the parties: *Whitehurst v. Boyd*, 8 Ala. 375; *Wheelock v. Freeman*, 13 Pick. 165; 23 Am. Dec. 674. If a bond for a deed is given, on a contract for the sale of land, the bond and contract should be construed together; and, if they conflict, the contract must prevail: *Coughran v. Bigelow*, 9 Utah, 260; affirmed in *Coughran v. Bigelow*, 164 U. S. 301. So, if written instruments refer to a former contract, with recitals of its subject matter, but there is a variance between such instruments, and between them and the contract, the recitals are to be explained and corrected by the contract to which reference is made: *Sawyer v. Hammatt*, 15 Me. 40.

MILWAUKEE MASONS AND BUILDERS' ASSOCIATION v. NIEZEROWSKI.

[95 WISCONSIN, 129.]

CONTRACTS—UNLAWFUL COMBINATION TO CONTROL BUSINESS.—If persons, associated in a city as masons and building contractors, have two sets of by-laws, one for general distribution and the other, under which the association carries on its operations, private, and each member is required by such private by-laws to submit all bids, proposed to be made by him, to such association, and, if found to be the lowest bidder and entitled to the contract, to add to such bid, before submitting it to the owner or architect of the proposed building, six per cent of the contract price, which he is to pay to the association, and thus exact from owners six per cent in excess of a fair price, the arrangement is an unlawful combination, contrary to public policy, and void, especially where the membership of the association embraces more than four-fifths of the masons and builders in the city, as its manifest purpose is to suppress fair and free competition in bidding for building contracts. Hence, a note given to such association, by a member of it, for the amount of such percentage, is void, because it is founded upon an unlawful consideration, and is not enforceable.

COSTS—WHEN LOST BY FAILURE TO PERFECT JUDGMENT.—Under a statute requiring the successful party in an action to perfect judgment within sixty days after entry of verdict, or within thirty days after the expiration of a stay of proceedings, he loses his right to costs, if he fails to perfect his judgment within sixty days after entry of verdict, where no stay of proceedings has been ordered, but the clerk must then enter the proper judgment without costs.

NEW TRIAL—STAY OF PROCEEDINGS.—The entry of a motion for a new trial does not operate as a stay of proceedings during the time of the pendency of the motion.

Action to recover the sum of two thousand two hundred and eighty-nine dollars claimed as a balance due upon a promissory note for four thousand two hundred and sixty-six dollars given by Niezerowski, the defendant, to the plaintiff, the Milwaukee Masons and Builders' Association, payable one year and three months after date. It was set up, in defense, that the note was without legal consideration, and void; that the pretended consideration was contrary to public policy and good morals; that the note was given by, and secured from, the defendant, who was a member of the plaintiff association, in pursuance of a secret combination and confederation of the plaintiff and its members to exact of and from the citizens of Milwaukee, Wisconsin, desiring to erect and construct buildings, a sum equal to six per cent in excess of the actual cost and value of the work to be done, and, by secret means, to prevent and suppress competition in bidding for such work; and that the note was given and received for the purpose and as a means of carrying such alleged unlawful combination into effect. Practically, there was no dispute as to the

facts, and a verdict was directed for the defendant. Judgment was rendered thereon against the plaintiff for costs, and it appealed. The plaintiff was a corporation, and its membership, at the time the note was given, comprised about sixty of the seventy or seventy-five mason contractors in Milwaukee. It was thought by the masons and builders that they were not receiving fair treatment from owners and their architects in the matter of bids for and letting work; and, as a protection against the practices of which they complained, the association devised and adopted certain rules and by-laws in relation to bids and contracts. It had two sets of by-laws, one for general distribution, and the other, under which the association carried on its operations, was private. The association had contracts with materialmen in the city under which members who complied with the private by-laws could, and did, receive rebates of one-third upon all material necessary for their contracts. This was notably the case respecting purchases of brick from the Brickmakers' Association. The members were thus enabled to underbid nonmembers for doing such work. All buildings in the city, within fire limits, were required, by ordinance, to be constructed of brick, stone, or other fire-proof material. If brick was purchased in Chicago, or outside of Milwaukee, where it could be procured much cheaper than of the Brickmakers' Association, the members of the plaintiff association were required, by its private by-laws, to charge two dollars more per thousand for laying them, one dollar and twenty-five cents of which went to the Brickmakers' Association of Milwaukee, and seventy-five cents to the plaintiff corporation. It was contended that this arrangement enabled the Brickmakers' Association to maintain general high prices, and to make the above-mentioned rebate to members of the plaintiff corporation. All members of the plaintiff association who wished to compete for any contract or job, public or private, were required, by its private by-laws, to bring their bids to the rooms of the association on the day preceding the one upon which bids were to be submitted to the person desiring to build, or his architect or agent. A committee of such bidders was then appointed by a chairman, one member of which was to inspect the bids and determine who was the lowest bidder. It having been determined who was the lowest bidder, he was required to add six per cent to the amount of his bid, before he could submit to the person for whose work he was competing, or to his architect or agent. If his bid was eight per cent or more lower than the next lowest bid, the bidders present were to determine how much should be added, over the said six per cent, to

his bid. The members were required to make all bids first at the rooms of the association, and at no other place. No member was allowed to change his bid after it had been submitted to the owner or architect, or to do work except at the figures therein specified. If any member did not comply with the rules of the association in submitting bids to it, he was, "under no circumstances, to submit a bid for the work." It was another private rule of the association that: "No member shall give a bid to any owner or architect for changes or additions to work under contract. The original contractor shall have the right to bid on such changes or additions without competition, unless the amount is larger than the contract; but other bidders shall go in for the accommodation of the owner, after arranging the same with the original contractor, who will pay only six per cent of such work; the other bidders having no voice in making such bid." Upon signing a contract, the successful bidder was required to report to the association certain particulars thereof, and to file the contract with the secretary within three days thereafter. Under another private rule, the successful bidder was required to pay six per cent of each estimate to the secretary; and, when the roof was on a building, he was to pay his percentage in full, whether he had received payment in full or not. Certain fines were imposed upon members for a noncompliance with by-laws. The defendant, in 1882, and while a member of the Milwaukee Masons and Builders' Association, became the successful bidder for building the Gesu Church in Milwaukee, for the sum of seventy-one thousand dollars. He did not, however, submit his bid to the association of which he was a member, but submitted it directly to the congregation, and there was no addition of six per cent made to it for his benefit. The association claimed the usual percentage of six per cent, and, after some discussion, the defendant gave the note in controversy for the required amount, and it was understood that he would remain a member. He had other contracts and was afraid that, if he did not give the note, the association might cut him off and give him trouble about his work. He understood that, if he did give it, he would have the benefit of rebates from the association. He did get rebates on material for the church work, not through the association, but by reason of prompt payment. Rebates were frequently arranged between the materialmen and members, though the ordinary method of getting them was to obtain a slip for that purpose from the secretary. Such benefits and advantages as were provided and secured by the by-laws, and the methods of transacting business under them, constituted the sole consideration for the note.

A. J. Eimermann and Hoyt, Ogden & Olwell, for the appellant.

Austin & Fehr, for the respondent.

¹³³ PINNEY, J. 1. The question to be determined is, whether the benefits and advantages which the defendant was entitled to receive, as a member of the association, in consequence ¹³⁴ of conducting its business under and in pursuance of the by-laws already noticed, constitute a lawful consideration for the note. The manifest purpose of the private by-laws was, by means of the combination thus effected, to suppress fair and free competition in bidding for building contracts in Milwaukee, and by such combination and method of bidding, upon its face apparently fair and free from objection, but in fact unfair and delusive, to compel owners to pay for the erection of buildings the sum of six per cent in excess of what they would be otherwise obliged to pay for them if fairly let to the lowest bidder, uninfluenced by such combination. It seems to us that the restraint put upon the rights of proprietors by the provisions of these by-laws or rules, as well as the entire scheme thus disclosed, is contrary to public policy, and therefore void. Agreements in restraint of trade are against public policy and void, unless founded upon a valuable consideration, and limited as regards time, space, and the extent of the trade, to what is reasonable under the circumstances of the case. All such arrangements tend to deprive the public of the services of parties in the employments and capacities in which they are most useful, and they tend to expose the public to the evils of monopoly: *Richards v. American etc. Co.*, 87 Wis. 512, and cases cited. In *Leather Cloth Co. v. Lorsche*, L. R. 9 Eq. 345, it was said: "All restraints upon trade are bad, as being in violation of public policy, unless they are actually, and not unreasonably, for the protection of parties dealing legally with some subject matter of contract." The test whether the restraint is reasonable is laid down in *Horner v. Graves*, 7 Bing. 735, 743, where it is said: "The question is whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the ¹³⁵ party can be of no benefit to either. It can only be oppressive; and, if oppressive, it is, in the eye of the law, unreasonable."

The combination in question is contrary to public policy, and strikes at the interests of those of the public desiring to build, and between whom and the association or the members thereof, there exist no contract relations; and it is not distinguishable

in principle from the case of *Hilton v. Eckersley*, 6 El. & B. 47, 64, 65. While all reasonable stipulations and means to protect labor or trade are laudable, we must hold that the means here sought to be employed are such as the law will not sanction. We must consider what may be done under such an agreement, and the result which it will necessarily produce. As already pointed out the operation of this combination, under its private by-laws, is to suppress free and fair competition in bidding for contracts, and by delusive and deceptive means members of the association are enabled to exact from owners a higher price for buildings than they would otherwise have to pay. In the matter of changes or additional work, all competition by other members of the association is prohibited, unless the amount exceeds the original contract price. And as the membership of the association embraces nearly six-sevenths of the mason builders in Milwaukee, the combination not only tends to suppress competition, but operates most unjustly toward builders not members of the association. The restraint thus imposed on the trade is neither fair nor reasonable.

In *People v. North River etc. Ry. Co.*, 3 N. Y. Supp. 401, 22 Abb. N. C. 164, it was said that "all the cases, ancient and modern, agree that a combination, the tendency of which is to prevent general competition, and to control prices, is detrimental to the public, and consequently unlawful"; and many cases are there cited, and in the note, to the same effect.

In *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 258, it was held that ¹³⁶ an agreement between the proprietors of five lines of boats engaged in the business of forwarders on the Erie and Oswego canals, to run for the remainder of the season at certain rates for freight and passage then agreed on, and to divide the net earnings among themselves in certain proportions, was a conspiracy to commit an act injurious to trade, and consequently void. The object expressed in the agreement was the "establishing and maintaining fair and uniform rates of freight, and equalizing the business among themselves, and to avoid all unnecessary expense in doing the same." Of this, Jewett, J., observed: "The object of the agreement, as expressed in the written contract, was plausible enough, but it was impossible to conceal the real intention." He added that "the great, if not the sole, object of the agreement was to destroy rivalry, and keep up the prices to certain rates fixed by themselves." *Stanton v. Allen*, 5 Denio, 434, 49 Am. Dec. 282, was a very similar case, where it was held the agreement was void at common law, as contravening public policy and injurious to the interests of the state: *Morris Run etc.*

Co. v. Barclay etc. Co., 68 Pa. St. 186; 8 Am. Rep. 159; Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 672; Craft v. McConoughy, 79 Ill. 346; 22 Am. Rep. 171; More v. Bennett, 140 Ill. 69; 33 Am. St. Rep. 216; Texas Standard Oil Co. v. Adoue, 83 Tex. 650; 29 Am. St. Rep. 690; Anderson v. Jett, 89 Ky. 375. These are all cases quite in point, and show that the restraint on trade produced by this combination is unreasonable, and without legal sanction.

The true test of the illegality of a combination to restrain business or trade is its effect upon the public interests; that is to say, of those outside of the combination: *Nester v. Continental etc. Co.*, 161 Pa. St. 473; 41 Am. St. Rep. 894. In *Atcheson v. Mallon*, 43 N. Y. 147, 149, 3 Am. Rep. 678, it was said that: "The true inquiry is, Is it the natural tendency of such an agreement to injuriously influence the public interests? The rule is, that agreements which, in their necessary operation upon the action of the ¹³⁷ parties to them, tend to restrain their natural rivalry and competition, and thus to result in the disadvantage of the public, or of third parties, are against the principles of sound public policy, and are void." If, from the plaintiff's own showing or otherwise, a cause of action appears to arise *ex turpi causa*, the court will not allow a recovery. The maxim is, *Ex dolo malo actio non oritur*. The defendant may properly invoke the maxim that in such cases *potior est conditio defendentis*. The court refuses to interfere in such cases, not on account of the defendant, but in the larger interests of the public: *Nester v. Continental etc. Co.*, 161 Pa. St. 473; 41 Am. St. Rep. 894; *Hooker v. Vandewater*, 4 Denio, 352; 47 Am. Dec. 258. In *Wight v. Rindskopf*, 43 Wis. 348, it was said by Ryan, C. J., that: "Courts owe it to the public justice, and to their own integrity, to refuse to become parties to contracts essentially violating morality or public policy, by entertaining actions upon them. It is judicial duty always to turn a suitor upon such a contract out of court, whenever and however the contract is made to appear." No court will enforce such an agreement as the one before us, or compel the defendant to go any further in performing on his part by enforcing payment of the note. The verdict for the defendant was rightly directed.

2. The verdict was entered November 25, 1895, and on November 30th a motion to set it aside and for a new trial was made, and denied by an order dated the same day the verdict was entered, but filed November 30th. On the 9th of December the defendant procured his costs to be taxed at fifty dollars and seventy-three cents. No order or direction had been made by the

court staying proceedings, or reserving the case for further consideration. On the 31st of January, 1896, the judgment was filed and entered, signed by the clerk of the court, and the costs, as theretofore taxed, are entered therein. The plaintiff afterward moved to strike the entry of costs out of the judgment, for the reason that the defendant had ¹³⁸ failed and neglected to perfect his judgment within sixty days from the entry of the verdict, as provided by Sanborn and Berryman's Annotated Statutes, section 2894 a, which makes it the duty of the successful party "to enter and perfect the judgment upon the finding or verdict within sixty days after the filing of the finding, or the rendition of the verdict"; and that, "in case the successful party shall neglect to perfect the judgment within the time aforesaid, it shall be the duty of the clerk of the court to prepare and enter the judgment, but without costs to either party; and the neglect or failure of the successful party to enter and perfect judgment, as hereinbefore required, shall be deemed a waiver of his right to the accrued costs in the action," provided that whenever there shall be a stay of proceedings after finding or verdict, judgment may be perfected, as therein provided, "at any time after thirty days from the expiration of such stay of proceedings." The giving notice or entry of the motion for a new trial did not operate to stay the entry of judgment, or as a stay of proceedings.

The statute provides that, upon receiving and entering a verdict, "if a different direction be not given by the court, the clerk must enter judgment in conformity with the verdict": Rev. Stats., sec. 2861; *Davison v. Brown*, 93 Wis. 85; *Wheeler v. Russell*, 93 Wis. 135. The clerk must enter judgment, but as provided by section 2927. "The judgment shall be entered in the judgment-book": Rev. Stats., sec. 2897. By section 2927 of Sanborn and Berryman's Annotated Statutes, "the clerk shall tax and insert in the entry of judgment, and in the docket thereof, if the same shall have been docketed, on the application of the prevailing party, upon three days' notice to the other, the sum of the costs and disbursements as above provided." If the successful party "shall neglect to perfect the judgment" within sixty days, as specified, then "it shall be the duty of the clerk of the court to prepare and enter the proper judgment, but without costs to either party": Sanborn and Berryman's Annotated Statutes, ¹³⁹ sec. 2894 a. No judgment appears to have been prepared by the successful party within the prescribed sixty days, although the costs were taxed within that time. It is the evident intention of the statute that the attorney of the party in whose favor a verdict is rendered shall prepare and deliver to

the clerk the proper judgment to be entered thereon, and the clerk is required to tax the costs on the application of such party, and insert in the entry of judgment the sum of the costs and disbursements, upon three days' notice to the other party. When this has been done, the prevailing party has perfected his judgment, within the meaning of section 2894 a. The defendant did not perfect his judgment within sixty days after the entry of the verdict, and as no different direction was given by the court, under section 2861, at the expiration of that time the defendant lost his right to costs, and it became "the duty of the clerk to prepare and enter the proper judgment, but without costs to either party": Sanborn and Berryman's Annotated Statutes, sec. 2894 a. It is to be noted that by section 2861, "upon receiving a verdict, the clerk shall make an entry on his minutes specifying . . . the verdict, and either the judgment rendered thereon, or an order that the cause be reserved for argument or further consideration." The case of Steinhofel v. Chicago etc. Ry. Co., 92 Wis. 123, was decided in view of a very general practice that had grown up to regard the entry of a motion for a new trial as a stay of proceedings until disposed of, and our attention was not directed to section 2861. Correct practice and a proper application of the statute compel a contrary conclusion: Davison v. Brown, 93 Wis. 85; Wheeler v. Russell, 93 Wis. 135. For these reasons we must hold that in this case the defendant, by failing to perfect judgment within sixty days after the entry of the verdict, lost his right to costs, and that the judgment, as to costs, must be reversed, and in all other respects affirmed, but without costs; the fees of the clerk of this court to be paid by the defendant.

By the Court. Judgment is ordered accordingly.

CONTRACTS — UNLAWFUL COMBINATION TO CONTROL BUSINESS.—Combinations of individuals formed for the purpose of stifling competition in trade are against public policy and void: Note to Consumers' Oil Co. v. Nunnemaker, 51 Am. St. Rep. 199; Chapin v. Brown, 83 Iowa, 156; 32 Am. St. Rep. 297. All combinations, whether of capitalists or of workmen, for the purpose of manipulating and controlling prices in any particular business, or influencing trade in their special favor, are illegal. For an application of this principle to various kinds of business, see More v. Bennett, 140 Ill. 69; 33 Am. St. Rep. 216; Nester v. Continental Brewing Co., 161 Pa. St. 473; 41 Am. St. Rep. 894; Morris' Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; 8 Am. Rep. 159; Craft v. McConoughy, 79 Ill. 346; 22 Am. Rep. 171; Stanton v. Allen, 5 Denio, 434; 49 Am. Dec. 282; Hooker v. Vandewater, 4 Denio, 349; 47 Am. Dec. 258; Atcheson v. Mallon, 43 N. Y. 147; 3 Am. Rep. 678. Hence, promissory notes, drafts, and other obligations given in furtherance of such combinations are illegal and void: Stanton v. Allen, 5 Denio, 434; 49 Am. Dec. 282; Morris' Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; 8 Am. Rep. 159.

WISCONSIN KEELEY INSTITUTE COMPANY v. MILWAUKEE COUNTY.

[95 WISCONSIN, 153.]

POLICE POWER OF STATE—TREATMENT OF DRUNKARDS—COUNTY LIABILITY.—A statute providing that, if any citizen of the state becomes an habitual drunkard, and "is pecuniarily unable to procure and pay for treatment for such disease," he may, by order of the county court, or of the judge thereof, be sent for treatment to some institution in the state for the cure of such disease at the expense of the county in which he resides, is void; and the county is not liable for such treatment. A law of this kind is not an exercise of the police power of the state, and is unconstitutional because it compels the county, without its consent, to tax its citizens for the benefit of private persons and institutions not accountable to the state, and not the legitimate objects of public charity.

N. S. Murphey, for the appellant.

Rietbrock & Halsey and E. E. Chapin, for the respondent.

154 CASSODAY, C. J. Chapter 203 of the Laws of 1895 provides, in effect: 1. That when any citizen of the state becomes an habitual drunkard, and is pecuniarily unable to procure and pay for treatment for such disease, any citizen of the state, the next friend, the attending physician, or any public officer may petition the county court or judge thereof, within and for the county where such habitual drunkard resides, for an order of said court or judge thereof permitting said habitual drunkard to take treatment at some institution for the cure of drunkenness and drug addictions, established within the state, at the expense of the county, as the county judge may select. 2. That the term "habitual drunkard," as defined by the act, includes all persons addicted to the use of spirituous, malt, or fermented liquors, morphine, opium, cocaine, or other drugs or narcotics to such a degree as to deprive him or her of the power of reasonable self-control. 3. That **155** such petition is required to set forth the full name, age, and residence of such habitual drunkard, whether married or single; that he has resided within the state at least one year previously; that he has not the means to pay for such treatment, nor have the person or persons, if any, who are charged with his support; what addiction he is affected by; that he appears to be unable to abstain by means of will power alone; and praying that such habitual drunkard may have treatment at the expense of the county at such institute—such petition to be signed and verified by the petitioner, and accompanied by a certificate, signed and sworn to by two reputable citizens and taxpayers, and the written consent of such drunkard to the granting

of the prayer of the petition, and his agreement to take the treatment and obey the rules of the institution. 4. That upon presenting such petition, verification, and written consent, the court or judge thereof, upon being satisfied of the truth thereof, shall cause an order to be entered that such drunkard shall be taken to some institution within the state, to be designated therein, provided that the expense of treatment in each case shall not exceed the sum of one hundred and thirty dollars, which sum shall cover and include all expenses for treatment, medicines, and board for four weeks, and such expense shall be paid by the county. 5. That no such court or judge thereof shall send any person for treatment a second time. 6. That any person so treated is at liberty to reimburse the county.

The complaint alleges, in effect, the incorporation of the plaintiff; that one J. S. White, an alleged habitual drunkard, age forty-two years, and a married man, and a resident of the defendant county, was, May 31, 1895, upon the requisite petition, certificate, verification, and consent of the said White, ordered by the county court to be conveyed to the Keeley Institute at Waukesha, for treatment for such habitual drunkenness at the expense of Milwaukee county, not to exceed one hundred and thirty dollars; that under such commitment, said White ¹⁵⁶ was duly conveyed to the plaintiff's said institution for such treatment, and was duly received into the plaintiff's institution for treatment, and was duly treated for said drunkenness and inebriety for a period of four weeks, commencing May 31, 1895, and the plaintiff in all things conformed to and complied with the terms and provisions of said act; that the defendant, by reason thereof, became and now is indebted to the plaintiff therefor in the sum of one hundred and thirty dollars, with interest, and prays judgment accordingly. To that complaint the defendant demurred, on the ground that it did not state facts sufficient to constitute a cause of action. From the order overruling the demurrer the defendant brings this appeal.

It is conceded that White was committed to the plaintiff's institute in the manner required by the act, and was there treated for drunkenness, as alleged, and that the plaintiff is entitled to recover in this action if the act in question is valid. On the other hand, it is obvious that, if the act is void, then the action cannot be maintained. The question presented, therefore, turns entirely upon the constitutionality of the act. It is undoubtedly true, as claimed by counsel for the plaintiff, that the state legislature has authority to exercise any and all legislative powers not delegated to the federal government, nor expressly or by necessary

implication prohibited by the national or state constitution: *Bittenhaus v. Johnston*, 92 Wis. 595, and cases there cited. So it is undoubtedly true, as claimed, that a statute should, if possible, be so construed as not to be in conflict with the constitution. But no construction is permissible which defeats the obvious purpose and object of constitutional restrictions.

Counsel for the plaintiff contend that the act in question comes within the police power of the legislature, and is therefore valid. Such power undoubtedly extends to the regulation and protection of the lives, limbs, health, comfort, good ¹⁵⁷ order, morals, peace, and safety of society, and hence may be exercised on many subjects and in numerous ways: *State v. Heinemann*, 80 Wis. 256; 27 Am. St. Rep. 34, and cases there cited; *Bittenhaus v. Johnston*, 92 Wis. 595. Mr. Cooley defines such power in the following language: "The police of a state, in a comprehensive sense, embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against the state, but also to establish, for the intercourse of citizens with citizens, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others": *Cooley's Constitutional Limitations*, 6th ed., 704. Mr. Tiedeman gathers from the American definitions given by him that "the term must be confined to the imposition of restraints and burdens upon persons and property." He further says: "The power of the government to embark in enterprises of public charity and benefit can only be limited by the restrictions upon the power of taxation, and to that extent alone can these subjects in American law be said to fall within the police power of the state": *Tiedeman's Limitations of Actions*, 4. It is not denied, if not conceded, that the legislature has ample power to suppress drunkenness and intemperance. The statutes have for many years provided for the care of inebriates in county asylums: *Rev. Stats.*, secs. 604 f, 604 g. So they have provided for placing drunkards under guardianship, and committing them to asylums: *Rev. Stats.*, secs. 3978, 3979; *State v. Ryan*, 70 Wis. 683, 684. The power of the legislature to pass such laws is not questioned. Nor is the power of the legislature to prescribe laws for reclaiming drunkards by public authority here involved. We are clearly of the opinion that the act in question is not an exercise of the police power as above defined. On the contrary, it is for private purposes, and to benefit ¹⁵⁸ private parties. The plaintiff is a private corporation, organized under the general laws of

the state, and conducted for private gain. The mere fact that it is subject to visitation and inspection by public officials does not make it a public institution. The manifest purpose of the act is to compel the county in which any citizen resides who has become "addicted to the use of spirituous, malt, or fermented liquors, morphine, opium, cocaine, or other drugs or narcotics, to such a degree as to deprive him or her of the power of reasonable self-control," who has been committed to such institute, in the manner indicated, to pay such institution a sum not exceeding one hundred and thirty dollars "for treatment, medicines, and board for four weeks," furnished to such person. True, such person is only to be so committed in case he "has not the means to pay for said treatment, nor have the person or persons, if any, who are charged with his support." This language clearly implies the ready means or money to make such payment. It does not mean that such person has become a pauper, or that he has become dependent upon charity or benevolence for support: *Rhine v. Sheboygan*, 82 Wis. 352. It is there said by Mr. Justice Pinney that "the word 'poor,' in the statute, has a restricted and technical meaning, and it is practically synonymous with 'destitute,' denoting extreme want and helplessness." In that case, it was, in effect, held that where a man has property of considerable value over and above encumbrances, and not indispensable for daily use, but available, by way of sale or security, for support, he is not a poor person for whose support the town is liable under the statute: *Ettrick v. Bangor*, 84 Wis. 256.

The act in question does not go upon the theory that the victim of such addiction is helpless and destitute, and hence the subject of public charity. It does treat such addiction as a "disease": but it does not treat it as a contagious or infectious disease, and there is no allegation or claim that it ¹⁵⁹ is a contagious or infectious disease. The question recurs whether any county may be compelled to pay any private party for treatment, medicines, and board of any resident therein, having a disease not contagious or infectious, merely because such diseased person "has not the means to pay for said treatment." If a county may be compelled to make such payment for such treatment, medicines, and board of a person having such a disease, then it logically follows that every county may be compelled to pay private parties for treatment, medicines, and board of any person having any disease, though not contagious or infectious, provided the victim has not the present means of making such payment himself. We are clearly of the opinion that no such power exists. This is the result of numerous decisions in this court which might be cited.

A few only will be referred to. In *Curtis v. Whipple*, 24 Wis. 350, 1 Am. Rep. 187, the town of Jefferson was authorized by statute to raise, by tax, five thousand dollars to aid in the erection of buildings for the "Jefferson Liberal Institute" therein, in case the majority of the votes cast upon that question at a special town meeting to be held should be in favor of such tax. The electors having decided affirmatively, the tax was accordingly assessed upon the taxable property of the town. Curtis resisted the payment of the tax, and, when his personal property was takjen therefor, he brought the action for the wrongful taking and conversion and recovered. The court held, in effect, that the "Jefferson Liberal Institute" was essentially a private educational institution, in which neither the town nor its inhabitants, as such, had any interest or power of control; and hence the act empowering the town to raise by taxation the sum mentioned was invalid. That decision has frequently been affirmed by this court: *Whiting v. Sheboygan etc. R. R. Co.*, 25 Wis. 181; 3 Am. Rep. 30; *State v. Tappan*, 29 Wis. 664, 684; 9 Am. Rep. 622; *Attorney General v. Eau Claire*, 37 Wis. 436. As stated by Ryan, C. J., in the case last cited: "Taxation is the absolute ¹⁶⁰ conversion of private property to public use. And its validity rests on the use. In legislative grants of the power to municipal corporations, the public use must appear. . . . The legislature can delegate the power to tax to municipal corporations for public purposes only; and the validity of the delegation rests on the public purpose. Were this otherwise, as was said at the bar, municipal taxation might well become municipal plunder": *Attorney General v. Eau Claire*, 37 Wis. 438, citing numerous cases in this court in support of the proposition. Here the act compels payment without the consent of the county or its taxpayers; and in such cases the purposes for which taxation may be authorized are much more restricted than where such consent is first obtained, as indicated in numerous decisions of this court: *Lund v. Chippewa Co.*, 93 Wis. 640, and cases there cited.

A learned writer on constitutional law says upon this subject: "So a municipal corporation cannot be authorized to tax the citizens for the support of a school, hospital, or library, although its doors are open to the public and a great number of persons will participate in the advantages which it confers, unless it is a public agency, or controlled and managed by the state. The power would seemingly be limited, though there were no express prohibition. It is inherent in the idea of taxation that it should be for the public good; and a law taxing one set of men for the benefit of another, or in furtherance of an industrial enterprise in which

they were engaged, would be regarded as confiscation in all civilized countries. . . . Schools, almshouses, and hospitals occupy an intermediate position, and may be public or private uses, according to circumstances. When controlled by the commonwealth, and open to all who need such aid, they are public uses, and may be endowed and sustained by taxation; but it cannot properly be employed for the support of any institution, however admirable or useful, which is in the hands of private persons who are not accountable to ¹⁶¹ the government": 1 Hare's American Constitutional Law, 280, 284; citing, among other cases, *Loan Assn. v. Topeka*, 20 Wall. 655; *Lowell v. Boston*, 111 Mass. 454; 15 Am. Rep. 39; *St. Mary's Industrial School v. Brown*, 45 Md. 310. To the same effect: *Philadelphia Assn. v. Wood*, 39 Pa. St. 73; *Hitchcock v. St. Louis*, 49 Mo. 484; *State v. Osawkee*, 14 Kan. 418; 19 Am. Rep. 99. The Massachusetts case cited appealed strongly to the generosity of the people, as the legislative enactment authorized Boston to aid in rebuilding portions of the city destroyed by the great fire of 1872; but the act was held to be unconstitutional and void. The Kansas case made a similar appeal, and involved the validity of a legislative enactment authorizing townships to provide "the destitute citizens of such townships with provisions, and with grain for seed and feed"; but the act was held to be unconstitutional and void, as not being for a public purpose. The opinion in that case was written by Justice Brewer, now a justice of the supreme court of the United States; and it is not only instructive, but, as we think, unanswerable.

Three cases are cited involving the validity of statutes somewhat similar to the one in question. The Maryland act was broadly distinguishable from the one at bar, and was held valid: *Mayor etc. v. Keeley Inst.*, 81 Md. 106. The Colorado act was more like ours, and it was held, in effect, that one who "is financially unable to pay for the treatment of such disease" belongs to a class of "poor who have become helpless and unable to care for themselves," and hence "within the governmental functions of the state," and the act was valid: *In re House*, 23 Colo. 87. The case is not made to turn upon the questions we have considered, and we cannot regard it as authority in the case at bar. The Minnesota case is made to turn upon the delegation of power, and the law is held to be invalid: *Foreman v. Hennepin Co.*, 64 Minn. 371.

¹⁶² But it is unnecessary to continue the discussion. For the reasons given, we hold the act in question unconstitutional and void.

By the Court. The order of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

TAXATION—PRIVATE BUSINESS ENTERPRISES.—Taxation cannot be imposed for the purpose of establishing, aiding, or maintaining private business enterprises whose sole object is the private emolument of the proprietors, no matter how beneficial to the community such enterprises may be: See monographic note to Zigler v. Menges, 16 Am. St. Rep. 370, on what purposes justify the imposition of taxes or assessments: New Orleans v. Telephone etc. Co., 8 Am. St. Rep. 510, on what is a tax, and what impositions may be sustained as an exercise of the taxing power.

LEHMANN v. FARWELL.

[95 WISCONSIN, 185.]

ACTIONS—PERSONAL INJURIES—SURVIVAL—ASSIGNMENT.—Under the statutes of Wisconsin, a cause of action for a personal injury survives and is, therefore, assignable before judgment.

ASSIGNMENT—CAUSE OF ACTION FOR PERSONAL INJURIES.—A husband, who is indebted to his wife, and who obtains a verdict in an action for personal injuries, may lawfully assign his cause of action to her, after verdict but before judgment, to the extent of his actual indebtedness to her.

ATTACHMENT—GARNISHMENT—CLAIM FOR PERSONAL INJURIES.—A liability contingent on a future, uncertain event is not subject to garnishment. The garnishee is not liable, unless, at the time of service of process, his liability to the principal defendant is absolute. Hence a mere claim for personal injuries is not the subject of garnishment until after judgment. It cannot be garnished after verdict and before judgment.

Garnishee action. The main defendant, Hubert Deuster, on May 24, 1893, obtained a verdict for fifteen hundred dollars against the garnishee defendant, the Milwaukee Street Railway Company, for personal injuries. Before judgment was entered on the verdict, Deuster, on May 25, 1893, and before any garnishment papers were served, assigned his right of action to his wife, to whom he owed the sum of six hundred and twenty-two dollars; and later, upon the same day, but still before the entry of judgment, garnishee process was served on the railway company at the suit of Henrietta Lehmann, the plaintiff in this action, who was one of Deuster's creditors. Judgment was not entered on the verdict in the damage suit until June 20, 1893. The judgment against the railway company was affirmed on appeal, and on May 25, 1895, it, as garnishee, deposited in court the sum of seventeen hundred and fifty-one dollars and fifty-one cents, the amount of the judgment at that time. On June 22, 1893, the intervening defendants, Farwell and others, composing the firm of Farwell & Co., commenced an action against Deuster to recover more than eight hundred dollars, and served garnishee process on the railway company. After the affirmance of the

Deuster judgment, all of the garnishee creditors obtained judgments against Deuster, and, by appropriate proceedings, were brought into this action, after the garnishee defendant had paid into court the amount of the judgment obtained against it by Deuster. Caroline A. Deuster was also made a party to this action on her own petition. The attorneys of Deuster, in his damage suit, were, by agreement of all parties in this action, paid one-third of the deposit, which left in the hands of the clerk of the superior court the sum of eleven hundred and thirteen dollars and eight cents, which was the subject of this litigation. The trial court found that at the time of the service of the plaintiff's garnishee process the garnishee was not indebted to Hubert Deuster in any sum. The trial court's disposition of the money appears in the opinion. From its judgment, the plaintiff Henrietta Lehmann appealed, the defendant Caroline A. Deuster, appealed, and the defendants John V. Farwell & Co. appealed.

Sylvester, Scheiber, Riley & Orth, for the appellant Henrietta Lehmann.

Julius E. Roehr, for the appellant Caroline A. Deuster.

Haring & Frost, for the appellant Farwell & Co.

¹⁸⁸ WINSLOW, J. An action for personal injuries resulting from negligence was tried, and a substantial verdict rendered for the plaintiff. Before judgment on the verdict, the plaintiff assigned his right of action to his wife; and later, upon the same day and still before the entry of judgment, garnishee process was served on the defendant, at the suit of one of the plaintiff's creditors. The crucial questions in the case are simply: 1. Whether, before judgment, the cause of action was assignable; and 2. Whether before judgment, the defendant could be effectively garnished.

¹⁸⁹ 1. If the cause of action survived it was assignable: *Webber v. Quaw*, 46 Wis. 118. It is well understood that such an action does not survive at common law; hence the question is whether it survives under section 4253 of the Revised Statutes, as amended by chapter 280 of the Laws of 1887. That section reads as follows, the amendments of 1887 being printed in italics: "In addition to the actions which survive at common law, the following shall also survive, that is to say: actions for the recovery of personal property or the unlawful *withholding and* conversion thereof, actions for assault and battery or false imprisonment, *or other damage to the person*, or for goods taken and carried away, and actions for damages done to real and personal estates. *All equitable actions to set aside conveyances of real estate, or to compel*

a reconveyance thereof, and all actions for a specific performance of contracts relating to real estate." The question whether the section, as changed by the act of 1887, includes a cause of action for personal injuries resulting from negligence, has not been decided by this court. It was raised in *Hiner v. Fond du Lac*, 71 Wis. 74, but expressly left undetermined. Under a statute in almost identical terms, in Massachusetts, such a cause of action was held to be included: *Norton v. Sewall*, 106 Mass. 143; 8 Am. Rep. 298. It was there said that the words "include every action the substantial cause of which is bodily injury": See, also, *Cutter v. Hamlen*, 147 Mass. 471. The language of the Massachusetts statute was, "actions of replevin, of tort for assault, battery, imprisonment, or other damage to the person." The only difference in the two sections which is material to the present inquiry is, that the Massachusetts statute rather unnecessarily refers to the action as a "tort action." This adds nothing and takes away nothing from the meaning of the words. It does not seem to us that there is any room for mere construction. The words of the statute are plain. They are to the effect that an action for assault and battery, false imprisonment, or other damage to the person, shall ¹⁹⁰ survive. The injury resulting from being run over by a street-car is certainly "other damage to the person," and it is damage of the same character as the damage resulting from an assault and battery; that is, it is physical pain and suffering. We are referred to no other statutes of this character, save the Massachusetts statute. The amendment of 1887 incorporated the words of that statute in our own after they had received a construction there. It might be argued that we took the law with the construction. But whether this be so or not, the construction seems to us entirely reasonable and logical, and we adopt it.

The cause of action being assignable before judgment, the only remaining question in regard to the claim of Mrs. Deuster was whether she received the assignment in good faith, for a bona fide indebtedness. On this we find sufficient evidence to justify the findings of the trial judge; and we shall not disturb them, either on her appeal, or on the appeals of the other appellants.

2. The second question is whether a mere verdict in a purely tort action creates a liability which can be garnished. The garnishee is not liable unless at the time of the service of process his liability to the principal defendant is absolute: *Rev. Stats., sec. 2768; Vollmer v. Chicago etc. Ry. Co.*, 86 Wis. 305. The question of liability or not is fixed at the time of the service of process, and it must then be absolute, though, perhaps, payable

subsequently. If, however, the liability is contingent on a future, uncertain event, it is not subject to garnishment: *Edwards v. Roepke*, 74 Wis. 571; *Dowling v. Lancashire Ins. Co.*, 89 Wis. 96. A mere claim for personal injuries is not the subject of garnishment: *St. Joseph Mfg. Co. v. Miller*, 69 Wis. 389. The verdict does not turn it into a debt, nor into an absolute liability. That must be done, if at all, by the judgment. No matter how long a verdict remained on the records of the court, no action could ever be maintained upon it: *Thayer v. Southwick*, 8 Gray, 191 229; *Rood on Garnishment*, sec. 152. The case of *Jones v. St. Onge*, 67 Wis. 520, is claimed to support the contrary doctrine. While there may be language in the opinion in that case which would tend to support the theory that a mere verdict in a tort action is subject to garnishment, the case itself was evidently rightly decided upon another ground. In that case the garnishee had been sued in replevin for certain logs by the main defendant and the verdict rendered was that St. Onge, the main defendant, was the owner of the logs, and that the garnishee unlawfully withheld possession of them, and fixed their value. After verdict and before judgment, the garnishment papers were served. It was plainly a proper case for garnishment, because the garnishee had property of the main defendant in his hands, or was indebted to him therefor, at the time process was issued. In fact, the verdict neither helped nor hindered the liability of the garnishee. He would have been liable had no suit been pending at all, because he had property of the main defendant in his hands at the time the garnishee process was served, or was indebted to the main defendant to the amount of the value of such property. So far as the St. Onge case seems to justify the doctrine that a mere verdict in an action to recover damages for personal injuries is the subject of garnishment, we cannot follow it. It follows that the plaintiff's garnishment must fail, because she garnished after verdict and before judgment, and the Farwell & Co. process becomes the first lien upon the moneys in court after the claim of Mrs. Deuster is paid. These were the conclusions reached by the court below.

By the Court. Judgment affirmed.

ACTIONS—ASSIGNMENT OF RIGHT OF ACTION IN TORT.—

Mere personal torts that die with the party and do not survive to the personal representatives are not capable of passing by assignment. Conversely, a cause of action which does survive to a personal representative can be enforced in the name of the assignee: *Slauson v. Schwabacher*, 4 Wash. 783; 31 Am. St. Rep. 948, and note showing that a claim for damages arising from a personal injury is not assignable. See extended note to *Boor v. Lowrey*, 53 Am. Rep. 525-539, on survival and abatement of actions.

ATTACHMENT—ASSIGNMENT—TORT.—A debt is not subject to garnishment unless it is due absolutely: Note to Hancock v. Colyer, 96 Am. Dec. 731. A liability for a tort may be assigned so as to give the assignee a priority over an attaching creditor of the assignor: Weire v. Davenport, 11 Iowa, 49; 77 Am. Dec. 132.

WOLFF v. BLUHM.

[95 WISCONSIN, 257.]

DURESS—WHAT CONSTITUTES—THREAT OF PROSECUTION.—It is not the threat of criminal prosecution in any case that constitutes duress, but the condition of mind produced thereby. The threat must be of such a nature, and made under such circumstances, as to constitute a reasonably adequate cause to control the will of the threatened person, and must have that effect, and the act sought to be avoided must be performed by the person while in such condition.

DURESS—WHAT IS NOT—THREAT OF PROSECUTION.—If a married man unlawfully causes a girl fifteen years of age to become pregnant, a mere threat by the girl's father to prosecute him criminally, unless he gives a note and mortgage to provide for the care of the girl and her child, followed by the execution of the papers several days afterward, and after the seducer's consultation with friends, who advised him to settle, does not constitute duress which will avoid the instruments.

Action to foreclose a mortgage, given under the circumstances detailed in the opinion. Bluhm, the defendant, was charged by the father of one Ida Nell, a young girl fifteen years of age, and unmarried, with being the father of a child with which she was pregnant. A note and mortgage were given by Bluhm and his wife as a provision for the girl and her child. The note was not paid. Hence, this action was brought. The defense was that the note and mortgage were obtained by duress and were void on that account. Judgment was entered canceling the note and mortgage, and the plaintiff appealed.

Simon Gillen and Martin Hughes, for the appellant.

C. H. Maynard and M. C. Mead, for the respondents.

258 MARSHALL, J. The sole question here is, Does the evidence warrant the finding that the note and mortgage were obtained by duress? That Gottfried Bluhm was the father of the child with which the girl, Ida Nell, was pregnant, that he was so charged, and was threatened with criminal prosecution unless he gave such note and mortgage to provide for the care of the girl and the child, and that he complied with such demand, appears by the findings, and is well supported by the evidence; yet all this does not necessarily constitute duress. The evidence shows

that William Nell, the father of the girl, went to Bluhm's house, June 17, 1894, and accused the latter of having been intimate with his daughter, and demanded five hundred dollars to settle the matter, stating that unless such sum was paid he (Bluhm) would be sent to Waupun; that Bluhm, the same day, talked the matter over with the girl and her father; that she would not say anything about it; that Nell, after seeing Joseph Klahn, proposed to Bluhm that he should pay three hundred dollars, stating that Klahn would pay two hundred dollars; that, on the twentieth day of June, Bluhm talked the matter over with August Wolff, a member of the board of supervisors of the town, who advised him that he might be sent to Waupun, and that he had better settle, or go and see a lawyer and be guided by him; that ²⁵⁰ on the twenty-first day of June, Bluhm visited L. A. Bartlett, a merchant at Cascade, and advised with him respecting the matter, the result of which was that Bartlett advised a settlement, and thereupon the settlement complained of was arranged, under Bartlett's direction, at whose suggestion Mr. Wolff was made trustee for the benefit of the girl and Nell, who proposed taking care of her and the child. The note and mortgage were executed to consummate such settlement. Bluhm had plenty of time, it will be observed, and the amplest opportunity, to consult with disinterested friends and with a lawyer, if he desired, before coming to a conclusion. It is very clear to our minds that he did not act under duress. His will was not overcome, in a legal sense. He was free to do as he saw fit at all times—to come and go as he chose; and, after being fully advised, so far as he desired, by his own friends and neighbors, he executed the papers in suit. Duress exists when one, by the unlawful act of another, is induced to make a contract, or to forego some act, under circumstances which deprive him of the exercise of his free will: 6 Am. & Eng. Ency. of Law, 64-69; City Nat. Bank v. Kusworm, 91 Wis. 166. It is not the threat of criminal prosecution in any case that constitutes duress, but the condition of mind produced thereby. The threat must be of such a nature, and made under such circumstances, as to constitute a reasonably adequate cause to control the will of the threatened person, and must have that effect, and the act sought to be avoided must be performed by such person while in such condition. A threatened lawful arrest or prosecution, which does not imply harsh or unusual use of criminal process, and where no warrant has been issued and there is no danger of the threat being immediately carried out, does not constitute duress: Harmon v. Harmon, 61 Me. 227; 14 Am. Rep. 556; Higgins v. Brown, 78 Me. 473; Landa v. Obert, 45 Tex. 539.

In view of the foregoing, obviously, there is an entire failure ²⁰⁰ of evidence in this case to support the finding of the trial court that the note and mortgage were obtained by duress.

By the Court. The judgment of the circuit court is reversed, and the cause remanded, with directions to render judgment in favor of the plaintiff according to the prayer of the complaint.

DURESS, WHAT IS AND WHAT IS NOT.—It is not duress for one who believes that he has been wronged to threaten the wrongdoer with a civil suit; and, if the wrong includes a violation of the criminal law, it is not duress to threaten him with a criminal prosecution: *Hilborn v. Bucknam*, 78 Me. 482; 57 Am. Rep. 816. Threats of prosecution do not constitute duress unless the will of the person threatened is controlled thereby: *Note to Eadie v. Slimmon*, 82 Am. Dec. 400. But duress exists when there is a fear of imprisonment incited by threats: *Cribbs v. Sowle*, 87 Mich. 340; 24 Am. St. Rep. 166. Compare monographic note to *Hatter v. Greenlee*, 26 Am. Dec. 374-378, on what is and what is not duress.

McMAHON v. IDA MINING COMPANY.

[95 WISCONSIN, 308.]

MASTER AND SERVANT—NEGLIGENCE—DANGEROUS PLACE TO WORK.—A master is bound to furnish the servant a reasonably safe place in which to work, considering the nature of the work. He is not to set a man at work among latent and extraordinary dangers, of which the employé knows nothing, and which he cannot ascertain by experience or observation.

MASTER AND SERVANT—NEGLIGENCE—DANGEROUS PLACE TO WORK.—If a "shift boss" in a mine, whose duty it is to direct miners where to work, knows of a concealed danger in the mine, such as an unexploded blast of dynamite, but puts a miner, ignorant of such danger, at work in the place where such danger is concealed, without notifying him of it, and the miner is unable, with ordinary care, to ascertain such danger, the master is liable for an injury to the miner caused by an explosion of the blast while he is at work in such place, although his own act caused it to go off, as the shift boss plainly and palpably acted in the capacity of master in directing the miner to work there.

Action to recover damages for personal injuries received by the plaintiff while at work as a miner in the defendant's lead and zinc mine, by the discharge of a blast of dynamite. It was alleged in the complaint that the plaintiff was set to work by a shift boss in a certain part of the mine where there were concealed unexploded blasts known to the shift boss, but not to the plaintiff; and that, in ignorance of the danger, the plaintiff was injured by the explosion of one of these concealed blasts, while he was drilling and preparing for a blast. The mine was about one hundred feet below the surface of the ground, in solid rock,

and in it there were drifts. In the forehead of these drifts holes were drilled by steam power. These holes were then charged with dynamite, which was exploded by electricity, several such blasts being frequently discharged simultaneously. They were sometimes drilled so deep that the explosive power of the dynamite was insufficient to rend the rock, and the force of the explosion was not, therefore, observable at the mouth of a hole where this was done. Holes in which a blast had been fired, but had not apparently rent the rock, were called "butts," or the "butt end" of a hole. McMahon was an experienced miner, and had worked for the company about one month before the accident occurred. It appeared from the evidence that one Thomas Cadden was also an employé of the company when the accident occurred and was what is termed a "shift boss." His duties were to direct the men in the mine where to work. He had loaded six holes in the forehead of a certain drift with dynamite, and made an effort to explode them by electricity, but, after the blasts had been fired, there were three holes that had wires sticking out of them. This was evidence that the charges in those three holes had not exploded. Nothing further was done for about sixteen days, when the shift boss put McMahon and one Hugh Cadden at work upon the forehead where the accident happened. McMahon testified that he did not hear the shift boss say anything about unexploded blasts, but Hugh Cadden testified that the shift boss said that there were two unexploded blasts there, and that they must look out for them. Two holes were found by the workmen, which had wires sticking out of them, and concluded that they were unexploded blasts. They carefully scraped up the tamping, put in some more dynamite, and fired them. It appeared that there were no other holes in the face of the drift which had wires sticking out of them. They quit work, after firing these two blasts, and returned to the same place on the following day. Several "butts" of holes were found in the face of the drift, but there was no way to distinguish them from holes in which no blast had been fired. The workmen found a hole without any wires sticking out of it, and concluded that it had been fired unsuccessfully. They proceeded, therefore, to scrape out the contents of it so far as possible, and, finding it in the proper place for a blast, started to drill it deeper, when the dynamite exploded and seriously injured the plaintiff. This hole, of course, contained the other unexploded blast. The plaintiff was nonsuited and appealed.

Orton & Osborn and J. B. Simpson, for the appellant.

Spensley & McIlhon and Aldro Jenks, for the respondent.

³¹¹ WINSLOW, J. The nonsuit is attempted to be justified on the ground that the shift boss was a coemployé, and that thus the plaintiff's injury resulted from the negligence of a coemployé. There is little or no dispute as to the principles of law on the subject, but the difficulty is in the application of the law. In *Cadden v. American Steel Barge Co.*, 88 Wis. 409, it is correctly said: "In *Dwyer v. American Exp. Co.*, 82 Wis. 307, 33 Am. St. Rep. 44, it was held that the question whether different employés of the same master are to be regarded as fellow-servants in a common employment depends upon the nature of the act in the performance of which the injury was inflicted, without regard to the rank of the negligent servant, and that the master is not liable unless the negligent act pertained to a matter in respect to which he owed a direct duty to the servant injured." So the question here is simply whether the shift boss, Cadden, in sending the plaintiff to work in a new part of the mine, where there was a concealed danger of which he (the shift boss) knew, but the plaintiff did not, was performing a duty of the master. A master is bound to furnish the servant a reasonably safe place in which to work, considering the nature of the work. He is not to set a man at work among latent and extraordinary dangers, of which the employé knows nothing, and which he cannot ascertain by experience or observation. In taking the plaintiff from one part of the mine in which he had been at work and setting him at work in a different place, the shift boss was plainly and palpably acting in the capacity of master. The evidence tends to show that he knew of a concealed and terrible danger in the place, of which he did not inform the plaintiff, and that the plaintiff could not, in the exercise of ordinary care, ascertain the existence of that ³¹² danger. We entertain no doubt of the sufficiency of this evidence to take the case to the jury. Further evidence may, perhaps, show that the risk was a common and ordinary one in a mine of this character, and so was assumed by the plaintiff, or that the plaintiff should have known from the appearance of the hole that it contained the unexploded blast, but neither of these facts now appears so clearly that the court is justified in taking the case from the jury.

By the Court. Judgment reversed, and action remanded for a new trial.

MASTER AND SERVANT—SAFE PLACE TO WORK.—It is the master's duty to furnish his employés a reasonably safe place in which to work. If he puts them in an insecure and dangerous place, and injury is suffered by the workmen, the master is answerable: Note to *Petala v. Aurora Iron Min. Co.*, 58 Am. St. Rep. 511; *Elledge v. National City etc. Ry. Co.*, 100 Cal. 282;

38 Am. St. Rep. 290; notes to *Boss v. Northern Pac. R. R. Co.*, 33 Am. St. Rep. 766; *Orman v. Mannix*, 31 Am. St. Rep. 349. When the master directs his servant to perform some service to which a particular risk is attached, which is not patent and open to the observation of any person exercising reasonable care, it is his duty to inform the workman of it, and caution him against it: Note to *Orman v. Mannix*, 31 Am. St. Rep. 349.

MENZ v. BEEBE.

[95 WISCONSIN, 383.]

ACTIONS—WEAK AND FEEBLE-MINDED PERSON—CAPACITY TO SUE.—At common law, and in the absence of a statute to the contrary, a weak and feeble-minded person of full age may bring an action in his own name, and appear by attorney.

ACTIONS—WEAK AND FEEBLE-MINDED PERSON—CAPACITY TO SUE.—Unless prohibited by statute, a weak and feeble-minded person may sue in his own name, without a guardian ad litem, to set aside an exchange of property fraudulently procured from him by the defendant; and there is no such prohibition in the statutes of Wisconsin. The statement in his complaint that he is "of a weak and feeble mind, and not of sufficient mental capacity to attend to ordinary business transactions, or to protect and preserve his property rights," is no impediment to the action.

ACTIONS—CAUSES ARE NOT MISJOINED, WHEN.—In an action against two defendants to rescind an exchange of lands made by the plaintiff, the complaint does not misjoin causes of action but states only one cause where it alleges that one of the defendants fraudulently induced the plaintiff to exchange Wisconsin land for Tennessee land, by false representations as to the title and quality of the latter, and by taking advantage of the plaintiff's mental incapacity; that said defendant, by a land contract, sold the Wisconsin land received by him in such exchange to the other defendant, who took it with knowledge of the facts; and that both defendants threaten to sell or encumber the land so as to prevent the plaintiff from collecting any judgment he may obtain.

Action by Menz, a feeble-minded person, against Beebe and Behn, to rescind an exchange of land fraudulently obtained by them from him. He sued in his own name without a guardian ad litem, and stated in his complaint that he was of "a weak and feeble mind, and not of sufficient mental capacity to attend to ordinary business transactions, or to protect and preserve his property rights." He alleged in his complaint, in substance, that the defendant, Beebe, fraudulently induced him to exchange land in Wisconsin for land in Tennessee, by taking advantage of his mental incapacity and by making false representations as to the quality and title of the land in Tennessee; that Beebe, by a land contract, sold the Wisconsin land conveyed by the plaintiff to him, in pursuance of the contract of exchange, to the defendant, Bohn, who took it with knowledge of the facts; that each of

the defendants threatened to sell or encumber his interest in such land so as to prevent the plaintiff from collecting any judgment he might obtain; and that they would do so unless enjoined. One ground of demurrer to the complaint was that the plaintiff had not legal capacity to sue, by reason of his being weak, feeble-minded, and incompetent, and could, therefore, only sue by a guardian ad litem duly appointed; and another ground of demurrer was that several causes of action were improperly united. The grounds of demurrer were overruled, and the defendants appealed.

G. S. Martin and Bushnell, Rogers & Hall, for the appellants.

G. W. & H. S. Bird, for the respondent.

³⁸⁷ CASSODAY, C. J. The mere fact that the complaint states that at the times mentioned the plaintiff was "of a weak and feeble mind, and not of sufficient mental capacity to attend to ordinary business transactions, or to protect and preserve his property rights," did not prevent him from commencing and maintaining this action. "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 2607" of the Revised Statutes: Rev. Stats., sec. 2605. The section thus referred to provides that: "An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted": Rev. Stats. sec. 2607. "When an infant is a party, he must appear ³⁸⁸ by guardian": Rev. Stats., sec. 2613. Section 2614 of the Revised Statutes prescribes how such guardian for an infant shall be appointed. Where an insane defendant is without a guardian, "the court or a judge thereof shall appoint a guardian of him for the action": Rev. Stats., sec. 2615. The same section provides that: "If, during the pendency of any action, either party shall become or prove to be insane, the action may be prosecuted or defended by his guardian, in like manner as if it had been commenced after the appointment of the guardian, or the court, or judge, may appoint a guardian for the action as the case may require." "Such guardian for the action may be appointed upon the application of any party thereto, or of any relative or friend of such insane party," etc: Rev. Stats., sec. 2616. It is stated in the brief of counsel for the plaintiff that "these are the only statutes of this state requiring parties to appear in the circuit court by guardian ad litem," and counsel for the defendants fails to cite any other statute, and we find none. True, as conceded by counsel for the plaintiff, there are other statutes providing

for the appointment by the county court, under certain circumstances, of guardians of insane persons, and of persons mentally incompetent to have the care and management of their own property, and drunkards or spendthrifts: Sanborn and Berryman's Annotated Statutes, secs. 3976-3982. But none of these statutes preclude the plaintiff from commencing and maintaining this action upon the facts stated. Nor is there anything in rule 9 of the circuit court, cited by counsel, which prevents him from doing so. Since there is no statute requiring this action, upon the facts stated, to be commenced by guardian, there seems to be no reason why the plaintiff should not appear by his attorneys, and prosecute the action in the name of himself, as the real party in interest: Rev. Stats., sec. 2605. Of course, if the plaintiff becomes or proves to be insane, then, under a statute cited, "the court or judge may appoint a guardian for the action, as the case may require": Rev. Stats., ³⁸⁹ sec. 2615. The trial court may be relied upon to protect the rights of all parties, and appoint a guardian whenever it is necessary. Besides, the authorities cited by counsel for the plaintiff are to the effect that at common law, and in the absence of a statute to the contrary, a weak and feeble-minded person of full age may bring an action in his own name, and appear by attorney, and not by guardian ad litem: *Faulkner v. McClure*, 18 Johns. 134; *Petrie v. Shoemaker*, 24 Wend. 85; *Cameron v. Pottinger*, 3 Bibb, 11; *Reed v. Wilson*, 13 Mo. 28; *Green v. Kornegay*, 4 Jones, 66; 67 Am. Dec. 261; *Chicago etc. R. R. Co. v. Munger*, 78 Ill. 300. We are cited to no other authorities to the contrary. The objections that the plaintiff has not the legal capacity to sue, and that there is a defect of parties plaintiff, are not well taken.

It is equally clear that several causes of action are not improperly united. There is but a single cause of action stated, and that is to rescind the trade, and to restore to the plaintiff, as far as possible, the property wrongfully taken from him, and to give him damage so far as he has wrongfully been deprived of his rights. The complaint states a good cause of action.

By the Court. Both orders of the circuit court are affirmed.

WEAKNESS OF MIND, though it renders a person incapable of managing his affairs, does not deprive him of the power of governing himself: *In re Lindsley*, 44 N. J. Eq. 564; 6 Am. St. Rep. 913.

STATE v. BURDGE.

[95 WISCONSIN, 390.]

BOARDS OF HEALTH—COMPULSORY VACCINATION—PUBLIC SCHOOLS.—In the absence of a statute authorizing compulsory vaccination, or of one requiring vaccination as one of the conditions of the right or privilege of children to attend the public schools, a rule adopted by a state board of health, excluding from public and other schools all school children who do not present certificates of vaccination, is not a valid exercise of the rightful powers of the board.

BOARDS OF HEALTH—POWERS—DELEGATION OF LEGISLATIVE POWER.—A state board of health is a creation of the statute, and has only such power as the statute confers. It has no legislative power and none can be delegated to it. It is purely an administrative body.

BOARDS OF HEALTH—UNAUTHORIZED DELEGATION OF POWER.—A statute authorizing a state board of health to make such regulations as may, in its judgment, be necessary for the protection of the people from dangerous, contagious diseases, and giving it power to designate what diseases are "contagious," or "dangerous" to the public health, is a delegation of legislative power not authorized by the constitution.

BOARDS OF HEALTH—POLICE POWER—UNREASONABLENESS OF RULE AS TO VACCINATION.—Conceding that a state board of health has power to make a rule excluding from the public schools children who do not present certificates of vaccination, such a rule is not a valid exercise of the police power of that board, but void, on account of its unreasonableness and extraordinary character, where, at the time of its adoption, there is no apparent or immediate necessity for its existence; and no such necessity for the enforcement of a rule of that kind, in a particular locality, is shown by the existence of a few cases of smallpox scattered throughout the state, and of but one in the locality, which has been properly quarantined, if there is no epidemic of smallpox existing in the state.

Mandamus to compel the defendants, Burdge and others, who composed the school board of the city of Beloit, to permit three children of the relator, Adams, to attend the public schools of said city, from which they had been expelled and excluded on the ground that they had not been vaccinated with virus, as a preventive of smallpox. The defendants justified under a rule made by the state board of health, in the absence of any statute authorizing compulsory vaccination or requiring vaccination as one of the conditions of the right or privilege of attending the public schools, whereby every child of school age, throughout the entire state, that had not been vaccinated, was excluded from the common schools, and forbidden to be enrolled as a pupil, or to attend school, without a certificate of vaccination; and it was provided by the rule in question that it should be enforced by the proper school authorities in their respective localities. This rule

professed, upon its face, to be made under section 1409 b of the Wisconsin statutes, discussed in the opinion. The court granted a peremptory writ of mandamus, with judgment accordingly, and the defendants appealed.

J. C. Rood and Ruger & Norcross, for the appellants.

Fethers, Jeffris, Fifield & Mouat, for the respondent.

³⁹⁶ PINNEY, J. 1. The legality of the action of the defendants, constituting the school board of the city of Beloit, in expelling and excluding the relator's three children from the ³⁹⁷ public schools in that city, which they were and had been respectively attending, and which they had a lawful right to attend, is attempted to be justified by the rule adopted by the state board of health of January 26, 1894, and as modified in June, 1894, after this proceeding had been commenced. The defendants were acting only under the supposed authority of the rule of the state board of health, and this presents the question of the power of the board to adopt and cause such rule to be enforced. By section 1407 of the Revised Statutes, the state board of health is vested with "a general supervision throughout the state of the interests of the health and life of citizens," and directed to make certain investigations, and "voluntarily, or when required, advise public boards or officers," in regard to divers matters affecting the public health. By section 1408 the board was "to have charge of all matters pertaining to quarantine," and might, from time to time, "make general or local rules and regulations for the preservation or improvement of the public health not inconsistent with law, or those prescribed by local authorities pursuant to law," and "all sheriffs, constables, police officers, and all other officers and employés of this state, are required to respect and enforce the same, in every particular affecting their respective localities or duties." By sections 1409 a, 1409 b, of Sanborn and Berryman's Annotated Statutes, an annual appropriation of fifteen thousand dollars was made as a contingent fund, which might be used, under the conditions and restrictions of section 1409 b, "to prevent the introduction of Asiatic cholera, smallpox, or other dangerous contagious diseases into this state, or the suppression and control of such disease, if the same shall be found already existent within the state." By section 1409 b, the state board of health, the more effectually to protect the public health, was authorized to establish such systems of inspection as in its judgment might be necessary to ascertain the presence of the infection of Asiatic cholera or other dangerous contagious diseases, and to put the

³⁹⁸ same in force, and might, "from time to time, make, alter modify, or revoke rules and regulations for guarding against the introduction of contagious diseases into the state; for the control and suppression thereof, if within the state; for the quarantine and disinfection of persons, localities, and things infected, or suspected of being infected, by such diseases; . . . for the proper sanitary care of jails, asylums, schoolhouses, . . . and the premises connected therewith, . . . and may declare any or all of its rules in force within the whole state, or within any specified part thereof; . . . and in general the state board of health shall have power, and it shall be its duty, to make such rules and regulations, and to take such measures as may in its judgment be necessary for the protection of the people of the state from Asiatic cholera, or other dangerous contagious diseases." By section 1409 c it is provided that "any person who shall neglect or refuse to obey the said rules and regulations, or who shall willfully obstruct or hinder the execution thereof, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished for each offense by a fine of not less than twenty-five dollars, and not more than five hundred dollars, or by imprisonment in any county jail for a period of not more than six months, or by both fine and imprisonment, in the discretion of the court."

The police power of the state is relied on to support the rule in question. This power has been defined in varying language, but of substantially the same general import. "All laws for the protection of life, limb, and health, for the quiet of the person, and for the security of property," fall within the general police power of the government. "All persons and property are subjected to all necessary restraints and burdens, to secure the general comfort, health, and prosperity of the state"; and it has been said that "it is coextensive with self-protection, and is not inaptly termed 'the law of overruling necessity.' It is that inherent and ³⁹⁹ plenary power in the state which enables it to prohibit all things hurtful to the comfort and welfare of society": Tiedeman's Limitation of Police Power, 2-5; Cooley's Constitutional Limitations, 572; Redfield, C. J., in *Thorpe v. Rutland etc. R. R. Co.*, 27 Vt. 140; 62 Am. Dec. 625; *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 192; 22 Am. Rep. 71; *State v. Noyes*, 47 Me. 189. As the police power imposes restrictions and burdens upon the natural and private rights of individuals, it necessarily depends upon the law for its support; and, although of comprehensive and far-reaching character, it is subject to constitutional restrictions, and, in general, it is the province of the lawmaking

power to determine in what cases or upon what conditions this power may be exercised. As applied to the present case, the relator had a right, secured by statutory enactment, to have his children continue to attend the city schools in which they were respectively enrolled as pupils, and they, too, had a right to so attend such schools. Whether it be called a right or privilege cannot be important, for in either view it was secured to the relator, and to his children as well, by the positive provisions of law, and was to be enjoyed upon such terms and under such conditions and restrictions as the lawmaking power, within constitutional limits, might impose.

There is no statute in this state authorizing compulsory vaccination, nor any statute which requires vaccination as one of the conditions of the right or privilege of attending the public schools; and, in the absence of any such statute, we think it cannot be maintained that the rule relied on is a valid exercise of the rightful powers of the state board of health. The state board of health is a creation of the statute, and has only such power as the statute confers. It has no common-law powers. To lawfully exclude the relator's children from the city schools for the cause relied on required such a change in the existing law as the legislature alone could make, a change that should make vaccination of pupils ⁴⁰⁰ compulsory, or, at least, prescribe it as a condition of the right or privilege of attending the public schools generally or during the occurrence of certain emergencies, or upon the happening of certain contingencies or conditions, in respect to the prevalence of smallpox. The powers of the state board of health, though quite general in terms, must be held to be limited to the enforcement of some statute relating to some particular condition or emergency in respect to the public health, and, although they are to be fairly and liberally construed, yet the statute does not, either expressly or by fair implication, authorize the board to enact a rule or regulation which would have the force of a law changing the statute in relation to the admission and the right of pupils of a proper school age to attend the public schools. The state board of health had no legislative power, properly so called, and none could be delegated to it. It is purely an administrative body. The powers of the state government are vested in three departments, the legislative, to enact the laws, the executive, to execute them, and the judicial, to declare, construe, and apply them. The constitution, article 4, section 1, declares that "the legislative power shall be vested in a senate and assembly." That no part of the legislative power can be delegated by the legislature to any other department or

body is a fundamental principle of constitutional law, essential to the integrity and maintenance of the system of government established by the constitution, and repeatedly recognized and asserted by the courts. In the recent case of *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63, we had occasion to examine and apply this principle to an attempt to delegate the power, essentially legislative, to the insurance commissioner, to prepare, approve, and adopt a so-called standard fire insurance policy, the adoption of which would necessarily effect important changes in the law of fire insurance, a delegation of authority which would transfer bodily the legislative power on this subject to the ⁴⁰¹ insurance commissioner. We are satisfied that the conclusions there reached are correct, and sustained by numerous decisions of the highest courts of the country, some of which were there cited.

The application of the views there expressed is, we think, decisive against the validity of the rule under consideration. The language of the statute (Sanborn and Berryman's Annotated Statutes, sec. 1409 b) is very general, and goes to the extent of authorizing the state board of health "to make such rules and regulations and to take such measures as may, in its judgment, be necessary for the protection of the people from Asiatic cholera, or other dangerous contagious diseases," and by section 1409 d it is declared that the term "dangerous and contagious diseases," as used in the act, "shall be construed and understood to mean such diseases as the state board of health shall designate as contagious and dangerous to the public health." The provisions of the statute import and include an absolute delegation of the legislative power over the entire subject here involved, and this, too, without any previous legislative provision for compulsory vaccination, or as a condition of enrollment of children of proper school age as pupils in the public school, or of their right to attend such schools. Without any other legislative authority than the right thus conferred, the state board of health assumed the power to so far control the public schools of the state as to require "the proper school authorities in their respective localities to enforce the rule in question." It cannot be doubted but that, under appropriate general provisions of law in relation to the prevention and suppression of dangerous and contagious diseases, authority may be conferred by the legislature upon the state board of health or local boards to make reasonable rules and regulations for carrying into effect such general provisions, which will be valid, and may be enforced accordingly. The making of such rules and regulations is an administrative function, and not a legislative ⁴⁰² power, but there must first be some sub-

stantive provision of law to be administered and carried into effect. The true test and distinction whether a power is strictly legislative, or whether it is administrative, and merely relates to the execution of the statute law, "is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law." The first cannot be done. To the latter, no valid objection can be made: Per Ranney, J., in *Cincinnati etc. R. R. Co. v. Commrs. of Clinton County*, 1 Ohio St. 88. The same conclusions substantially were reached in *Field v. Clark*, 143 U. S. 650, 681, 694. Where an act is clothed with all the forms of law, and is complete in and of itself, it may be provided that it shall become operative only upon some certain act or event, or, in like manner, that its operation shall be suspended; and the fact of such act or event, in either case, may be made to depend upon the ascertainment of it by some other department, body, or officer, which is essentially an administrative act. There need therefore be no delay or embarrassment in such cases, as the legislature may easily so formulate the act as to adapt it, and make it operative upon any contingency or emergency: *Locke's Appeal*, 72 Pa. St. 491-498; 13 Am. Rep. 716; *Moers v. Reading*, 21 Pa. St. 202; *Blanding v. Burr*, 13 Cal. 358. In the present instance neither method of legislation was adopted, and the fatal vice of the rule, in our judgment, is that there was no precedent or existing law under which it could be framed and adopted as an adjunct or act of administrative authority to effectuate its purposes and carry it into effect: *School Directors v. Breen*, 60 Ill. App. 201. The cases of *Abeel v. Clark*, 84 Cal. 226, and *Bissell v. Davison*, 65 Conn. 183, were sustained by ample legislative authority. In the case of *Duffield v. Williamsport School Dist.*, 162 Pa. St. 476, the authority to exclude from the schools those who had not been ⁴⁰³ vaccinated rested upon an ordinance of the city, but whether there was precedent legislative authority does not appear. The making of such rules and regulations, to carry into effect the provisions of an act of strictly legislative authority, as was said in *In re Griner*, 16 Wis. 423, 434, "no more partakes of legislative power than that discretionary authority intrusted to every department of the government in a variety of cases. This practice of giving discretionary power to other departments or agencies, who were intrusted with the duty of carrying into effect some general provisions of law, had its origin at the adoption of the constitution, and in the action of the first congress under it, as the federal legislation abundantly

shows. But a distinction must be made of those important subjects which must be entirely regulated by the legislature itself from those of less interest in which a general provision may be made. The line has not been exactly drawn which separates those important subjects which must be entirely regulated by the legislature itself from those of less interest in which a general provision may be made, and power given to those who are to act under such general provision to fill up the details." It not unfrequently occurs that provisions are found in legislative enactments which might well have been determined and regulated by some board or body having administrative powers, but it is safe to say, we think, that where the provision in question lies strictly and solely within the domain of legislative authority, in all such cases there can be no delegation of the power to enact it. Our conclusion is, that the rule under consideration could be made operative only as an act of legislative power, and it does not come within the domain of the power to make rules and regulations in aid or execution of some general statutory provision. This view is illustrated by reference to certain of the general provisions contained in section 1409 b, yet of a sufficiently definite character, so that the state board of health, as an administrative ⁴⁰⁴ body, might be authorized to adopt reasonable rules and regulations to carry them into effect. As to the matter of inspections authorized by the act, to ascertain the presence of the infection of Asiatic cholera or other dangerous and contagious diseases, and the power conferred on the inspector to enter any building, vessel, railway car, etc., as well as the quarantine authorized by section 1409, the power of the state board of health to make appropriate rules and regulations to effectuate the general purposes thus declared would seem to be free from doubt: *Hurst v. Warner*, 102 Mich. 238; 47 Am. St. Rep. 525; *Train v. Boston Disinfecting Co.*, 144 Mass. 523-531; 59 Am. Rep. 113; *Health Dept. v. Knoll*, 70 N. Y. 535.

2. The circuit court held that the rule in question was unreasonable, and therefore void; and, had the state board of health possessed the power to make the rule, we agree it would have been void for that reason. The rule was an unreasonable and extraordinary one, and serves to enforce the importance and necessity of a strict adherence to the constitutional rule, that the power to make the law cannot be delegated to any board or body not directly responsible to the people. When the rule in its original form was adopted, there was no epidemic of small-pox existing in the state, but there were a few cases scattered throughout the state. There had been but one case in Beloit,

which had been properly quarantined; and when the substituted rule was adopted in June, 1894, as well as when this proceeding was instituted, there was no epidemic of smallpox in or near the city of Beloit, or approaching it, and the defendant board of education had no belief or apprehension that it was prevalent in Beloit or approaching it. None of the relator's children had been exposed to it or varioloid, and there was no immediate necessity for the rule requiring scholars to be vaccinated. All these facts are established by the findings of the court, the correctness of which as not questioned at the argument; ⁴⁰⁵ and yet, by an arbitrary rule, as by a single stroke of the pen, every child of school age, throughout the entire state, that had not been vaccinated was excluded from the common schools, and forbidden to be enrolled as a pupil, or to attend school, without a certificate of successful vaccination from a reputable physician, or, in lieu thereof, a certificate showing that such child had been vaccinated twice within a period of three months next preceding its application for admission.

There must be, at least, circumstances apparently rendering such a rule or regulation necessary for the preservation of the public health. It would be a very extraordinary condition that would justify such a sweeping and far-reaching exercise of the power to make a rule of the character of the one in question either justifiable or proper, as the statute provides for making rules and regulations of local application only. Whether rules and regulations framed by an administrative body are reasonable or not is a question that may be determined in the courts, and, were there no other question in regard to the validity of this rule, we should feel compelled to declare it void as unreasonable and unnecessary: *Kosciusko v. Slomberg*, 68 Miss. 469; 24 Am. St. Rep. 281; *In re Smith*, 146 N. Y. 68; 48 Am. St. Rep. 769; *School Directors v. Breen*, 60 Ill. App. 201-208.

The question as to the validity of legislation making vaccination of children attending school compulsory is not presented by the record, and in respect to it we express no opinion. Two of the relator's children affected by the rule of exclusion are within the age prescribed for compulsory education of children by chapter 187 of the Laws of 1891; but, as this objection may be obviated by subsequent legislation, there is no occasion now to express any opinion in respect to it.

It follows from these views that the judgment of the circuit court is correct.

By the Court. The judgment of the circuit court is affirmed.

BOARDS OF HEALTH—SCHOOL CHILDREN—VACCINATION—POWER TO COMPEL.—The laws of Illinois do not require vaccination of children as a condition precedent to their attending school. The power to compel vaccination is derived from the general police power of the state. School directors cannot, either under their own rules, or by order of a state board of health, exclude children from school because they are not vaccinated, unless an apparent necessity exists therefor; and a rule compelling vaccination is unreasonable where smallpox does not exist in the community and there is no reasonable cause to apprehend its appearance: *Potts v. Breen*, 167 Ill. 67; 59 Am. St. Rep. 262.

BOARDS OF HEALTH—POWERS—DELEGATION OF POWER. Statutory power conferred on a state board of health to make rules and regulations for the preservation of public health gives it no authority to prescribe conditions under which people may exercise rights and privileges guaranteed by the laws of the state: *Potts v. Breen*, 167 Ill. 67; 59 Am. St. Rep. 262.

HAWKINS v. LUTTON.

[95 WISCONSIN, 492.]

DISORDERLY HOUSES—DEFINITION.—At common law, a disorderly house is one in which the inmates behave so badly as to become a nuisance to the neighborhood, or one kept in such a way as to disturb or scandalize the public generally, or the inhabitants of a particular neighborhood, or the passers-by.

DISORDERLY HOUSES—MEANING OF TERM IN ORDINANCE.—The term "disorderly house," in a city ordinance providing for the punishment of any person found in a "disorderly house, or a house of ill-fame, or a place resorted to for the purpose of prostitution," is not restricted to a house resorted to for the purpose of prostitution, assignation, fornication, gambling, etc., but includes a house in which quarrels, fighting, boisterous, profane, and obscene language, and other things occur, disturbing the repose of the neighborhood and violating public order and tranquillity.

ARREST, WITHOUT WARRANT—BREACH OF THE PEACE.—A city council has power to pass an ordinance authorizing police officers to make arrests of persons engaged in a breach of the peace, in their presence, without warrant; and, as a disturbance or violation of public order is a breach of the peace, a police officer who, from the outside of a house, hears a disturbance, or is made aware of disorderly conduct, within it, may, acting in good faith, under the authority of such an ordinance, enter the house and lawfully arrest the person guilty of such conduct as being an inmate of a disorderly house, for the offense may be fairly said to have been committed in his presence.

APPEAL—NONAPPEALABLE ORDER.—An order denying a motion for a new trial, which motion is founded on the minutes of the court, is not appealable.

Action to recover damages for an alleged false imprisonment of the plaintiff, Hawkins, by the defendant Lutton, the city marshal of the city of Superior, and five other codefendants, policemen of that city. It appeared that Lutton was chief of police of

said city and was, one evening, going past the plaintiff's house, and, seeing some police officers standing in front of it, he stayed there two or three minutes. There was a disturbance in the house, and very loud talking and profane and indecent language were heard. The chief learned that the officers had been called there by some of the neighbors, and, after listening a few minutes he directed the officers to "pull" the house for a disorderly house. It appeared from what he heard that they either had a fight there or that there had been one. There were two male and two female voices, and it was a female voice that was doing most of the talking. The language was loud, profane, and indecent. The officers arrested the plaintiff, and charged her with being arrested in, and taken from, a disorderly house. The defendant was acquitted and brought this action, in which she recovered a verdict for five hundred dollars. After the verdict, and in consideration of forty dollars, she released and discharged the defendants from all liability by reason of the verdict and any judgment that might be entered thereon, and from all liability and obligation for damages sustained by her by reason of false imprisonment, and any cause of action she might have against the defendants. The court made an order, after judgment, upon motion founded upon and opposed by affidavits, vacating and setting aside the release, and reinstating the verdict and judgment, and directing the forty dollars, less ten dollars, costs of motion, to be returned to the defendants. From the judgment and order, as well as from an order denying a motion for a new trial, founded on the minutes of the court, the defendants appealed.

Reed & Reed and H. W. Dietrich, for the appellants.

Loud & O'Brien and W. R. Foley, for the respondent.

497 PINNEY, J. 1. The ordinance for the violation of which the defendants arrested the plaintiff provides that "any person who shall, within the limits . . . be an inmate of, visit, resort to, frequent, or be found in a disorderly house or place, or a house of ill-fame, or a place resorted to for the purpose of prostitution, assignation, fornication, or for the resort of persons of ill-fame, or ill-name, or dishonest conversation, or common prostitutes, shall, upon conviction thereof, be punished," etc. The trial court held that a house could not be considered a disorderly house unless it was a house of ill-fame, resorted to for the purpose of prostitution, assignation, fornication, gambling, etc., and charged the jury that the arrest of the plaintiff could not be justified unless the fact that the house of which the plaintiff was an inmate was a house of prostitution

was proved to the satisfaction of the jury; that the word "disorderly" must not be construed to mean a house in which quarrels, disturbances, and that class of things occur, but must be construed in the more restricted sense, as meaning a house used for the purpose of prostitution, gambling, etc. The ordinance is clearly directed against disorderly houses and places, independent of the question whether they are houses of ill-fame, or places resorted to for the purpose of prostitution, etc., or for the resort of persons of ill-fame, or ill-name, or dishonest conversation, or common prostitutes. A house, the inmates of which behave so badly as to become a nuisance to the neighborhood, is esteemed, at common law, a disorderly house, and ⁴⁹⁸ so of one which is kept in such a way as to disturb or scandalize the public generally, or the inhabitants of a particular neighborhood, or the passers-by: 2. Wharton's Criminal Law, 7th ed., sec. 2392; 5 Am. & Eng. Ency. of Law, 693; State v. Wilson, 93 N. C. 608. And it seems that a complaint for keeping such a house may be maintained by proof that only one person in the neighborhood or community was disturbed or annoyed, if the acts done were of such a nature as tended to annoy all good citizens: Commonwealth v. Hopkins, 133 Mass. 381; 43 Am. Rep. 527. The term "disorderly house" denotes a house or other like place in which people abide, or to which they resort, disturbing the repose of the neighborhood, violating public order and tranquility: 1 Bishop's Criminal Law, sec. 1106; Garrison v. State, 14 Ind. 287. The ruling of the trial court was clearly erroneous, and, in its application to the case, practically nullified an important clause of the ordinance, designed to preserve the public peace. The same error occurs in other instructions given, and in instructions refused, and in ruling that evidence that there were disorderly noises, boisterous, profane, and obscene language, frequently emanating from the house, and fighting and quarreling and conduct of that kind carried on therein, could not be received as a justification of the arrest. The court, however, admitted considerable such evidence, but erroneously restricted its effect to showing, in connection with other facts, that the house was a house of prostitution. It is said that the defense that the house here in question was a disorderly house was not set up in the answer, but we think that the answer, though crude and general, was sufficient, in substance, to admit the evidence. The remedy of the plaintiff, if it was deemed indefinite and uncertain, was by motion to correct the answer.

2. It is argued that the arrest of the plaintiff without a warrant was illegal, and cannot be justified. The defendants, by

virtue of their offices, were conservators of the public ⁴⁰⁰ peace, and had a right at common law to arrest all persons who were guilty of a breach of the peace, or other violation of the criminal laws, in their presence; but in all such cases the arrest must be made at the time of the offense, or immediately after its commission. The provisions of the ordinance pleaded in that behalf are substantially to the same effect, and authorized a summary arrest of anyone in the act of violating any of the general laws, or any ordinances of the city passed in accordance therewith. The city council had power to pass such an ordinance, authorizing police officers to make arrests of persons engaged in a breach of the peace without warrant, such authority not being repugnant to the general laws of the state: 1 Am. & Eng. Ency. of Law, 735, notes, and cases cited; *Commonwealth v. Hastings*, 9 Met. 259; *White v. Kent*, 11 Ohio St. 550. A disturbance and violation of public order is a breach of the peace: 2 Am. & Eng. Ency. of Law, 515. The evidence tends to show that the alleged violation of the ordinance may fairly be said to have been committed in the presence of the defendants. They had heard the disturbance and disorderly conduct from the outside of the house, and the evidence tends to show that they had been summoned there or their attention had been attracted to it. The chief of police arrived in time to become aware of the conduct in progress within, and, acting in apparent good faith and on what appeared to be reasonable ground, ordered the house to be pulled. The policemen at once entered the house and found the plaintiff an inmate and abiding therein. The evidence tends to show that she was its proprietor. The authority of conservators of the public peace to make arrests in such cases should be liberally construed and upheld, but always at the risk that they will be liable if it be misused or abused: *People v. Bartz*, 53 Mich. 493; *Ballard v. State*, 43 Ohio St. 340; *O'Connor v. Bucklin*, 59 N. H. 589; *State v. Russell*, Houst. Cr. Cas. 122.

⁵⁰⁰ For these reasons, we think there must be a new trial. The order setting aside the release appears to have been warranted by the facts, and should be affirmed. The appeal from the order refusing a new trial cannot be sustained. The order was not appealable: *Laws 1895, c. 212*.

By the Court. The order setting aside the release, appealed from is affirmed; the judgment of the superior court is reversed, and the cause remanded for a new trial; and the appeal from the order refusing a new trial is dismissed.

DISORDERLY HOUSES.—A house is disorderly which tends to public annoyance, although only one person may have been actually disturbed: *Notes to State v. Calley*, 17 Am. St. Rep. 706; *Harmes v. State*, 8 Am. St. Rep. 471; *Beard v. State*, 71 Md. 275; 17 Am. St. Rep. 536, and note.

BREACH OF PEACE, WHAT IS.—A breach of the peace is a violation of public order, a disturbance of the public tranquility, by any act or conduct inciting to violence, or tending to provoke or excite others to break the peace: *People v. Johnson*, 86 Mich. 175; 24 Am. St. Rep. 116.

ARREST WITHOUT WARRANT—BREACH OF PEACE.—An officer may, without warrant, arrest one who commits a breach of the peace in his presence: *Martin v. State*, 89 Ala. 115; 18 Am. St. Rep. 91; *People v. Johnson*, 86 Mich. 175; 24 Am. St. Rep. 116. He may enter any house, the door of which is unfastened, where there is a noise amounting to a breach of the peace, and arrest any person disturbing the peace there in his presence: *Commonwealth v. Tobin*, 108 Mass. 426; 11 Am. Rep. 375.

DOBIE v. FIDELITY AND CASUALTY COMPANY OF NEW YORK.

[95 WISCONSIN, 540.]

SURETYSHIP—EXONERATION OF SURETY WITHOUT HIS PAYING DEBT.—A surety may, by an action in equity, compel his principal to exonerate him from liability by discharging the debt for which both are liable, although the surety has not first paid it.

Action to compel the payment of a judgment and to exonerate a surety from liability. In an action for personal injuries, one Knute Anderson obtained a judgment against M. C. Burke and John Burke. The Burkes were insured against such claims by the Fidelity and Casualty Company, which company defended the action. It procured one Dobie and Tennis to become sureties on the defendant's appeal, and gave them its own bond in the sum of seven thousand dollars to indemnify them on account of their obligation as sureties. There was a judgment against the defendant on the appeal, and Dobie and Tennis became liable on their undertaking. Before any part of the judgment was paid, the plaintiff, Dobie, brought this action to compel the defendant company to pay the judgment and thus exonerate the plaintiff from liability. There was a judgment upon the pleadings for the plaintiff, and the defendant appealed.

Ross, Dwyer & Hanitch, for the appellant.

Thorson & Crawford, for the respondent.

541 NEWMAN, J. The question presented is whether the complaint states a cause of action. The action is by a surety

to compel his principal to pay the debt for which both are liable, for the exoneration of the surety. It is ultimately the defendant's liability. That party is the principal debtor, who is ultimately liable for the debt. The question is, whether a surety can in equity compel his principal to exonerate him from liability by extinguishing the obligation without having first paid it himself. It seems to be well-settled that a surety against whom a judgment has been rendered may, without making payment himself, proceed in ⁵⁴² equity against his principal to subject the estate of the latter to the payment of the debt, in exoneration of the surety: 2 Beach's Modern Equity Jurisprudence, sec. 903; 3 Pomeroy's Equity Jurisprudence, sec. 1417; Willard's Equity Jurisprudence, 110; United New Jersey etc. Co. v. Long Dock Co., 38 N. J. Eq. 142; Beaver v. Beaver, 23 Pa. St. 167; Gibbs v. Mennard, 6 Paige, 258; Warner v. Beardsley, 8 Wend. 194; 7 Am. & Eng. Ency. of Law, 486, cases in note.

By the Court. The judgment of the circuit court for Douglas county is affirmed.

SURETYSHIP.—A surety may, in equity, compel his principal to discharge the debt: *Pride v. Boyce*, Rice Eq. 275; 33 Am. Dec. 78.

CHICAGO AND NORTHWESTERN RAILWAY CO. v. MILWAUKEE, RACINE, AND KENOSHA RAILWAY CO.

[95 WISCONSIN, 561.]

HIGHWAYS—TITLE OF ABUTTING OWNER.—The owner of land abutting upon a public street or highway has the legal title to the center of such street or highway, subject only to the public easement.

HIGHWAYS—RAILROADS—ADDITIONAL SERVITUDE.—The appropriation of a public highway for the purposes of a railroad is the imposition of an additional burden upon the abutting owners, and is, therefore, the taking of private property for public use.

RAILROADS—COMMERCIAL STREET RAILWAY—ADDITIONAL SERVITUDE.—The construction, on a public street, of a commercial street railway, that is, one for the transportation of merchandise, personal baggage, mail and express matter, as well as passengers, is, though operated by electricity, not a mere exercise of the public easement previously acquired by the establishment of such street, but constitutes an additional servitude or burden for which an abutting owner is entitled to compensation, although such owner may be a railroad company whose line is crossed in the street by the tracks of the other company.

Injunction to prevent the defendant from constructing its track across plaintiff's road. The plaintiff, the Chicago & North-

western Railway Company, was a corporation, organized under the laws of Wisconsin, and owned, and operated by steam power a line of railway, consisting of two main tracks, from Milwaukee to Chicago. In Milwaukee, its line, running nearly north and south, crossed Milwaukee avenue almost at right angles. This railway was engaged in the carriage of passengers and freight. The defendant railway, also a Wisconsin corporation, was authorized, by its articles of association, to build and operate a street railway from Milwaukee to Kenosha. Cars were to be run on this road for the purpose of carrying passengers, merchandise, personal baggage, mail and express matter. The part of the defendant's proposed railway in question was to be a part of its connecting line between the two cities named. That part of the road in question was on Milwaukee avenue. The defendant company was engaged in constructing this part of its road along that avenue, and which, of course, would, if completed, cross the plaintiff's road, on that avenue, nearly at right angles, when the plaintiff commenced this action to perpetually enjoin the defendant from constructing its track over and across or upon the plaintiff's land, which it owned to the center of the avenue on the south side and east of its road for a distance of two hundred feet, and on the north side and east of its road for a distance of fifty feet, as well as to enjoin it from crossing the railroad tracks of the plaintiff, or in any manner interfering therewith. The plaintiff's motion for a preliminary injunction was denied, and it appealed.

Fish & Cary, for the appellant.

Kearney, Phipps & Thompson and Quarles, Spence & Quarles, for the respondent.

566 CASSODAY, C. J. Milwaukee avenue, at South Milwaukee, runs east and west, and the plaintiff's railroad tracks cross it nearly at right angles. Its depot grounds at that place extend east from such tracks along the south side of the avenue, and abutting thereon, for a distance of two hundred feet. On the north side of the avenue, and abutting thereon, and immediately east of said tracks, the plaintiff owns a strip of land or right of way fifty feet in width. The answer expressly admits "that the plaintiff is the owner of the lands" so described, "within said public street, and to the center line thereof," on both sides, "subject to the easement vested in the public." This admission is in accordance with the well-settled rule of law in this state to the effect that the owner of land abutting upon a public street or highway has the legal title to the center of such street

or highway, subject ⁵⁶⁷ only to the public easement: *Milwaukee v. Milwaukee etc. R. R. Co.*, 7 Wis. 85; *Mariner v. Schulte*, 13 Wis. 692. Upon this principle it has been held by this court that the abutting owner has such rights of property in the soil within the limits of a street or highway that he may remove portions thereof, and construct vaults or other areas under the sidewalk, with openings in the walk, and construct projecting bay windows, provided he does so in a manner not to interfere with or endanger public travel: *Papworth v. Milwaukee*, 64 Wis. 389; *Hay v. Weber*, 79 Wis. 590; 24 Am. St. Rep. 737. The general rule is, that subject to such public easement, the abutting owner has all the rights and remedies of an absolute owner in fee: 3 Elliott on Railroads, sec. 1085.

Such being the facts and the law in this case, it is obvious that the adjudication of cases arising in certain states and cities where the title to the land within the limits of public streets and highways is vested in the state or the public can have no bearing upon the question here involved, since the title to the land of such abutting owner in such states and cities terminates at the outer lines of the street or highway; and hence such abutting owner in such states and cities can only have, in addition to such public easement, a right of ingress and egress to and from his premises, or, as it is sometimes called, "an easement of access" to and from his premises: 3 Elliott on Railroads, sec. 1085. The question presented, therefore, is whether the construction of the defendant's track and operating its street railway, as proposed, across the plaintiff's tracks, and upon and over the plaintiff's lands so within Milwaukee avenue, would be merely an exercise of the public easement previously acquired by the construction of that avenue, or an additional servitude and burden, for which the plaintiff, as such abutting owner, is entitled to compensation. In *Ford v. Chicago etc. R. R. Co.*, 14 Wis. 609, 616, 80 Am. Dec. 791, Dixon, C. J., speaking for the court, and following New York and Massachusetts cases, among other things, in ⁵⁶⁸ effect, said: "It is too well settled to allow it now to be drawn in dispute before this court that the proprietors of lots bounded by a public street within a recorded town plat or village take to the center of the street, and own the soil, subject to the public easement." The conclusion is, therefore: "That a railroad company cannot appropriate and occupy it with the track of its road without the consent of such proprietor, or without compensation made to him, and that neither the legislature nor municipal authorities have any power to dispense with such compensation, seems irresistible.

The reason is stated in few words by Chief Justice Shaw: 'The two uses are almost, if not wholly, inconsistent with each other; so that taking the highway for a railroad will nearly supersede the former use to which it had been legally appropriated.' The dedication to the public as a highway enhances the value of the lot, and renders it more convenient and useful to the owner. The use by the railroad company diminishes its value, and renders it inconvenient and comparatively useless. It would be a most unjust and oppressive rule which would deny the owner compensation under such circumstances." Accordingly, the court affirmed the judgment granting a perpetual injunction. To the same effect: *Hegar v. Chicago etc. Ry. Co.*, 26 Wis. 624; *Pettibone v. Hamilton*, 40 Wis. 411; *Kneeland v. Van Valkenburgh*, 46 Wis. 434; 32 Am. Rep. 719; *Burbach v. Schweinler*, 56 Wis. 391; *Norcross v. Griffiths*, 65 Wis. 607, 611; 56 Am. Rep. 642. Since such abutting owners have the legal title to the lands in the street, subject only to the public easement, it follows that, whenever such street is abandoned or vacated, such easement becomes extinguished and such abutting owners, respectively, thereby acquire the right to possession as reversioners: *Burbach v. Schweinler*, 56 Wis. 391; *Racine v. Crotsenberg*, 61 Wis. 485; 50 Am. Rep. 149. "It is well-settled in this state that the appropriation of a public highway for the purposes of a railroad is the imposition of an additional burden upon the abutting ⁵⁰⁹ owners, and hence is the taking of private property for public use, within the meaning of section 13, article 1, of the constitution: *Buchner v. Chicago etc. Ry. Co.*, 60 Wis. 272.

Such are the settled rules of law applicable to ordinary steam railways constructed, maintained, and operated in public streets for the carriage of passengers and freight. The question recurs whether the proposed street railway comes within the principles of law thus stated, or whether it will be a mere exercise of the easement acquired by the public when Milwaukee avenue was first opened to public use. In *Hobart v. Milwaukee City Ry. Co.*, 27 Wis. 194, 9 Am. Rep. 461, it was held that: "The construction and operation of a horse railway in the public streets of a city, by authority from the city government, is not a new burden imposed upon the owners of the fee of the land, and they are not entitled to a compensation therefor, except where some private right of such an owner (as his free access to his own land or buildings) has been materially impaired thereby." The learned chief justice who wrote the opinion of the court in that case, after showing that different courts and

different judges of the same court have disagreed as to whether the establishment and running of a horse railroad in a public street was an imposition of an additional burden upon the land of the abutting owners, reaches the conclusion "that the laying down of the rails and running of the cars in the manner shown by this case is not the appropriation of the street to a new use, requiring compensation to be made therefor to the plaintiff, unless he has shown that he will suffer some private or peculiar injury by being deprived of that free access to his premises which otherwise he would continue to have and enjoy." In that case the vehicles were drawn by horses, the same as ordinary carriages, the only difference being in the size and shape of the vehicles, and the fact that in the one case they were confined to the fixed ⁵⁷⁰ iron track at grade, while in the other they were not; and yet, even in that case, the conclusion of the court mentioned was manifestly so reached with some hesitation. The defendant in that case was incorporated under a special charter, and the law in force at the time authorized the municipality to grant to such corporation "such use . . . of any streets within its limits for the purpose of laying single or double tracks and running cars thereon for the carriage of passengers only, to be propelled by animals or such other power as shall be agreed on": Laws 1860, c. 313, secs. 1, 3, 4; Rev. Stats., sec. 1862. The same act authorized such corporation to extend its railways to any points within any town adjoining such municipality, and to lay and operate its railway upon the highways therein so as not to obstruct public travel thereon, upon procuring the written consent of a majority of the supervisors of such town: Rev. Stats., sec. 1863. In 1880 the powers of such street railway corporations were enlarged and extended so as to authorize the same to build and operate their railways "in any village or town, or to extend from any point in one village or town to, into, or through any other village or town; and for running of cars propelled by animals, for the carriage of either passengers or freight; . . . but not so as to obstruct the common public travel thereon": Laws 1880, c. 221; Sanborn and Berryman's Annotated Statutes, sec. 1863. In 1881 the powers of such street railway corporations were further enlarged and extended so as to authorize the same to run "cars thereon for the carriage of freight and passengers, to be propelled by animals or such other power as shall be agreed on": Laws 1881, c. 219; Sanborn and Berryman's Annotated Statutes, sec. 1862. In 1891 the act of 1880 (Sanborn and Berryman's Annotated Statutes, sec. 1863,) was amended; and the powers of such cor-

porations further enlarged and extended so that such railways should not be limited to "streets," and so that cars might be propelled thereon by "other power" as well as "by animals," "for ⁵⁷¹ the carriage of either passengers or freight": Laws 1891, c. 387.

As indicated in the statement made, the part of the defendant's proposed railway in question is to be a part of its connecting line of railway from the city of Kenosha to the city of Milwaukee; and, as expressed in the defendant's charter, it intends to use said railway, when constructed, for the carriage and transportation of passengers, merchandise, personal baggage, mail, and express matter, in cars and trains propelled by locomotive engines and electricity and other power; but with no provision for condemning lands or acquiring the right of way, nor for joining and uniting with other railways in forming crossings, intersections, and connections, nor in adjusting differences in case of disagreement, as required by statute in the case of steam railways: Sanborn and Berryman's Annotated Statutes, sec. 1828, subd. 6. Such a railway is not a street railway, within the ruling of the Hobart case, nor as generally understood. Upon what principle of law can it be said that, before the plaintiff can construct its railway across or upon a public street or highway at grade, it must make compensation to, or acquire the consent of, the abutting landowner, and yet that the defendant can do the same thing without such compensation or consent? The mere difference in motive power would seem to be insufficient. Besides, there is certainly far more difference in the use of mere horse power, as in *Hobart v. Milwaukee City Ry. Co.*, 27 Wis. 194; 9 Am. Rep. 461, and electric power, as in the case of the defendant, than there is in the case of electricity and steam. A mere street railway for carrying "passengers only," as the statute prescribed under which the Hobart case was decided, would greatly relieve the streets of a city or village from travel, and hence would, to that extent, facilitate travel on foot or by carriage. Such street railways under the decision in that case, do not necessarily constitute an additional ⁵⁷² servitude nor burden for which the abutting owners are entitled to compensation. The same would, to some extent, be true as to the suburbs of cities and villages. But the principle has no application to the country towns between Kenosha and Milwaukee. The carriage of "passengers only" probably included such articles and effects as the passengers retained in their own personal custody. But the several amendments of the Revised Statutes mentioned purposely dropped out

the word "only," and added the word "freight," and also added the words "other power," as well as horse power. In other words, the manifest purpose of the amendments was to authorize the construction and operation of commercial railways upon such streets and highways without consent of, or compensation to abutting owners. * The charter of the defendant company contemplates the construction and operation of such commercial railway between Milwaukee and Kenosha, which, of course, on the same theory, might be extended to Chicago. That such commercial railway upon public streets and highways, engaged in the carriage and transportation of merchandise, personal baggage, mail, and express matter as well as passengers, would tend to obstruct and interfere with the ordinary uses of a street or highway, would seem to be quite manifest. Such use of streets and highways by such commercial railways constitutes, in our judgment, an additional servitude or burden upon the lands of abutting owners for which they are entitled to compensation. This certainly is in harmony with the decisions of this court. While there is much contrariety of opinion on the subject, yet the better rule seems to be that a commercial railroad constitutes an additional servitude or burden for which abutting owners are entitled to compensation: 3 Elliott on Railroads, sec. 1087, and cases there cited: *Shepardson v. Milwaukee etc. R. R. Co.*, 6 Wis. 605; *Sherman v. Milwaukee etc. R. R. Co.*, 40 Wis. 645; *Sweet v. Rechel*, 159 U. S. 380; *Lahr* ⁵⁷³ *v. Metropolitan Elevated Ry. Co.*, 104 N. Y. 268; *Willamette Iron Works v. Oregon Ry. & Nav. Co.*, 26 Or. 224; 46 Am. St. Rep. 620; *State v. Chicago etc. Ry. Co.*, 36 Minn. 402.

By the Court. The order of the circuit court is reversed, and the cause is remanded, with direction to grant the temporary injunction, and for further proceedings according to law.

HIGHWAYS—TITLE OF ABUTTING OWNER.—Property in soil of highway is not in public, but in the owner of the land over which it passes: *State v. Buckner*, Phill. (N. C.) 559; 98 Am. Dec. 83; *Holden v. Shattuck*, 34 Vt. 336; 80 Am. Dec. 684. An owner of a lot bounded by a public street takes to the center thereof, and owns the soil subject to the public easement: *Ford v. Chicago etc. R. R. Co.*, 14 Wis. 609; 80 Am. Dec. 791; *O'Neal v. Sherman*, 77 Tex. 182; 19 Am. St. Rep. 743.

HIGHWAYS—RAILROAD—TAKING OF PRIVATE PROPERTY.—A railroad company cannot appropriate and occupy a public street with the track of its road, without the consent of the proprietors of lots bounded by such street, or without compensation made to them: *Ford v. Chicago etc. R. R. Co.*, 14 Wis. 609; 80 Am. Dec. 791; *Penn Mut. Life Ins. Co. v. Helss*, 141 Ill. 35; 33 Am. St.

Rep. 273. The erection or operation of a railway in a street is inconsistent with the use of the street, and, with regard to abutting owners, is a taking of private property, which will not be permitted without the proper compensation to such owners: Note to *Abendroth v. Manhattan Ry. Co.*, 19 Am. St. Rep. 469. Compare *Theobald v. Louisville etc. Ry. Co.*, 66 Miss. 279; 14 Am. St. Rep. 564.

COMMERCIAL RAILWAY—ADDITIONAL SERVITUDE.—The appropriation of a public street to the construction and operation of an ordinary commercial railroad upon it is not a proper street use: *Adams v. Chicago etc. R. R. Co.*, 39 Minn. 286; 12 Am. St. Rep. 644. Compare *Rafferty v. Central Traction Co.*, 147 Pa. St. 579, 30 Am. St. Rep. 763; *Chicago etc. Ry. Co. v. Street Ry. Co.*, 139 Ind. 297, 47 Am. St. Rep. 264, showing that a street railway is not an additional burden to that of the general easement in the street. See, also, monographic note to *Vanderlip v. Grand Rapids*, 16 Am. St. Rep. 610-615, on what is a taking of public property for public use.

GEILFUSS v. CORRIGAN.

[95 WISCONSIN, 651.]

STORAGE WARRANTS—WAREHOUSE RECEIPTS—CHATTEL MORTGAGES.—Although a corporation engaged in smelting ore issues so-called "storage warrants" on iron in its yard, the title to, and constructive possession of, the property covered thereby does not pass by their transfer and indorsement as in the case of negotiable warehouse receipts. To have the effect of warehouse receipts they must be issued by a warehouseman, or one openly engaged in the business of storing property for others for a compensation. Hence, the surreptitious issuance of false "storage warrants," or receipts, by such a corporation, does not constitute it a warehousing corporation. Neither are such warrants valid as chattel mortgages upon the iron named in them.

PLEDGE.—TO MAKE A VALID PLEDGE there must be either an actual or constructive delivery of the property pledged; and good faith does not avail the pledgee, in the absence of delivery and possession, either actual or constructive.

STORAGE WARRANTS—TRANSFER OF—TITLE TO PROPERTY COVERED.—If a mining corporation and a furnace corporation engaged in smelting iron ore are both owned and controlled by the same person, and the latter company gives the former receipts in the form of "storage warrants" on iron stored in its yard for the purpose of raising money without injuring its credit, but there is no consideration for the transfer, and no delivery of the property except by a transfer of the warrants, it even being understood that they shall be returned whenever they are needed by the furnace company, on account of sales of iron, and no specific iron is ever set apart as covered by the warrants, but other iron is piled in the yard as it is manufactured and indiscriminate shipments made, the mining company acquires no title to the iron as against creditors of the furnace company.

STORAGE WARRANTS—LIEN AS PLEDGEE, AGAINST THIRD PERSONS, ON PROPERTY COVERED.—If a furnace company engaged in smelting ore gives a mining corporation receipts in the form of "storage warrants" on iron stored in its yard, a bank receiving such warrants from the mining company as collateral secur-

ity, but getting no other possession of the iron represented than by a mere transfer of the warrants, and not even giving notice to the furnace company of its claim to the iron covered by the warrants, but permitting it to dispose of the iron on hand and to substitute other iron in its place, obtains no lien on the iron, against third persons, as pledgee, even if title passed to the mining company, for the reason that there is no delivery of iron to the bank.

A JUDGMENT NOTE IS NOT RENDERED FRAUDULENT by the fact that it was obtained for the very purpose of entering judgment at once and levying execution on the debtor's property.

Action to recover the value of ten thousand eight hundred tons of pig iron levied on by the sheriff of Mercer county, Pennsylvania, on July 19, 1893, upon an execution issued from a court of that county, upon a judgment in favor of Price McKinney, receiver of Corrigan, Ives & Co., for one hundred and seventy-eight thousand nine hundred and eight dollars, against the Douglas Furnace Company, a corporation, under the laws of the state of Illinois. The title of the iron was the question in controversy in this case. The plaintiff, Geilfuss, as assignee of the Commercial Bank of Milwaukee, Wisconsin, claimed a right in the iron as pledgee of the Buffalo Mining Company, a Wisconsin corporation, and of Ferdinand Schlesinger, to secure certain loans made by the bank to the mining company and to Schlesinger. Corrigan and another, the defendants, who were members of the firm of Corrigan, Ives & Co., justified the seizure, and subsequent sale of the iron under execution against the Douglas Furnace Company, upon the ground that the alleged pledge or transfer of the iron was fraudulent and void as against the creditors of the Douglas Furnace Company. The Buffalo Mining Company, a Wisconsin corporation, was a mining corporation, engaged in mining iron ore in Michigan, and was a lessee of the Buffalo mine and a number of others. The Douglas Furnace Company, an Illinois corporation, was engaged in smelting iron ore and manufacturing pig iron in Mercer county, Pennsylvania. The defendants, Corrigan and Burke, with one Franklin T. Ives, were copartners doing business at Cleveland, Ohio, under the firm name of Corrigan, Ives & Co., and were engaged in the business of selling iron ore and making advances thereon for a commission, as factors. Both the furnace company and the mining company were owned and controlled by Schlesinger. The Douglas Furnace Company, being largely indebted to Corrigan, Ives & Co., of whom it purchased its iron, but not wishing to injure its credit by giving the firm security on the iron, and yet wishing to raise money, gave the Buffalo Mining Company certain receipts in the form of "storage warrants" on iron stored in its yard. The following was the form of the warrants:

Warrant.

Number ——. Amount received, ——— tons. Less loss in weight from handling by scale, rust, or sand, if any, not to exceed ——— tons.

Douglas Furnace Company, Sharpsville, Mercer Co., Pa., hereby acknowledge to have received ——— tons of pig iron, and will deliver the same, less loss in weight from handling by scale, rust, or sand, if any, not to exceed ——— tons, to the order of Buffalo Mining Company, at its yards at Sharpsville, Pa., upon payment of storage and charges, and the surrender of this warrant properly indorsed.

Memorandum.

Charges from 189 , viz: Labor included, — cts. per ton. Storage, per month, ——— cts. per ton. If reweighed when delivered, ——— cts. per ton. Storage charges named above payable every six months from date. If not paid, interest will be charged. Reported brand ———, said to be ———, record book page ———. Sharpsville, Mercer county, Pa., ———, 1893.

By DOUGLAS FURNACE COMPANY.

MAX HIRSCHFELD, President.

F. F. OSBORNE, Secretary.

There was no consideration for the transfer, and no other delivery of the iron than the turning over of the warrants, and it was understood that they should be returned whenever the furnace company needed them on account of sales of iron. No specific iron was ever set apart as covered by the warrants, but other iron was piled in the yard as it was manufactured and indiscriminately shipped. The Commercial Bank of Milwaukee, Wisconsin, received some of these "storage warrants" in good faith from the Buffalo Mining Company as collateral security, but did not have any other possession of the iron than that given by the transfer of the warrants. It never even notified the furnace company of its claim thereto, but permitted the latter to dispose of the iron on hand and to substitute other iron in its place. In June, 1893, Corrigan, Ives & Co. had accepted time drafts of Schlesinger's mining companies to the amount of about two hundred thousand dollars, which drafts were then falling due at intervals of only a few days. The companies were unable to meet this paper as it fell due and it was not taken up. Schlesinger obtained from Corrigan, Ives & Co., two hundred thousand dollars worth of fresh paper to take up the old paper as it fell due, but the old paper was not taken up as promised by Schlesinger, and both sets of paper remained out and a charge against Corrigan, Ives & Co. On ascertaining this condition of things, an action was brought

by Stevenson Burke, one of the defendants in this case, in a proper court at Cleveland, Ohio, against his copartners, to close up the partnership relations of the firm of Corrigan, Ives & Co., to which he belonged. In that action Price McKinney was appointed receiver of the firm. Soon after this time, Hirschfeld, president of the Douglas Furnace Company, and one Krielsheimer, Mr. Schlesinger's secretary, went to Cleveland, with the avowed purpose of endeavoring to secure the receiver of Corrigan, Ives & Co., for the indebtedness owing them by the Douglas Furnace Company. At that interview Corrigan, Ives & Co. first learned that all of the iron at the furnaces, except about three thousand tons, was covered by storage warrants. Hard words were used by the defendant, Burke, who denounced the issuance of the warrants as a "swindle," and threatened to make all parties "walk the plank." After consultation with attorneys, Mr. Hirschfeld, on the demand of Burke and the receiver, McKinney, gave a judgment note representing the whole indebtedness of the furnace company to Corrigan, Ives & Co., and delivered it to the receiver. At the same time, he also transferred, as collateral security, about sixty thousand dollars' worth of book accounts to the receiver, and some other property of small value. Hirschfeld was employed, on the same day, by Corrigan and Burke, to work for them, at the same rate that he had been employed by the Douglas Furnace Company. The receiver, upon receipt of the judgment note, went at once to Mercer county, Pennsylvania, entered judgment thereon, and had all the iron in the yard levied upon and sold by the sheriff. The trial court found that the storage warrants were not issued as security for any debt or demand, but for the purpose and with the intention of vesting title of the pig iron in the Buffalo Mining Company in good faith, and without any intent to defraud the creditors of the furnace company; that the intention of the furnace company in the issue and delivery of such storage warrants to the mining company was to make a sale of the iron therein described, and vest title thereto in the Buffalo Mining Company, so that the mining company might raise money by the sale of said pig iron, or in any manner it saw fit; that the mining company also had such intention; that the Commercial Bank of Milwaukee made advancements to the mining company upon such storage warrants in good faith, and without any notice or knowledge of any infirmity of title; that Burke, Corrigan and McKinney concerted together and, by threats, persuasion, and fraud, procured the execution of the judgment note for the purpose of at once levying on all the property of the Douglas Furnace Company, without re-

gard to the rights of storage warrant holders; that they had full knowledge, before the judgment was taken, and before the levy and sale, of the rights of the bank; that by their acts they had converted the ten thousand eight hundred tons of pig iron, belonging to the bank, to their own use; that they fraudulently employed Hirschfeld as their own agent, so that he could not, or would not, before the levy, mark and set off to storage warrant holders any particular parts of the pig iron; and that the value of the iron was one hundred and sixteen thousand eight hundred dollars. Judgment was entered against the defendants for this amount, with interest, and they appealed.

W. J. Turner, J. E. Ingersoll, and Stephenson Burke, for the appellants.

Timlin & Glicksman and James G. Flanders, for the respondent.

⁶⁶³ WINSLOW, J. The so-called storage warrants were not warehouse receipts, either under the laws of Pennsylvania or of Wisconsin. In order to be such, they must be issued by a warehouseman or one openly engaged in the business of storing property for others for a compensation: 1 Brightly's ⁶⁶⁴ Purdon's Digest, 12th ed., p. 165, sec. 1; *Bucher v. Commonwealth*, 103 Pa. St. 528; *Shepardson v. Cary*, 29 Wis. 34. And the fact that the receipt was executed by a warehouseman must affirmatively appear in the evidence: *Shepardson v. Cary*, 29 Wis. 34. Not only was there no proof in this case that the furnace company was in the warehousing or storage business, but, on the contrary, the proof was conclusive that it was not in such business, and never had been. The fact that it surreptitiously issued the false receipts in question did not constitute it a warehousing corporation. As well might it be argued that the issuance of counterfeit bank bills constitutes the counterfeiter a bank. It seems that, had the certificates been negotiable warehouse receipts, the bank would have acquired a valid lien upon the iron they represented by the transfer and indorsement of the receipts to it by the Buffalo Mining Company: *Price v. Wisconsin etc. Ins. Co.*, 43 Wis. 267; 1 Brightly's Purdon's Digest, 12th ed., p. 165, sec. 1. But we may dismiss this question, because they were not such certificates, and the plaintiff obtains no advantage from the fact that they were in the usual form thereof. Nor were the certificates valid as chattel mortgages upon the iron named in them, not only because they are not chattel mortgages in legal effect, but also because by the law of Pennsylvania, as well as by the law of Wisconsin, a chattel mortgage

is only valid as to third persons when filed in the proper office, and there is no claim of any filing here: 1 Brightly's Purdon's Digest, 12th ed., p. 665, secs. 200-214.

Thus, at the outset of the case, it appears that the plaintiff had no interest in or lien upon the iron in question, as indorsee of a warehouse receipt nor as a chattel mortgagee. Nor can it be claimed that the plaintiff actually bought or obtained legal title to the iron. These possible claims being thus eliminated, we know of no other claim which the plaintiff can make, unless it be a claim as pledgee of the iron as collateral to the debts of the Buffalo Mining Company ⁶⁶⁵ and of Schlesinger; and this, in fact, is the claim made in the complaint, and the only claim which the evidence tends to justify. It becomes necessary, then, to consider the question whether the evidence shows a valid pledge. The principles of law governing a pledge of personal property are simple and familiar. To constitute a valid pledge, there must be transfer of possession to the pledgee, actual or constructive: *Seymour v. Colburn*, 43 Wis. 71. A pledge differs from a mortgage in this important respect, namely, that the legal title to the property pledged remains in the pledgor, subject to the pledgee's lien for his debt, while a mortgage passes the legal title to the mortgagee. In the case of a pledge, a lien is created, to the existence of which possession is absolutely necessary; in the case of a mortgage, title passes, subject to be revested by performance of a condition subsequent: *Jones on Pledges*, secs. 4, 7; *Thompson v. Dolliver*, 132 Mass. 103. Therefore, if the bank had any interest in the iron at the time of its seizure, it was that of a lien thereon, by way of a pledge.

In considering the question of whether it had such a lien which was valid as against the creditors of the furnace company, a brief recapitulation of the essential facts will be useful. Ferdinand Schlesinger owned two corporations, one, a mining corporation, engaged in mining ore in Michigan; the other, a furnace company, engaged in smelting ore in Pennsylvania. These corporations were nominally furnished with full complements of officers, but in fact the business of each was directed and controlled by Schlesinger as though it were his own. The furnace company had a large stock of pig iron constantly on hand in its yards in Pennsylvania, and was largely indebted to Corrigan, Ives & Co., of whom it purchased its iron. It refused to give Corrigan, Ives & Co. security on the iron, on the ground that such a course would injure its credit. In order to raise money for the furnace company, Schlesinger caused the furnace ⁶⁶⁶ company to issue apparent storage receipts to the min-

ing company, without consideration, and without agreement to purchase, and without selection or delivery of the property, either actual or constructive, unless the handing over of the receipts be delivery, and with the agreement that the receipts should be returned whenever the furnace company needed them on account of sale of the iron. On receiving the receipts, he borrowed money of the plaintiff bank upon the notes of the mining company, secured by assignment of the receipts as collateral. What was done with all the money so borrowed does not appear. The original purpose seems to have been, as said in respondent's brief, to raise money for the furnace company, and the evidence shows the fact that the mining company was almost daily remitting money in large amounts to the furnace company, as well as the fact that the furnace company was frequently remitting to the mining company. None of the remittances were made in payment of the iron certificates, nor were they ever intended to be applied thereon. The fact seems to be that each enterprise was bolstering up the other as occasion required, or, rather, that Mr. Schlesinger was using the property and credit of his apparently separate concerns indiscriminately, to obtain money as it was needed. It seems probable that much of the money borrowed on the notes of the mining company secured by the receipts in question was forwarded to the furnace company.

The court found that the bank took the certificates innocently, without knowledge of any defect. We cannot probably disturb this finding, because it is based on the affirmative evidence of the cashier who made the loans; but, in view of the facts proven on cross-examination of the cashier himself, this finding seems to be a considerable tax on the credulity. The facts are, in brief, that the cashier was well acquainted with Mr. Schlesinger, so much so that in 1892 Schlesinger put in his hands one share of stock in ⁶⁶⁷ the Buffalo Mining Company, in order that he might become a director of the company, and he was thereupon made a director and secretary of the company, and remained such until April, 1893, when he resigned, and returned his share of stock. This was after the loans on the credit of the receipts had begun to be made. Notwithstanding his high official position in the mining company, he testifies that he "knew nothing of its business," except that it was engaged in mining. We think he could hardly have failed to discover the manner in which Mr. Schlesinger conducted the business of his nominal corporations. However this may be, he knew, as he testifies, that the mining company was engaged in

mining ore, and not in buying or selling pig iron. He knew "something" about the furnace company; knew where it was doing business; knew Mr. Hirschfeld, the nominal president; discounted some of the furnace company's paper; obtained general information about it by inquiries through commercial agencies at the time of the pledging of the receipts. In view of all these facts which were within his knowledge, and the facts which he might have ascertained without difficulty by very little inquiry, it seems almost an impeachment of his intelligence to say that he received the receipts in ignorance of any defect or infirmity in them; but we suppose we are bound by the finding, and we shall proceed on that basis.

It is very apparent that, had the certificates remained in the hands of the mining company, they would have constituted no obstacle to creditors of the furnace company in the collection of their debts. They were subject to nearly, if not quite, all the objections which render transfers void as to creditors. They were absolutely false in fact. There was no change of possession of the iron; no payment nor agreement to pay for it; no intention to pass title. They were the merest shams. There was, in effect, an agreement that the furnace company should remain the apparent owner, ^{and} with the right to sell and receive and dispose of the proceeds of sales, and that it should have the right to call back certificates whenever it needed them for this purpose; and it was further expected that, when the need for borrowing money was over, the certificates should all be returned. The scheme was certainly a brilliant one. If successful, it created a shifting title or interest, which readjusted itself from day to day as the stock changed, automatically attaching to each new pig of iron as it emerged glowing from the furnace, and with equal facility detaching itself from each pig that was sold as it was loaded on the car for transportation to the vendee. Certainly, if such a scheme could be successful, the inventor should take high rank among a certain class of financiers; and the laws which have been supposed to prevent secret transfers and conveyances in fraud of creditors must be at once revised, or they will pass into the dim limbo of unexecuted and worn-out legislation.

It is seriously and ably argued that the scheme has been successful; that the original transaction has been purged of all objections by the intervention of the innocent third person, in the shape of the plaintiff bank; and thus that the shifting and self-adjusting, but void, title of the mining company has been turned into an equally shifting and delusive, but good, lien for the bene-

fit of the bank—a lien which is secret and invisible to creditors, but entirely visible and very real to the plaintiff. As before said in this opinion, the only interest which the plaintiff claims or can claim in the iron in question is that of a lien thereon as pledgee; and, in order to make a valid pledge, there must have been either actual or constructive delivery of the property pledged. Bona fides does not avail the pledgee in the absence of delivery and possession, either actual or constructive. There was confessedly no actual delivery here, and the only thing that can be claimed to be a symbolical or constructive delivery is the indorsement and delivery of the false receipts. Hence, the question becomes whether the delivery of the receipts under the circumstances is a constructive delivery of so much iron. Had they been in fact warehouse receipts, the transfer and indorsement thereof by way of pledge would have operated as a sufficient constructive delivery of the property, both by the common law and by the statute: Rev. Stats., sec. 4194; *Shepardson v. Cary*, 29 Wis. 34; *Price v. Wisconsin etc. Ins. Co.*, 43 Wis. 267. Bills of lading and railroad receipts are placed by the statutes of both states on the same footing: See statutes of Pennsylvania before cited in this opinion. The reasons for this rule are very apparent. In such cases, the property itself is in the hands of a third person or corporation, instead of in the possession of the vendor or pledgor. Consequently, it does not furnish any false basis of credit, nor is any creditor deceived, because it is well understood that goods in the hands of warehousemen or carriers are or may be the property of others, and, by the long usage of trade, subject to just this mode of transfer. No such considerations, however, apply in the case of goods in the possession of the vendor or pledgor, or of some third person who is not a warehouseman or wharfinger, and we know of no rule which makes the mere delivery of a receipt a constructive delivery of the property in pledge in such a case. In *Shepardson v. Cary*, 29 Wis. 34 (which was an action in equity to enforce a pledge of personal property as collateral, alleged to have been made by means of the transfer of a warehouse receipt), Dixon, C. J., says: "To uphold the receipt as a proper warehouse document transferring the title to the property, and operating as a good constructive delivery of it to the vendee, it must in all cases distinctly appear that it was executed by a warehouseman, one openly engaged in that business, and in the usual course of trade." There are numerous examples of constructive delivery in the books, but none, we think, which holds that the facts here constitute such delivery. Constructive or symbolical deliv-

cry is permitted because of the difficulty or impossibility, in some cases, of actual delivery. ⁶⁷⁰ Thus, where the goods are very bulky, as logs in a boom, delivery may be made by pointing them out to the pledgee; or, where they are goods in a warehouse, by a delivery of the keys; or, where a savings bank deposit is to be pledged, it may be done by delivery of the pass-book; *Jewett v. Warren*, 12 Mass. 300; 7 Am. Dec. 74; *Jones on Pledges*, secs. 36, 37; *Boynton v. Payrow*, 67 Me. 587. So, also, where goods are in possession of a third person, and the pledgor gives an order on the custodian to hold the goods for the pledgee, which is brought to the knowledge of the custodian, it seems that this would be a sufficient delivery and change of possession: *Whitaker v. Sumner*, 20 Pick. 399; *Tuxworth v. Moore*, 9 Pick. 347; 20 Am. Dec. 479. In all these cases it will be readily seen that the property is placed beyond the control of the pledgor, and is not being used to maintain an appearance of wealth by either the pledgor or others with the consent of the pledgee.

In the present case there is no such element. The pledgee never saw or attempted to see the iron described in the certificates, and made no inquiries concerning it. It never notified the furnace company that it held any certificates in pledge, or claimed any interest in any iron in its possession. It tacitly allowed the furnace company to go on in its business for months, selling out the very iron nominally covered by the certificates, and replacing it with other iron, and collecting and using the proceeds of its sales. There can be no constructive or symbolical delivery and continuance of possession logically claimed where such a state of facts appears. Conceding that the title to the iron was in the mining company, the furnace company was the custodian, and the custodian received no notice of pledge, made no agreement to hold for the benefit of the pledgee, but went on in business, selling the property, and substituting other property in its place, with no one to hinder or make it afraid. Apparently the owner of more than twenty thousand tons of iron, it was (if plaintiff's theory is correct) really not the owner of it in case a creditor appeared with an execution. It was held in *Casey* ⁶⁷¹ v. *Cavaroc*, 96 U. S. 467, that where property alleged to have been pledged has at all times been in the actual possession of the pledgor, with authority to dispose of it and substitute another article of equal value in its place, there exists no pledge as against third persons. No reason is perceived why this is not wholesome doctrine, nor why it does not apply with equal force to possession by a third person, with power of

sale and substitution, as in the present case. Our conclusion is, that as against third persons, the bank never perfected its pledge by obtaining possession, either actual or constructive, of the iron named in the certificates, and hence that it cannot maintain this action.

The trial court found that the judgment note was obtained by threats and fraud, for the purpose of at once levying on the property of the furnace company. We have found no evidence in the case which establishes fraud or duress. There was some excited language, but nothing amounting to duress or fraud. Corrigan, Ives & Co. had a right to obtain a judgment note for the very purpose of entering judgment at once, and levying upon the furnace company's property: Such is frequently the purpose for which judgment notes are taken, and such purpose does not, of itself alone, constitute fraud or vitiate the note.

We do not find any evidence that justifies the finding that the defendants fraudulently employed Hirschfeld, so as to prevent him from marking off particular lots of iron to the holders of storage warrants. There is nothing to show that Hirschfeld intended to do so, or that the plaintiff or anyone else expected or wished him to do so. Whether he would have done so or not had he not been employed by the defendants is purely a subject of speculation.

These views necessitate reversal of the judgment.

By the Court. Judgment reversed, and action remanded with directions to dismiss the plaintiff's complaint.

WAREHOUSE RECEIPTS—WHO MAY ISSUE—TRANSFER OF PROPERTY.—It is only persons who pursue the calling of warehousemen, by receiving and storing goods in a warehouse as a business for profit, that have power to issue technical warehouse receipts, the transfer of which is a good delivery of the goods represented by them: *Sinsheimer v. Whitely*, 111 Cal. 378; 52 Am. St. Rep. 192. A delivery of a warehouse receipt passes title to the property covered thereby: *Zellner v. Mobley*, 84 Ga. 746; 20 Am. St. Rep. 390; *Rice v. Cutler*, 17 Wis. 351; 84 Am. Dec. 747, and note thereto on the transfer and negotiability of warehouse receipts. A warehouse receipt is negotiable, and a transfer thereof, in good faith, passes title to the property covered thereby: *Hanover Nat. Bank v. American Dock etc. Trust Co.*, 148 N. Y. 612; 51 Am. St. Rep. 721; *Cavallaro v. Texas etc. Ry. Co.*, 110 Cal. 348; 52 Am. St. Rep. 94.

PLEDGE—NECESSITY OF CHANGE OF POSSESSION.—Delivery of possession is essential to the contract of pledge: See monographic note to *Lucketts v. Townsend*, 49 Am. Dec. 731, on pledge. A pledgee's title must fail unless the pledged property is delivered to, and retained by, him: *Moors v. Reading*, 167 Mass. 322; 57 Am. St. Rep. 460. Compare note to *Cooley v. Minnesota etc. Ry. Co.*, 39 Am. St. Rep. 614.

CASES
IN THE
APPELLATE COURT
OF
INDIANA.

CONBOY v. RAILWAY OFFICIALS AND EMPLOYÉS ACCIDENT ASSOCIATION.

[17 INDIANA APPEALS, 62.]

INSURANCE—ACCIDENT—DEATH WHILE ENGAGED IN AN UNLAWFUL ACT.—Under a policy of accident insurance exempting the insurer from liability for the death of the insured while engaged in an unlawful or vicious act, an answer setting up as a defense a violation by the insured of a statute prohibiting seining in streams at a point above tide water is insufficient on demurrer if it fails to allege that such seining was done in a stream above tide water.

INSURANCE—ACCIDENT—DEATH WHILE VIOLATING STATUTE.—Under a policy of accident insurance exempting the insurer from liability for the death of the insured while engaged in an unlawful act, the fact that the latter meets his death while violating a statute does not relieve the insurer from liability, unless the act done is one which increases the risk and is one between which and the death there is a causative connection.

INSURANCE—ACCIDENT—VOLUNTARY EXPOSURE TO DANGER.—Under an accident insurance policy exempting the insurer from liability for the death of the insured resulting from "voluntary exposure to unnecessary danger or perilous venture," the insurer, to absolve himself from liability, must not only allege and prove that the insured exposed himself to unnecessary danger, but also that he knew of such danger and voluntarily exposed himself thereto.

W. A. Pickens and L. A. Cox, for the appellant.

Finch & Finch, for the appellee.

62 BLACK, J. The appellant by her complaint sought to recover upon the appellee's policy whereby it was **63** agreed to pay the appellant as beneficiary one thousand dollars in the event of the death of Cornelius Horan resulting from physical bodily injury, inflicted by external, violent, and accidental means during the period of one year from October 6, 1891.

In the complaint it was alleged that said Cornelius Horan was drowned on the 3d of June, 1892, "by accidentally slipping and falling into a deep hole in ——— river, in the county of ———, state of Texas, from which place and deep water said Cornelius Horan was unable to swim or in any manner proceed, or to keep his head above water, though he diligently tried so to do," etc.

The appellee answered in three paragraphs. The first was a general denial.

The policy referred to and made part of the contract contained certain conditions printed on the back thereof, among which were provisions that the insurance should not cover "death or injury resulting from accident attributable partially or wholly, directly or indirectly, by or in consequence of voluntary exposure to unnecessary danger or perilous venture, or injuries or death while being engaged in any unlawful or vicious act."

The second paragraph of answer set up said provision of the contract relating to "injuries or death while being engaged in any unlawful or vicious act," and alleged that said Cornelius Horan at the time of his death was engaged in an unlawful and vicious act, in this, that it is provided in the statute laws of the state of Texas, wherein said Horan came to his death, as follows: "No person shall throw, drag, or haul any fishnet, seine, or other contrivance for the purpose of catching fish (except the ordinary pole, line, and hook, or trot line) in any stream, lake, or pool of water within the state, ⁶⁴ not his own, above tide water, between the first day of February and the first day of July of each year; and at no time of the year in such waters shall any one be permitted to drag or haul any fishnet or seine with meshes less than two and a half inches square; and anyone violating the provisions of this article shall, upon conviction, be fined in a sum of not less than five nor more than fifty dollars." It was alleged that this statute was in full force and effect on and before the death of said Cornelius Horan; that at the time of his death, on the 3d of June, 1892, he "was engaged in throwing, dragging, or hauling a fishnet or seine in the ——— river, in the county of ———, state of Texas, at a place not owned by him or any of his companions": Willson's Crim. Stats., art. 510.

The third paragraph set up said provision relating to death or injury resulting from or attributable partially or wholly, directly or indirectly, by or in consequence of voluntary exposure to unnecessary danger or perilous venture; and it was alleged

that the death of said Cornelius Horan was the result, or was attributable, partly or wholly, directly or indirectly, to and in consequence of his engaging in a perilous venture and to voluntary exposure to unnecessary danger in this, that on the 3d of June, 1892, he, together with a number of others, was engaged in throwing, dragging, or hauling a fishnet or seine in the ——— river, in ——— county, state of Texas; that said river was very swift and full of sudden step-offs or holes, and of swirls and eddies; that at said time said Horan had on his clothes and boots or shoes; that while so engaged in throwing, dragging, or hauling said seine in said river, he suddenly came to one of these step-offs, or holes, and to a swirl or eddy, and stepping into said hole, swirl or eddy, where the water ⁶⁵ was very deep, and being unable to swim or keep his head above the water, was drowned.

The appellant's demurrer to each of these affirmative paragraphs of answer was overruled, and the appellant was ruled to reply. Afterward the appellee withdrew its answer of general denial. The appellant refused to plead further, the cause was submitted to the court for finding and judgment upon the pleadings, and the court found for the appellee and rendered judgment accordingly.

We are required to consider the action of the court in overruling the demurrer to the second and third paragraphs of answer.

These provisions printed upon the back of the policy were not conditions precedent. They were exceptions to the contracted insurance. They provided that the particular cases of injury or death specified should not be covered by the insurance contracted for on the face of the policy.

The existence of facts bringing the death of the insured within such an exception would constitute matter of defense, and the burden of pleading and proving such facts was upon the insurer.

It was proper to set forth in each of the answers the particular provision of the contract upon which the pleader intended to base the defense, and it was not improper to make an averment in the language of the contract, bringing the death within the exception so pleaded; but in the second paragraph it was necessary to show an unlawful act by the averment of facts constituting a violation of law or a vicious act; and this general averment, in the language of the exception pleaded, was controlled by the particular facts which were alleged to show the death to have been within such exception.

⁶⁶ By the averments of facts in the second paragraph the appellee sought to show that the insured at the time of his death

was violating a particular criminal statute; but there was a manifest failure to show a violation of the statute. It was not alleged that the water in which he was seining was above tide water. This was an omission of an essential element of the offense defined by the statute. The words "above tide water," in the statute constituted a part of the description of the offense. This defect in the pleading was not, as suggested by counsel, one which was waived by failure to move to make the pleading more specific, but was one which rendered the pleading insufficient on demurrer. The act of the insured described was not vicious in its nature, and it was not unlawful, unless shown to be a violation of a statute. It was not shown that it was not a lawful act.

It may be said further, concerning such a defense as that which it was thus unsuccessfully attempted to plead in the second paragraph, that if the facts pleaded show the death of the insured while engaged in an unlawful or vicious act, it must also appear that the act was one which increased the risk, and one between which and the death there was a causative connection.

In *Bloom v. Franklin etc. Ins. Co.*, 97 Ind. 478, 49 Am. Rep. 469, where the provision of the policy under consideration was, if the assured should die "in the known violation of the laws of the state or of the United States," it was said: "A known violation of a positive law, whether the law is a civil or a criminal one, avoids the policy, if the natural and reasonable consequences of the violation are to increase the risk; a violation of law, whether the law is a civil or criminal one, does not avoid the policy, if the natural and reasonable consequences of the act do not increase the risk. Whether ⁶⁷ the violation of law was the proximate cause of death, and whether it was an act increasing the risk, must in general be determined from the facts of the particular case. There must in all cases, whether the law violated be a criminal or a civil one, be some causative connection between the act which constituted the violation of law and the death of the assured": See, also, *National Ben. Assn. v. Bowman*, 110 Ind. 355; *Insurance Co. v. Bennett*, 90 Tenn. 256; 25 Am. St. Rep. 685; *Bradley v. Mutual Ben. etc. Ins. Co.*, 45 N. Y. 422; 6 Am. Rep. 115; *Jones v. United States etc. Assn.*, 92 Iowa, 652.

Such exceptions are prepared and inserted in the contract by the insurer for the purpose of narrowing the obligations under the policy, and they are to be construed most strongly against

the insurer and in favor of the insured: *Milwaukee etc. Ins. Co. v. Niewedde*, 12 Ind. App. 145.

It cannot be supposed that the insured, in accepting the policy containing this exception, contemplated, as embraced therein, injury or death while he should be engaged in an act which would not increase the risk, and between which and the injury or death there would be no causative connection; but it must be presumed that he contemplated only acts by which the risk would be increased and to the doing of which the injury or death could be attributed as a reasonable consequence. Many deaths from accidental causes of insured persons while engaged in unlawful acts may be supposed, where there would be no reasonable ground for concluding that the insured, in accepting a policy containing such an exception, contemplated the loss of the indemnity contracted for, if his death should be so caused. If such an insured person should be killed by a tile blown from a housetop while he was unlawfully traveling on Sunday, or if he should ⁶⁸ be accidentally shot while violating a law against profanity, or while unlawfully engaged in seining, it could not be claimed reasonably that such a death was within the exception: *Bloom v. Franklin etc. Ins. Co.*, 97 Ind. 478; 49 Am. Rep. 469.

But the parties make their contract, and such an exception should not be refined away by the court to the extent of making a different contract for the parties. A reasonable conclusion as to the intention of the parties should be sought: *Continental Ins. Co. v. Vanlue*, 126 Ind. 410.

To relieve the insurer from liability it is not necessary that it be shown that the insured expected death in the manner in which it occurred, or that he knew of the particular danger which was the cause of his death.

In *Bloom v. Franklin etc. Ins. Co.*, 97 Ind. 478, 49 Am. Rep. 469, it is said: "While the unlawful act of the assured must tend in the natural line of causation to his death, in order to work a forfeiture, it is not necessary that the act should be the direct cause, nor that the precise consequences which actually followed could have been foreseen. It is enough if the act is unlawful in itself, and the consequences flowing from it are such as might have been reasonably expected to happen, for, in such a case, the ultimate result is traced back to the original proximate cause."

In the second paragraph of answer under consideration, if it had been alleged that the drowning was at a place above tide water, and it had thus been shown that the insured was engaged in an unlawful act, it would not have been necessary to show

also that the insured knew of the particular peril which caused his death. Drowning while being engaged in seining in water in which such an act can be performed seems to be, *prima facie*, a result which would not have happened ⁶⁹ but for being so engaged, and to be an incident of the act in which he was engaged and a consequence thereof without reference to the question whether the seining was or was not an unlawful act.

We should seek by the same rule of construction to ascertain the intention of the parties in the exception upon which the third paragraph of answer is based. We must resolve any doubt against the insurer.

Do the facts stated in that paragraph show the death of the insured "resulting from or attributable partially or wholly, directly or indirectly, by or in consequence of voluntary exposure to unnecessary danger or perilous venture"?

Giving the words definitions, and the language a meaning most unfavorable to the insurer and most favorable to the insured, the exception may be construed as contemplating knowledge on the part of the insured of the existence of the danger or peril and an encountering of it by him willingly.

We think that the facts alleged do not show that the death of the insured was within the exception. They indicate an accidental death from a suddenly encountered danger. It is not shown that the insured consciously and intentionally exposed himself to danger, or that he presumed or dared to run a risk of peril. It does not follow because an act was voluntary that the exposure was voluntary.

If the pleading shows negligence on the part of the insured, it will hardly be contended that it was the purpose to except injury or death through an inadvertent act or omission of the insured: See *Schneider v. Provident etc. Ins. Co.*, 24 Wis. 28; 1 Am. Rep. 157; *Manufacturers' etc. Co. v. Dorgan*, 58 Fed. Rep. 945; *Burkhard v. Travelers' Ins. Co.*, 102 Pa. St. 262; 48 Am. Rep. 205; *Providence etc. Ins. Co. v. Martin*, 32 Md. 310; *De Loy v. Travelers'* ⁷⁰ *Ins. Co.*, 171 Pa. St. 1; 50 Am. St. Rep. 787; *Miller v. Insurance Co.*, 92 Tenn. 167; *Collins v. Bankers' etc. Ins. Co.*, 96 Iowa, 216; 59 Am. St. Rep. 367; *Jones v. United States etc. Assn.*, 92 Iowa, 652.

We are of the opinion that both of the affirmative answers were insufficient on demurrer.

The judgment is reversed, and the cause is remanded, with instructions to sustain the demurrer to the second and third paragraphs of answer.

INSURANCE—LIFE AND ACCIDENT—EXPOSURE TO UNNECESSARY DANGER—BURDEN OF PROOF.—If an accident insurance policy excludes liability for injury to the insured caused by his voluntary exposure to unnecessary danger, the burden of proof is upon the insurer to show that the injury is within the excepted cause: *Follis v. United States etc. Assn.*, 94 Iowa, 435; 58 Am. St. Rep. 408, and note; note to *Meadows v. Pacific etc. Ins. Co.*, 50 Am. St. Rep. 441. If the danger was obvious, the exposure to it voluntary and unnecessary, and the death of the insured ensued in consequence, the case may fairly be held to be within the exception in the policy: *Extended note to Travelers' Ins. Co. v. Jones*, 12 Am. St. Rep. 272.

Life Insurance—Death in Known Violation of Law.

Many life and accident policies of insurance contain a clause exempting the insurer from liability if the insured shall meet his death in "known violation of law," or "while engaged in an unlawful act," or the like. The meaning of such a clause has been the subject of considerable discussion in the courts of last resort, and cannot be said to be fully settled by judicial authority. The correct rule, we think, was excellently stated in *Bloom v. Franklin Life Ins. Co.*, 97 Ind. 478, 49 Am. Rep. 469-474, where Chief Justice Elliott, speaking for the supreme court said: "In our opinion, the law is this: A known violation of a positive law, whether the law is a civil or criminal one, avoids the policy if the natural and reasonable consequences of the violation are to increase the risk; a violation of law, whether the law is a civil or a criminal one, does not avoid the policy if the natural and reasonable consequence of the act does not increase the risk. Whether the violation of law was the proximate cause of death, and whether it was an act increasing the risk must, in general, be determined by the facts of the particular case. There must in all cases, whether the law violated be a criminal or a civil one, be some causative connection between the act which constituted the violation of law and the death of the assured. A man engaged in uttering counterfeit money might meet his death while so engaged, and yet there might be circumstances which would destroy the causal connection between the death and the violation of law, and in such a case it is clear that a company would not be relieved from liability. On the other hand, an assured might bring on his death while engaged in the violation of a civil law, as, for instance, in the case of an attempt to force an entrance into a man's house for the purpose of arresting him on civil process. Another illustration may be found in the case of a railway engineer who, in violation of law, neglects to sound signals and brings on a collision in which he perishes, and a hundred examples are supplied in cases of collisions at sea or on navigable streams brought about by a violation of maritime laws. It would not be difficult to multiply examples proving that the rule must be that the known violation of a positive law relieves the company, when the act constituting the violation is the proximate cause of death, whether the law violated be a civil or a criminal one." To the same effect are *Bradley v. Mutual etc. Ins. Co.*, 45 N. Y. 422; 6 Am. Rep. 115; *Jones v. United States etc. Assn.*, 92 Iowa, 653; *Prader v. National etc. Assn.*, 95 Iowa, 149.

In some jurisdictions there has been an attempt, although not necessarily involved in the decisions, to limit the operation of such a clause to a violation of a criminal statute or the commission of a purely criminal act: *Cluff v. Mutual etc. Ins. Co.*, 13 Allen, 308. The cases are uniform in holding that whether the law violated be a criminal or a civil one, there must be some causative connection between the act which constituted the violation of law and the death of the insured, and such act must have increased the risk, in order to bring it within the meaning of such a clause, and make it available as a defense: *Jones v. United States etc. Assn.*, 92 Iowa, 652; *Prader v. National etc. Assn.*, 95 Iowa, 149; *National etc. Assn. v. Bowman*, 110 Ind. 355; *Cluff v. Mutual etc. Ins. Co.*, 13 Allen, 308; *Utter v. Travelers' Ins. Co.*, 65 Mich. 545; 8 Am. St. Rep. 913; *Insurance Co. v. Seaver*, 19 Wall. 531.

In *Insurance Co. v. Bennett*, 90 Tenn. 256, 25 Am. St. Rep. 685-691, the court said: "In order to defeat a recovery because of such provision, there must appear a connecting link between the unlawful act and the death. It is not sufficient that there was an unlawful act committed by the insured, and that death occurred during the time he was engaged in its commission. There must be some causative connection between the act which constituted the violation of the law and the death of the insured. . . . The provision of the policy excluding liability for injury received by the insured while committing an unlawful act refers to such injuries as may happen as the necessary or natural consequences of the act, as its probable and to be anticipated consequences, and the reference to injuries received 'in consequence of any unlawful act' is to those injuries which arise out of or flow naturally from the act committed as its effect or resulting consequence."

"While the unlawful act of the assured must tend in the natural line of causation to his death, in order to work a forfeiture, it is not necessary that the act should be the direct cause, nor that the precise consequences which actually followed could have been foreseen. It is enough if the act is unlawful in itself, and the consequences flowing from it are such as might have been reasonably expected to happen, for in such case the ultimate result is traced back to the original proximate cause": *Bloom v. Franklin Life Ins. Co.*, 97 Ind. 478; 49 Am. Rep. 469-475. In *Murray v. New York etc. Ins. Co.*, 96 N. Y. 614, 48 Am. Rep. 658-660, the court said: "It seems to be clear that a relation must exist between the violation of law and the death to make good the defense; that the death must have been caused by the violation of law. It may be that the proviso in the policy was primarily intended to exempt the company from hazard of a death from violence to which persons engaged in the execution of criminal acts are exposed, and especially where the unlawful or criminal act is such as is likely to be met by forcible resistance. It is plain that a homicide committed in self-defense would be a death within the condition, so also a death at the hands of justice in punishment for crime. The death in these cases would be the direct and legitimate result of the criminal act. Another case,

a little further removed from the violation of law as its cause, would be one where a party assailed, in the heat of passion, naturally engendered by the act of the assured, on the moment takes the life of the aggressor, although the provocation might not be a legal justification of the homicide. Such a death we conceive might be within the condition, depending upon circumstances. If the violation of the law in which the deceased was engaged was trivial, although calculated to some extent to excite opposition or resistance, but the taking of life was a result which no reasonable man could have contemplated as likely to follow from the unlawful act, there would be no such relation between the act and the death that the former could be said to be the cause of the latter. . . . The proviso clearly exempts the company from all risks of life which attend the violation of law, which are the natural and reasonable concomitants of the transaction. . . . We think it is clear that there may be a death in violation of law within the meaning of the policy, although not intentionally inflicted, and, although it was not occasioned by the act of another. A burglar who, in consequence of a misstep, or to escape detection, falls or jumps from the roof of a house which he is attempting to enter, and is killed, dies in violation of law as plainly as if he had been shot by the owner in defense of his dwelling. In the former, as in the latter, case, the death results from the criminal act, within the policy, as a natural and reasonable consequence, because, although the immediate cause of the death was a fall, yet the exposure to the danger was encountered in the prosecution of the criminal purpose." In this case of *Murray v. New York etc. Ins. Co.*, 96 N. Y. 614, 48 Am. Rep. 658, the insured and his brother planned an assault upon a third person, and, in pursuance thereof, one of them seized and held such third person while the assured beat him. The party assaulted drew a pistol, and the insured, in seeking to escape, was killed by its discharge, and it was held that a policy which provided that it should be void if the assured should die "in or in consequence of the violation of the laws" was avoided. We agree with the reasoning in this case and think it sound, but the decision is directly opposed to the adjudication in *Griffin v. Western etc. Assn.*, 20 Neb. 620, 57 Am. Rep. 848, where a policy of life insurance was conditioned to be void if the insured should "die while violating any law." The insured, with an accomplice, went to the state treasury, and, presenting pistols, they demanded the money in the treasury. The treasurer delivered the money to them, and they started away with it, and had nearly reached the outer door of the building when they were fired upon by a policeman, and the insured was killed. It was held that the policy was not avoided, the court saying: "It will be observed that the condition named is, 'if a member shall die while violating any law,' that is in the actual violation of a law. Now, suppose Griffin had robbed the state treasury, and had left it, and was about to emerge from the building when he was killed, can it be said that at the time of his death he was violating any law of the state? We think not. Suppose that instead of robbing the treasury he had made an assault upon the treasurer in his office, or com-

mitted a battery upon him and had nearly reached the outer door of the capitol when he was killed, it will not be contended that at the time of his death he was violating the law. So, in this case, the act of Griffin in obtaining money from the treasury had been completed, and he was then endeavoring to make his escape. Griffin, therefore, was not killed while violating the law, and there is no forfeiture of the certificate on that ground": *Griffin v. Western etc. Assn.*, 20 Neb. 620; 57 Am. Rep. 848. We cannot approve the doctrine announced in this case. We apprehend that Griffin, after obtaining the money, and while in the act of trying to make his escape, was violating the law as much as at the time of actually committing the robbery. No recovery can be had upon a policy of life insurance conditioned to be void if death results in or in consequence of the violation of law, if death results from the insured having voluntarily submitted herself to an illegal operation, known by her to be dangerous to life, with intent to cause an abortion, without any justifiable medical reason: *Hatch v. Mutual etc. Ins. Co.*, 120 Mass. 550; 21 Am. Rep. 541. If the insured assaults a married woman, without cause of justification, and her husband, while defending her, kills him, he is killed while "in the known violation of law," and his life insurance is forfeited: *Bloom v. Franklin etc. Ins. Co.*, 97 Ind. 478; 49 Am. Rep. 469. "The act of the assured in this case was the proximate cause of his death within the meaning of the law. A man who makes a violent assault upon a woman puts his own person in danger, for a father, a husband, or a child may interfere to protect the assailed woman, and may overcome the assailant by force. Strangers not only may interfere to protect the person violently assaulted, but are in strict law under a duty to interfere. The natural result of such an illegal act as that of the assured, therefore, was to bring his person into danger, and, as death resulted, his own act was the proximate cause": *Bloom v. Franklin etc. Ins. Co.*, 97 Ind. 478; 49 Am. Rep. 469-475. If the insured is killed while attempting to forcibly seize and take a team away from its owner, he dies while "in the known violation of law," within the meaning of a clause in the policy avoiding the insurance for death while in such violation: *Bradley v. Mutual etc. Ins. Co.*, 45 N. Y. 422; 6 Am. Rep. 115. Engaging in a horserace, where horseracing is unlawful, and where injury or death results to the insured during the race, or in an effort to stop one of the horses during the progress of the race, is an act falling within the terms of a policy forfeiting the insurance for death caused by "dueling, fighting, or other breach of the law on the part of the assured": *Insurance Co. v. Seaver*, 19 Wall. 531. If both parties engage willingly in a personal fight or mutual combat, death resulting therefrom, caused by a pistol in the hands of one of the combatants is not included in a policy excepting from the risk death caused by "dueling, fighting, or other breach of the law": *Gresham v. Equitable etc. Ins. Co.*, 87 Ga. 497; 27 Am. St. Rep. 263. If a policy of life insurance contains a clause providing that the policy shall be void if the insured shall die in the known violation of any law, the insurance is forfeited if the insured is killed by being shot while

engaged in the commission of a robbery and assault and battery, but it must appear, in order to exonerate the company, that such criminal act was not so far completed as to render the shooting a new and distinct event, rather than a mere continuation of the original affray, and that the death was in consequence of the crime of the insured, but it need not be proved that the insured knew or had reason to believe that his criminal act would or might expose his life to danger: *Cluff v. Mutual etc. Ins. Co.*, 13 Allen, 308; 99 Mass. 318.

Under an accident insurance policy providing that no recovery can be had for an injury effected or resulting wholly or partly, directly or indirectly, from any violation of law, the insured cannot recover for an injury received on Sunday, and caused by an accident while he was returning from a hunting expedition, in a state where the statute prohibits both hunting and traveling for pleasure on Sunday: *Duran v. Standard etc. Ins. Co.*, 63 Vt. 437; 25 Am. St. Rep. 773. But if the insured is injured on Sunday after he has finished hunting, and has returned to a friend's house where he is stopping, he is not injured while violating law, although hunting is prohibited on Sunday. Such violation is too remote to be regarded as the cause of the injury: *Prader v. National etc. Assn.*, 95 Iowa, 149-150.

Death by suicide is not within the meaning of a provision in a life insurance policy that it shall be void if the assured shall die in the violation of, or an attempt to violate, any criminal law: *Darrow v. Family Fund Soc.*, 42 Hun, 245; *Freeman v. National etc. Soc.*, 42 Hun, 252. These decisions are put upon the ground that suicide is not a violation of any criminal law. Under such a policy it was held in *Kerr v. Minnesota etc. Assn.*, 39 Minn. 174, 12 Am. St. Rep. 631, that suicide committed by an alleged fugitive from justice, to avoid arrest and trial for a crime committed by the assured, is not to be considered as the approximate result of the alleged crime, and that his death by suicide is not within the proper meaning of the policy, to be considered as the violation of law therein referred to. "Suicide, though strictly a crime, is not reckoned among offenses or violations of law, such as the language of the policy would be commonly understood to refer to": *Kerr v. Minnesota etc. Assn.*, 39 Minn. 174; 12 Am. St. Rep. 631.

In *Goetzman v. Connecticut etc. Ins. Co.*, 3 Hun, 515, it appeared that the assured was shot by one Hesler immediately after he had criminal intercourse with Hesler's wife, and the court held that a policy such as we have under consideration was not avoided, and, in delivering the opinion, said: "Assuming that the act of adultery was a violation of law, within the meaning of the parties to the contract of insurance, we are of opinion that the assured did not die in consequence. The undisputed facts show that he was killed, not in the act of adultery, nor in defense of person or property. The offense had been completed and the assured was about to go away. He was not, therefore, at the time he was killed, violating any law or even committing a trespass, for he was in the house by the license of the wife, from whom the husband had separated. Our law plainly denounces an act like that perpetrated by Hesler as a crime, and we can conceive of no principle upon which it could properly be treated in

a court of justice as a natural or legitimate effect of the cause stated. The fact that the interval between the injury and the killing was short is not in this instance material. If the assured had been killed a day, or a week, or a year after the injury for the same cause, it would have been quite as direct a result thereof as when it was done. In short, the proposition that a man, who has been thus wantonly killed by another, without necessity or lawful excuse, died in consequence of his own act, is logically contradictory, unless it be admitted that the killing of an adulterer follows his offense in the ordinary sequence of events. That admission we are not prepared to make: *Goetzman v. Connecticut etc. Ins. Co.*, 3 Hun, 515-517.

In another case it was held that under such a clause, the policy was not avoided, if the assured was killed after retreating from an altercation which he had commenced under circumstances which made the slayer guilty of felonious homicide: *Harper v. Phoenix Ins. Co.*, 19 Mo. 506. Nor is the policy avoided if the assured is killed in a personal rencounter, while acting in the lawful defense of his person, when he has reasonable cause to apprehend a design on the part of his adversary to do him great personal injury, and did apprehend immediate danger of such design being accomplished. If he had killed his adversary, under such circumstances, it would have been justifiable homicide, and not a violation of law: *Overton v. St. Louis etc. Ins. Co.*, 39 Mo. 122; 90 Am. Dec. 455.

A provision in the policy exempting the insurer from liability for injuries to the assured while engaged in or in consequence of some unlawful act does not extend to exempt the insurer from liability because of some infraction of law by the insured, when the act has no causative connection with the injury, or when the act is in violation of some obligation of morality or rule of policy not recognized or adopted as law. Thus living in fornication is not an unlawful act unless accompanied with circumstances of notoriety or publicity, and the fact that the insured was so living at the time of his death does not exempt the insurer from liability under such clause: *Insurance Co. v. Bennett*, 90 Tenn. 256; 25 Am. St. Rep. 685. The fact that the assured was in a public highway, in a public place, in an intoxicated condition contrary to a criminal statute, at the time he was injured, does not of itself show any causative connection between the act constituting a violation of law and the injury sufficient to avoid the policy: *National etc. Assn. v. Bowman*, 110 Ind. 355. Visiting a house of ill-fame, unlawful carrying of weapons, and leaving such house for the street needlessly, the first two acts being a violation of law, do not absolve the insurer unless some causative connection between such acts and the injury to the insured is shown: *Jones v. United States etc. Assn.*, 92 Iowa, 652. If the insured, shortly after committing a misdemeanor by shaking dice with another, is shot and killed by the latter, evidence failing to show that any quarrel arose over the game, or that any provocation was given up to the moment of the shooting, does not show that the death of the assured resulted from the violation of law: *Standard etc. Ins. Co. v. Fraser*, 76 Fed. Rep. 705.

**BALTIMORE AND OHIO RAILROAD COMPANY v.
NORRIS.**

[17 INDIANA APPEALS, 189.]

RAILROADS—EXPULSION OF TRESPASSER.—If the conductor of a passenger train, while acting within the scope of his authority, willfully injures a trespasser while ejecting him from the train, the company is liable therefor in damages.

RAILROADS—EXPULSION OF PASSENGER—OFFER TO PAY FARE.—If a person gets upon a railroad train without a ticket and without knowing that the train does not stop at the station of his destination, he is entitled, upon payment or tender of sufficient money, either by himself or a third person, to pay his fare to the next regular stopping place, to remain upon the train as a passenger, and if such payment or tender is refused, and the conductor thereupon expels him from the train, the expulsion is wrongful and the company is liable in damages.

RAILROADS—EXPULSION OF PASSENGER—PROVOCATION.—The fact that a passenger, at the time of tendering his fare, accuses the conductor in charge of the train of violating a rule of the company on a former occasion and threatens to report such violation, does not justify the conductor in wrongfully ejecting him from the train, and he is entitled to recover damages therefor.

J. H. Collins and J. E. Rose, for the appellant.

S. A. Wood, D. M. Link, J. F. Shuman, and F. S. Roby, for the appellee.

190 BLACK, J. The appellee sued the appellant and recovered judgment for one hundred and fifty dollars, for the acts of a conductor upon appellant's passenger train, into one of the cars of which the appellee had gone for the purpose of traveling from appellant's station at Garrett to its station at Albion, the alleged wrongs complained of being the assaulting of the appellee with force and violence while in said car, and the act of said conductor in ejecting the appellee from said train with unnecessary force, at night, at a dangerous place, away from any dwelling, station, or stopping place, said conductor accompanying his acts with opprobrious and indecent epithets applied to the appellee in the presence and hearing of other passengers.

The argument on behalf of appellant is so general in its character that it is not quite clear that any portion of it should be treated as relating properly to the assignment that the court erred in overruling the demurrer to the complaint.

191 In the course of the argument in appellant's brief, however, it is said: "If the complaint or the evidence had either shown that the appellee was lawfully upon the train, then the complaint would have been sufficient; otherwise not."

The complaint contained two paragraphs, the second of which

alleged many facts in addition to those alleged in the first, and, amongst other things, showed, in substance, that the appellee, having been prevented by the fact that the ticket office was closed from purchasing a ticket or ascertaining at what places the train stopped to receive and deliver passengers after leaving Garrett, and having seated himself in the car, and taken passage thereon, he tendered to the conductor, when he came through the car, payment of the regular cash fare charged by the appellant for transportation between said towns; that he was then informed and for the first time learned that the train did not stop to take on and deliver passengers at Albion; that he thereupon offered to pay and tendered to the conductor payment of the regular cash fare charged by the appellant from Garrett to the first regular stopping place of the train, before he was ordered to leave the train, and before any active steps had been taken to eject him therefrom; that the conductor wrongfully refused to receive said fare; that by the rules and regulations of the appellant the train was scheduled to stop at the town of Walkerton to discharge passengers, and that the appellee offered to pay his fare to that town, but the appellant wrongfully refused to receive said fare, or to transport him to that town, but wrongfully and lawfully ejected him from the train, etc.

The first paragraph contained an allegation that after the appellee offered and tendered to the conductor the regular cash fare charged by the appellant ¹⁹² for transportation between Garrett and Albion, the appellant, by its said conductor, with force and violence assaulted the appellee.

If the first paragraph did not show the appellee to be entitled to be considered a passenger, but showed him to be a trespasser, still the appellant was bound not to injure him willfully.

In *Lake Erie etc. R. R. Co. v. Matthews*, 13 Ind. App. 355, this court said: "The wrong charged is in the nature of a willful injury, and if the appellee was guilty of negligence or was even guilty of being a trespasser, a willful or wanton injury would not be justifiable. If the appellee was not entitled to ride upon the train, the conductor should have requested him to alight. It was time enough to resort to force and violence when the same became necessary." Very many authorities might be cited to the same effect.

If it could be held that the second paragraph did not proceed upon the theory of an unlawful expulsion, and did not show the appellee to have been a passenger, but, on the contrary, showed him to have been a trespasser, that paragraph could not, on that account, be held insufficient; for it was alleged therein

that the appellee used no force in resisting ejection, but in all things conducted himself in an orderly, proper and law-abiding manner, and that the conductor, in ejecting him, used unnecessary force, and accompanied his acts with opprobrious and indecent language and epithets, which he applied to the appellee in the presence and hearing of a number of persons in the car; that the appellee was greatly humiliated and mortified thereby, and put in great anxiety of mind; and that he was disgraced in the eyes of the persons who heard said language and were not familiar with the facts.

¹⁹³ All such injury is willful, and, being inflicted by the conductor while acting within the scope of his authority, the appellant would be liable therefor, whether the injured person were a passenger or a trespasser.

It is said in the recent valuable work, Elliott on Railroads, section 1255, that the company may be held liable, "although the injured person be a trespasser, if its employes, while acting within the scope of their actual authority, willfully injure him or eject him with unnecessary force and violence."

In Chicago etc. R. R. Co. v. Bills, 118 Ind. 221, in the original complaint the plaintiff sought to recover for injuries sustained to his person and property while being wrongfully expelled from the defendant's cars. An amended complaint counted upon a right to recover for injuries suffered by being expelled from the train with unnecessary force. It was said by the court: "Both complaints involve the same transaction. The gravamen, or substantial grievance complained of in both, is the personal injury suffered by the plaintiff in being ejected from the defendant's train. The original complaint proceeded upon the theory that the plaintiff sustained an injury to his person by being wrongfully expelled from a train on which he had a right to be. The amended complaint is predicated upon the same transaction and injury, but proceeds upon the theory that the plaintiff may have been wrongfully or carelessly on the train, and that he was ejected therefrom with unnecessary force, to his injury. The first complaint was more comprehensive than the last, and embraced elements of damage which were not in the amended complaint, but the last embraced nothing that was not covered by the first."

¹⁹⁴ In the same case it is said by the court that expulsion from a train with excessive force and violence is equivalent to an assault and battery, and that no degree of carelessness on the part of the person assaulted furnishes any excuse for an unlawful invasion of the right of personal security.

A railroad company is liable to one who has been ejected from a train by the conductor with unnecessary force, though the latter had a right to expel such person: *Chicago etc. R. R. Co. v. Bills*, 104 Ind. 13.

But we are of the opinion that the second paragraph of the complaint proceeded upon the theory of a wrongful expulsion of a passenger, and that it may be held sufficient as such a complaint.

In *Columbus etc. Ry. Co. v. Powell*, 40 Ind. 37, it was held that, notwithstanding the fact that the plaintiff's intestate got on the train by mistake, the relation of passenger and carrier existed.

Such a person is entitled to be treated as a passenger while on the train: *Cincinnati etc. R. R. Co. v. Carper*, 112 Ind. 26; 2 Am. St. Rep. 144; *Lake Erie etc. R. R. Co. v. Mays*, 4 Ind. App. 413; *Ham v. Delaware etc. Canal Co.*, 142 Pa. St. 617; *Louisville etc. R. R. Co. v. Garrett*, 8 Lea, 438; 41 Am. Rep. 640.

It is true that, in the absence of statutory provisions to the contrary, a railroad company may make rules providing that particular trains shall stop only at certain stations, when it furnishes reasonable means (the want of which is not asserted in this case) of reaching all stations on its road by other trains; and that it is the duty of a person taking passage on a train to inform himself when, where, and how he can stop, according to the regulations and time card of the railroad company. If he makes a mistake, not induced by the company, he has no remedy against the company for its enforcement of such rule: *Elliott* ¹⁹⁵ on Railroads, secs. 200, 1576, 1593; *Ohio etc. Ry. Co. v. Applewhite*, 52 Ind. 540; *Pittsburgh etc. Ry. Co. v. Nuzum*, 50 Ind. 141; 19 Am. Rep. 703.

It is the duty of the person about to become a passenger to use reasonable diligence to acquaint himself with such a rule: *Pittsburgh etc. Ry. Co. v. Lightcap*, 7 Ind. App. 249.

We think the second paragraph of the complaint at least showed diligence on the part of the appellee sufficient to relieve him from the imputation of being a trespasser in entering the car, and to entitle him to be treated as a passenger; and, though he had no right to require the conductor to deviate from the rule and to demand to be put down at Albion, he could lawfully remain upon the train as a passenger, by paying his fare to the first regular stopping station, which he offered to do: *Pittsburgh etc. Ry. Co. v. Lightcap*, 7 Ind. App. 249.

There was a special verdict consisting of interrogatories and

the answers of the jury thereto. The action of the court in rendering judgment upon the verdict is not mentioned in argument, but it is contended on behalf of the appellant that the special verdict was contrary to law and not sustained by sufficient evidence, and that the damages were excessive.

A question is suggested in argument as to the manner in which the offer to pay fare to the first stopping place was made. It appears from the evidence that the appellee was accompanied by four other men; that when the appellee had tendered the amount of the fare from Garrett to Albion to the conductor, and had been informed by the latter that the train would not stop at Albion, and before the conductor had ordered him off or had made any attempt to stop the train, one of appellee's companions offered to pay the fare for the whole party to the next stopping place, ¹⁹⁰ and took out his pocketbook and money, having more than sufficient so to pay, but the conductor refused to carry them, and compelled them to get off the train.

In *Ham v. Delaware etc. Canal Co.*, 142 Pa. St. 617, it was held that if an actual tender of fare be made before the train has been stopped the conductor cannot refuse it, no matter who made the tender.

In *O'Brien v. New York etc. R. R. Co.*, 80 N. Y. 236, it was held that where the train has not been stopped for the sole purpose of putting the passenger off, if, before being ejected, he or others in his behalf offer to pay the full fare, the conductor should accept it; and that, if he refuses to do so and ejects the passenger, the company will be liable.

In *Louisville etc. R. R. Co. v. Garrett*, 8 Lea, 438, 41 Am. Rep. 640, where the conductor had taken hold of the passenger (who had offered, ignorantly and in good faith, a tax receipt in payment of his fare, and was unable to pay), and was walking with him to the door of the car, after ringing the bell to stop the train, and, as he opened the door, another passenger said, "Let him go back; I will pay his fare," and the conductor heard the offer, but ejected the plaintiff, it was held that it was correct to instruct the jury that, if another person offered to pay the fare before ejection from the car, the carrier was bound to receive it and transport the passenger: See *Clark v. Wilmington etc. R. R. Co.*, 91 N. C. 506; 49 Am. Rep. 647.

We think the offer to pay fare, shown, as above stated, by evidence, in the case at bar, was sufficient to make the expulsion wrongful.

A question is discussed in the briefs, relating to an altercation between the appellee and the conductor, the evidence of

which, it is claimed, showed the appellee to be equally in fault with the conductor. It was in evidence that when the conductor came to the appellee, the latter placed in the hand of the former a ¹⁹⁷ certain sum, being the fare from Garrett to Albion; that the conductor said, "Where the hell are you going?" and the appellee said he was going to Albion; that the conductor said that the train did not stop there; that the appellee said he guessed it did, as he had ridden upon that train before, and it always stopped; that the appellee had ridden on the train before; that the conductor said, "You knew this train didn't stop at Albion [interjecting an abusive and indecent epithet]; what in the hell are you on this train for?"

Afterward, the conductor having said something to one of the party about losing his job if he should stop, the conductor was told by the appellee that he had paid him the cash fare from Auburn Junction to Albion at a previous date, and that he, the conductor, had accepted the cash, stopped his train and let the appellee off at Albion, and did not give the appellee a cash receipt; and the appellee threatened to report the conductor for what he had done on that previous occasion.

It is claimed, in effect, that this language of the appellee was a sufficient provocation for the conduct of the conductor.

It must be observed that, if the evidence for the appellee be accepted as true, the conductor himself commenced the abusive altercation and was guilty of the first offensive provocation. Under such circumstances, we cannot regard the language of the appellee as so disorderly as to authorize his expulsion after the offer to pay his fare: *Louisville etc. Ry. Co. v. Wolfe*, 128 Ind. 347; 25 Am. St. Rep. 436; *Chicago etc. R. R. Co. v. Flexman*, 103 Ill. 546; 42 Am. Rep. 33.

The amount of the damages was so much within the province of the jury that it would be improper for us to interfere with the result reached by them upon that ¹⁹⁸ question: *Louisville etc. Ry. Co. v. Goben*, 15 Ind. App. 123.

We do not find any available error.

Judgment affirmed.

RAILROADS—EXPULSION OF TRESPASSERS OR PASSENGERS FROM TRAIN—LIABILITY OF COMPANY.—A trespasser upon a railroad train should not be ejected therefrom without a reasonable regard for his safety: *Arnold v. Pennsylvania R. R. Co.*, 115 Pa. St. 135; 2 Am. St. Rep. 542, and note. He may be ejected at a place other than a regular station, provided he is not wantonly exposed to peril of serious personal injury: *Hardenbergh v. St. Paul etc. Ry. Co.*, 39 Minn. 3; 12 Am. St. Rep. 610, and note. In all cases where a railway employé uses undue force in ejecting a passenger from the cars and commits an assault and battery upon him the

company is liable in damages: Monographic note to Richmond etc. R. R. Co. v. Jefferson, 32 Am. St. Rep. 99. See, also, extended note to Commonwealth v. Power, 41 Am. Dec. 476-478; also, monographic note to Chicago etc. R. R. Co. v. Parks, 68 Am. Dec. 570-573, as to when the right of expulsion may properly be exercised.

BEDFORD BELT RAILWAY COMPANY v. McDONALD.

[17 INDIANA APPEALS, 492.]

RAILROADS—DUTY TO FURNISH MEDICAL AID FOR EMPLOYÉS.—A railroad corporation is under no different obligation to procure medical and surgical aid for its employés than is any other corporation or person under like circumstances.

RAILROADS—POWER TO EMPLOY MEDICAL AID FOR EMPLOYÉS.—The general officers of a railroad company have power to employ medical attendance for its employés injured in the performance of duty in the company's service. Otherwise as to subordinate officers, except on an urgent exigency.

RAILROADS—GENERAL OFFICERS—POWER TO EMPLOY MEDICAL AID FOR EMPLOYÉS.—The president, vice-president, general manager, secretary, and treasurer of a railroad company are general officers, with power to employ medical attendance for railroad employés injured in the performance of services for the company.

RAILROADS—GENERAL OFFICERS—POWER TO EMPLOY SURGEON.—The general officers of a railroad company have power to contract for the services of a surgeon for railroad employés injured in the course of their employment, provided he is to receive compensation only for services actually rendered. Such contract is not against public policy, nor is it an invasion of the rights of injured employés.

CORPORATIONS—CONTRACTS—ULTRA VIRES.—If a private corporation has entered into a contract not immoral in itself, and not forbidden by statute, and it has been in good faith fully performed by the other party, the corporation cannot sustain a plea of ultra vires.

APPELLATE PRACTICE—EVIDENCE—RECORD.—Unless it affirmatively appears that the long-hand manuscript of the evidence was filed with the clerk before it was incorporated in the bill of exceptions, the evidence cannot be considered as being in the record.

T. M. Trissal, for the appellant.

H. C. Duncan, I. C. Batman, W. H. Martin, J. R. East, and R. G. Miller, for the appellee.

492 ROBINSON, J. Appellee seeks to recover the value of medical services rendered appellant's employés. The complaint is in two paragraphs. Demurrers for want of facts were overruled and appellant answered with the general issue and payment. The jury returned a special verdict, and, over appellant's motion in arrest, and its motion for a new trial, judgment was rendered on the verdict. The errors assigned are the

overruling of the demurrers to the complaint, the motions ⁴⁹³ for a new trial and in arrest, and in rendering judgment in appellee's favor on the special verdict.

The first paragraph of the complaint alleges that appellee is a licensed practicing physician and surgeon; that appellant is a railway corporation, organized under the laws of this state; that appellant is indebted to appellee for medical and surgical services rendered employes of appellant at appellant's special instance and request; that the services were rendered employes injured in the line of their employment in appellant's service.

It is averred in the second paragraph that appellee was employed by the president, vice-president, general manager, secretary, and treasurer of appellant to render medical and surgical attention to appellant's employes injured in the line of their employment in appellant's service, and particularly to employes named in a bill of particulars filed with and made a part of each paragraph of complaint, the value of which services he seeks to recover.

When this case was here on a former appeal, the complaint was held bad for failing to show that appellant was a licensed physician and that the services were rendered for workmen of appellant injured in the performance of duty, or for persons injured by its trains: *Bedford Belt Ry. Co. v. McDonald*, 12 Ind. App. 620.

A railroad corporation is under no different obligation to procure medical and surgical aid for its employes than is any other corporation or person under like circumstances.

It is well settled that the general officers of a railroad company have power to employ medical attendance for workmen injured in the performance of duty in the company's service: *Toledo etc. R. R. Co. v. Mylott*, 6 Ind. App. 438, and cases there cited.

⁴⁹⁴ On the former appeal it was said that: "A subordinate officer or agent of a corporation has no authority to employ surgical attendance for a servant injured in the performance of duty or for a person injured by its trains, except on an urgent exigency. In such case the liability arises with the emergency, and with it expires": *Bedford Belt Ry. Co. v. McDonald*, 12 Ind. App. 620.

It is said by appellant's counsel that: "The reference to 'subordinate officers' could only mean, and was doubtless intended to be meant, as 'subordinate' to the board of directors, and could not possibly have been used to designate some one whose rank or title was inferior to that of the general officers.:"

We do not think it can be said that the president of a railroad company is a subordinate officer of the corporation: The statute concerning the organization of railroad companies provides that there shall be a president of the company, who shall be chosen by and from the directors. The statute further provides that the board of directors has power to make by-laws for the management of the business affairs of the company, and prescribing the duties of officers, and for the appointment of all the officers for carrying on all the business within the object and purpose of the company: Burns' Rev. Stats. 1894, secs. 5145, 5147.

The officers named in the complaint are selected by the company through its board of directors. They are placed in a position of power by the company, and it invests them with ostensible authority. The appellee acted upon the apparent authority with which the company clothed these officers. So far as the public is concerned, such officers are almost always looked upon as the corporation itself, and through them the substantial part of the business of the corporation is done. They could make the contract sued on if the corporation itself could make it, and the only question ⁴⁹⁵ here is, whether the contract is beyond the power of the corporation to make.

It is stoutly maintained by appellant's counsel that such a contract is outside of the objects for which the corporation was created, and is beyond the scope of the powers granted by the act of incorporation.

In *Terre Haute etc. R. R. Co. v. McMurray*, 98 Ind. 358, 49 Am. Rep. 752, it was held that the conductor of a train could employ a surgeon to attend an injured brakeman, the conductor being the highest representative of the corporation on the ground.

In *Louisville etc. Ry. Co. v. McVay*, 98 Ind. 391, 49 Am. Rep. 770, the company was held liable for the services of a nurse employed by a roadmaster, the employment having been ratified by the general manager of the company.

In *Atlantic etc. R. R. Co. v. Reisner*, 18 Kan. 458, it was held that the general agent of the company could employ a surgeon to attend an injured employé, the court saying: "The general agent of the company is virtually the corporation itself."

In *Swazey v. Union Mfg. Co.*, 42 Conn. 556, the business manager bound the corporation for the value of a surgeon's services in attending a boy injured in the corporation's service.

The general superintendent of a railroad company has author-

ity to employ a surgeon to attend a person injured by one of the company's trains, whether the injured person be an employé or not: *Cincinnati etc. Ry. Co. v. Davis*, 126 Ind. 99. See *Terre Haute etc. R. R. Co. v. Stockwell*, 118 Ind. 98; *Terre Haute etc. R. R. Co. v. Brown*, 107 Ind. 336.

During recent years many railroad companies have established voluntary relief departments for the purpose of accumulating a fund out of which to pay employés, who are members, sick and disablement benefits, and the courts of many states have assumed that ⁴⁰⁶ the act of establishing such a department is within the express or implied powers of the corporation: *Miller v. Chicago etc. Ry. Co.*, 65 Fed. Rep. 305; *Lease v. Pennsylvania Co.*, 10 Ind. App. 47; *Vickers v. Chicago etc. R. R. Co.*, 71 Fed. Rep. 139; *Donald v. Chicago etc. Ry. Co.*, 93 Iowa, 284; *Johnson v. Philadelphia etc. R. R. Co.*, 163 Pa. St. 127; *Voluntary Relief Department etc. v. Spencer*, 17 Ind. App. 123.

In *Thompson on Corporations*, section 5840, the author says: "An implied power will be ascribed to any corporation employing labor to incur expense on account of injuries received by its employés in the line of their employment, in the absence of any express statutory grant of such power."

While, in a certain sense, it may be said that the complaint counts on a contract of general employment, yet there was no contract to pay appellee a certain sum as physician, nor to pay him any sum, unless some employé should be injured, and the complainant seeks to recover only for services actually rendered such injured employés. The effect of the contract was nothing more than an agreement between appellee and the corporate officers that if an employé was injured and needed medical or surgical attention appellee should render the services. If appellee performed no services he could recover no compensation. He is not seeking to recover a salary agreed to be paid him in any event, but the value of services actually rendered. A fair construction of the contract is, that no services were to be rendered unless an emergency arose for such services. We do not decide whether a corporation has power to employ a surgeon at a stated salary which he is to receive in any event, because that question is not presented by the demurrer.

We cannot agree with appellant's counsel that to ⁴⁰⁷ permit a corporation to make such a contract is against public policy, and is an invasion of the rights of the injured employé. We cannot presume that the amount paid the surgeon by the company is deducted from the wages of the injured employé,

nor will we presume that such a contract cuts off the right of the injured employé to call in any surgeon he may choose. The fact that the other contracting party has performed his part of the contract necessarily implies that the corporation has received the benefits of it.

The general rule is, that where a private corporation has entered into a contract not immoral in itself and not forbidden by any statute, and it has been in good faith fully performed by the other party, the corporation will not be heard on a plea of *ultra vires*: Louisville etc. Ry. Co. v. Flanagan, 113 Ind. 488; 3 Am. St. Rep. 674; State Board etc. v. Citizens' Street Ry. Co., 47 Ind. 407; 17 Am. Rep. 702; Thompson on Corporations, sec. 6026.

The business of railroading is recognized by everyone as hazardous. Persons engaged in the business are liable to be injured, and often receive injuries which the highest degree of skill and care could not have prevented. If a railroad corporation sees proper to recognize this fact, and, prompted by the highest considerations of justice and humanity, enters into a contract with a physician to give prompt attention to any of its servants who may be injured, and such attention is given injured employés, a court will not say, in a suit for the value of such services, that the contract is one beyond the power of the corporation to make. We fail to see any difference in effect between a corporation through its general officers employing a surgeon at the time an employé is injured, and employing him in advance to render services to an employé only in the event that the employé is injured.

⁴⁰⁸ It is urged by appellee's counsel that the evidence is not in the record. The record sets out the complaint, the demurrers and rulings thereon and exceptions, the answers, reply, trial, instruction requested by appellant, special verdict, motion for a new trial and ruling thereon and exception, judgment, motion in arrest, and appeal bond, in the order named. This is followed by the clerk's certificate, in which he certifies "that the above and foregoing transcript contains a full and complete copy of all the files and entries of record made and rendered in said cause, . . . that on the tenth day of April, 1896, the official reporter who took down the evidence in said cause on the trial thereof, filed in my office his longhand report thereof, and certified to its correctness, which is the same manuscript of the evidence incorporated in the bill of exceptions and made a part of the foregoing transcript." This is followed by what is termed the "stenographer's transcript," which contains the

evidence. Following the stenographer's certificate is the following entry: "And afterward a motion for a new trial, as elsewhere appearing in the record, having been filed by the said defendant, the same was, on the sixteenth day of March, 1896, overruled by the court, to which ruling the defendant did then and there except, and was allowed sixty days in which to file its bill of exceptions." The record then shows that, "on the tenth day of April, 1896, and within the time allowed so to do, the said defendant came and presented to the judge of said court its bill of exceptions in said cause, containing the sworn official reporter's original longhand manuscript of his verbatim shorthand notes and report of the evidence given and delivered in the cause, etc., and asked the court to sign and seal the same and certify that it contains a full, true, complete ⁴⁹⁰ and impartial transcript and report of all the evidence given and introduced and of all the proceedings had on the trial of said cause, and make it a part of the record thereof, which is now accordingly done (said bill of exceptions having been examined and found to be true) this tenth day of April, 1896." This is signed by the judge. In his final certificate the clerk says: "That the above and foregoing is the identical bill of exceptions and identical longhand manuscript of the verbatim report of the evidence made by the official reporter of said court in said cause, the said manuscript having been by the defendant, on the 10th of April, 1896, filed with me, as such clerk, incorporated in said bill of exceptions, and the said bill also having been filed at the said time."

Granting there is a bill of exceptions, and that it was filed, it purports to contain nothing but the evidence, and it does not affirmatively appear from the record that the longhand manuscript of the evidence was filed in the clerk's office before it was incorporated in the bill of exceptions, or before the bill was filed as required by the statute. The evidence is not in the record: *Fitzmaurice v. Puterbaugh*, 17 Ind. App. 318; *Thompson v. Shewalter*, 17 Ind. App. 290; *Pittsburgh etc. Ry. Co. v. Cope*, 16 Ind. App. 579.

The only ground for a new trial argued in appellant's brief is, that the damages are excessive; but, as the evidence is not in the record, we cannot say that the amount fixed by the jury is too large.

There are other alleged errors assigned, but as they have not been discussed in appellant's briefs, they are deemed waived.

Judgment affirmed.

CORPORATIONS—CONTRACTS OF—ULTRA VIRES AS A DEFENSE.—A corporation cannot avail itself of the defense of ultra vires when a contract has been performed in good faith by the other party, and the corporation has had the full benefit of its performance: *Kadish v. Garden City etc. Building Assn.*, 151 Ill. 531; 42 Am. St. Rep. 256, and note; *Williams v. Bank*, 71 Miss. 858; 42 Am. St. Rep. 503, and note. An executed corporate contract, not merely ultra vires, but also void as against public policy, cannot be enforced in favor of either party to it: *McNulta v. Bank*, 164 Ill. 427; 56 Am. St. Rep. 203, and note.

RAILROADS—DUTY TO FURNISH MEDICAL ATTENDANCE. A railroad company is under no legal obligation to provide surgical aid for its injured employes. If it does so, voluntarily and gratuitously, its liability cannot be extended beyond its negligence, if any, in the selection of a surgeon: *Pittsburgh etc. R. R. Co. v. Sullivan*, 141 Ind. 83; 50 Am. St. Rep. 313, and note; *Quinn v. Railroad*, 94 Tenn. 713; 45 Am. St. Rep. 767.

CORPORATIONS—ULTRA VIRES—WHAT CONTRACTS ARE. Acts of corporations spoken of as ultra vires are not necessarily unlawful, or even such as the corporation cannot perform, but merely those which are not within the power conferred upon the corporation by its charter, and are in violation of the trust reposed in the managing board by the shareholders that the affairs shall be managed, and the funds applied solely for carrying out the object for which the corporation was created: *Kadish v. Garden City etc. Building Assn.*, 151 Ill. 531; 42 Am. St. Rep. 256, and note. See *Jemison v. Citizens' Sav. Bank*, 122 N. Y. 135; 19 Am. St. Rep. 482; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; 99 Am. Dec. 300, and note.

ALBANY FURNITURE COMPANY v. MERCHANTS' NATIONAL BANK.

[17 INDIANA APPEALS, 531.]

APPELLATE PRACTICE—JUDGMENT BY DEFAULT.—An assignment of error that the complaint does not state facts sufficient to constitute a cause of action cannot be made available for the first time on appeal for the reversal of a judgment upon default, unless some fact essential to the existence of the cause of action has been wholly omitted from the complaint.

JUDGMENTS BY DEFAULT—PRESUMPTION ON APPEAL. If a judgment is taken by default, it cannot be presumed on appeal that anything was proved beyond what was alleged in the complaint.

PLEADING—FAILURE TO PLEAD.—Failure by defendant to demur or answer to a complaint, followed by judgment by default is a confession that the complaint is true.

NEGOTIABLE INSTRUMENTS—PLEADING.—A complaint on a note signed "J. E. Stafford, Pres., J. Zapf, Mgr., Albany Furniture Co.," alleging that the note sued on is the joint note of the parties, while the note recites that "we promise to pay," states a cause of action against Stafford and Zapf as individuals.

NEGOTIABLE INSTRUMENTS—JUDGMENT BY DEFAULT AGAINST AGENT OF INDORSER.—If a note sued on is indorsed "S. by G." and the action is dismissed as to "S." and judgment taken by default against the makers and "G.," the judgment as to the latter is erroneous.

J. W. Ryan and W. A. Thompson, for the appellants.

J. F. and E. E. Meredith, for the appellee.

⁵³² ROBINSON, J. Appellee sued appellants upon the following instrument:

"Chicago, Ill., Aug. 15, 1894.

One hundred and eighty days after date, for value received, we promise to pay, at the office of Frank T. Gilpin, Muncie, Indiana, to the order of E. A. Shanklin & Co., the sum of one hundred and fifty dollars with interest at the rate of — per cent per annum, payable annually, and attorneys' fees. The makers and indorsers of this note hereby severally waive presentment for payment, protest, and nonpayment, and also waive relief from all valuation and appraisement laws.

(Signed)

ALBANY FURNITURE CO."

J. ZAPF, Mgr.

JAS. E. STAFFORD, Pres.

The note was indorsed "E. A. Shanklin & Co., per Frank T. Gilpin."

The complaint alleges: "The plaintiff complains of the defendants and alleges that on the fifteenth day of August, 1894, the defendants, The Albany Furniture Company, James E. Stafford, and Jacob Zapf, by their joint promissory note, a copy of which is filed herewith, marked 'Exhibit A,' and made a part of this complaint, promised to pay to the order of," etc.

The summons issued directed the sheriff to summon "The Albany Furniture Company, James E. Stafford, Jacob Zapf, E. A. Shanklin & Co., and Frank T. Gilpin." The summons was served on Stafford and Gilpin by reading, on the furniture company "by reading the same to and in the hearing of James E. Stafford, president of said company, and by giving him a true copy of this writ," and on Jacob Zapf by leaving a copy at his place of residence. None of the defendants appeared, and judgment was rendered in appellee's favor on default.

Without objection to the proceedings in the trial ⁵³³ court, appellants question the sufficiency of the complaint.

The error assigned is, that the complaint does not state facts sufficient to constitute a cause of action; and it cannot be available for the reversal of a judgment upon default, unless some fact essential to the existence of the cause of action has been wholly omitted from the complaint: *Laverty v. State*, 109 Ind. 217; *Western Assur. Co. v. Koentz*, 17 Ind. App. 54.

The judgment having been taken by default, we cannot assume that anything was proved beyond what is alleged in the

complaint. So that the sufficiency of the complaint comes before us exactly as if there had been an unsuccessful demurrer in the court below: *Old v. Mohler*, 122 Ind. 594; *Albany Furniture Co. v. Merchants' Nat. Bank*, 17 Ind. App. 93.

The failure of the appellants to demur or answer the complaint was a confession that the complaint was true as to the facts stated: *Fisk v. Baker*, 47 Ind. 534.

It is alleged in the complaint that the note sued on is the joint promissory note of the furniture company, Stafford and Zapf, and we must assume that that fact was proven.

The case of *Albany Furniture Co. v. Merchants' Nat. Bank*, 17 Ind. App. 93, cited by counsel for appellee, is not controlling in this case, for the reason that the complaint in that case was essentially different from the complaint in the case at bar.

In *Means v. Swormstedt*, 32 Ind. 87; 2 Am. Rep. 330, the note read, "We promise to pay," etc., and was signed "Wm. B. Swormstedt, Sec'y." On the lower left-hand corner of the note was an impression of a seal, embossed upon the paper of the note, bearing the words, "Neal Manufacturing Co., Madison, Ind." In holding this to be ⁵³⁴ the note of the corporation only, the court said: "The seal of the company is in the hands of the secretary; it is his duty to affix it to papers executed by the corporation. The presumption is, then, that he did, after signing his name and adding his office, affix the seal of the corporation, which, containing upon its face the proper designation of the corporation, was a signing of their name."

In the case of *Pearse v. Welborn*, 42 Ind. 331, "the makers of the note only added to their names letters which indicated the offices they held, and the characters in which they acted, but in the body of the note the promise is made by them as master, wardens, and trustees of said lodge."

In *Armstrong v. Kirkpatrick*, 79 Ind. 527, the note on its face says that it is the note of the Howard County Agricultural Association, and that it executes the note by the directors of the association. In that case the note was held to be the note of the association.

In the case of *Mears v. Graham*, 8 Blackf. 144, the note was: "\$333.15. Ten days after date, we, the trustees of the Methodist E. Church in Rockport, promise to pay to the order of I. and J. Mears three hundred and thirty-three dollars and fifteen cents for value received. Rockport, Ind., July 25, 1842. John W. Graham, Wm. Drum, John E. Cotton, Alexander Britton, Oliver Morgan, Trustees of the M. E. Church." This was held to be the note of the individuals signing it, although the face

of the note would seem to indicate that the intention was to bind the church only: See *Jackson School Tp. v. Farlow*, 75 Ind. 118; *Hobbs v. Cowden*, 20 Ind. 310; *Inhabitants of Congressional Tp. v. Weir*, 9 Ind. 224; *Prather v. Ross*, 17 Ind. 495.

It has been held in a number of cases in this state ⁵³⁵ that when a note is signed by one or more individual makers, and the signatures followed by the words "trustees of," etc., "president," or "secretary," such words are generally considered as descriptive of the person of the maker, and the note is the obligation of the person or persons so signing it: *McClellan v. Robe*, 93 Ind. 298; *Williams v. Second Nat. Bank*, 83 Ind. 237; *Hayes v. Brubaker*, 65 Ind. 27; *Hayes v. Matthews*, 63 Ind. 412; 30 Am. Rep. 226; *Hayes v. Crutcher*, 54 Ind. 260.

In *Heffner v. Brownell*, 75 Iowa, 341, suit was brought on a note in substance as follows: "We promise to pay Daniel Heffner, or bearer, two hundred dollars. . . . Independence Mfg. Co., B. S. Brownell, Pres., D. B. Sanford, Sec'y."

The court held this to be the joint note of the corporation and of the other persons signing it, and that there was no ambiguity appearing upon the face of the note, and that extrinsic evidence was not admissible to show the intention of the parties: See *Matthews v. Dubuque etc. Co.*, 87 Iowa, 246; *Lee v. Percival*, 85 Iowa, 639; *Brunswick etc. Co. v. Boutell*, 45 Minn. 21.

In the case of *Swarts v. Cohen*, 11 Ind. App. 20, the note read: "We promise to pay to the order of . . . National Forge & Iron Co., Mark Swarts, President."

"We are of the opinion," said the court, "that the note in suit is ambiguous. It was upon that theory that the case proceeded, was tried and determined in the court below. The appellee declared in his complaint that the appellant executed the note. If John ⁵³⁶ Doe should execute his promissory note in the name and style of Richard Roe, he would be liable thereon, and extrinsic evidence would be admissible to show the manner of the execution under proper averments in the pleadings. . . . It is readily conceivable that the note in suit might have been executed by both the corporation and by Swarts, and be their joint obligation. In such a case, affixing the word 'president' to his name does not make it the note of the corporation only, but, under proper averments, it may be shown to be the obligation of the individual as well, and this may be made to appear by extrinsic evidence."

Although the fact is not disclosed by the pleading, it is admitted in the briefs of counsel for appellants and appellee that

the Albany Furniture Company is a corporation. It is true the name of the corporation was signed to the note by some officer or agent of the corporation. But the corporate name could not have been signed by both Stafford and Zapf. It might have been signed by neither and still be binding on the corporation. The presumption that would arise where the corporate name is followed by an officer's name that he signed the corporate name does not arise where the corporate name is followed by the names of two persons. In the very nature of things the name was signed by one person, and we cannot presume that it was one to the exclusion of the other, nor can we from the face of the instrument presume that the name was signed by either.

The appellants, Stafford and Zapf, were notified to appear and answer as individuals, and not as officers of the corporation. The cause of action stated was against them as individuals.

Construing the complaint and the exhibit together, we see no ambiguity. It is alleged to be the joint note ⁵³⁷ of the parties signing it, and the exhibit is not inconsistent with that allegation. Had there been an appearance and answer, the question of the admissibility of parol evidence might have been presented, but, as the record comes to us, it is not necessary to decide anything upon that question.

As the cause was dismissed as to the defendants, E. A. Shanklin & Co., it necessarily follows that the judgment against F. T. Gilpin was erroneous.

Judgment reversed as to the appellant, Gilpin, and affirmed as to the appellants Stafford and Zapf.

JUDGMENT BY DEFAULT—PRESUMPTION ON APPEAL.—A judgment by default admits to be true all material allegations properly set forth in the declaration: *Garrard v. Dollar*, 4 Jones, 175; 67 Am. Dec. 271, and note; but it cures no other defects than those of form: *Whipple v. Fuller*, 11 Conn. 582; 29 Am. Dec. 330. In a direct attack upon it by appeal there is no presumption in favor of the existence of any fact essential to the jurisdiction of the court over the defendant, but in all matters of which the judgment contains a record its verity is presumed as fully as upon collateral attack: *Eichhoff v. Eichhoff*, 107 Cal. 42; 48 Am. St. Rep. 110, and note; *Evans v. Young*, 10 Colo. 316; 3 Am. St. Rep. 583.

NEGOTIABLE INSTRUMENTS—WHO DEEMED PARTIES TO—EVIDENCE.—A promissory note in the ordinary form, reading "we promise to pay," and signed "Belle Plaine Canning Co., A. J. Harman, Pres., H. Wessel, Sec.," in the absence of a clause showing the capacity in which the parties signed, binds all the persons signing, including the corporation, and extrinsic evidence is inadmissible to show the intention of the parties who signed the note: *McCandless v. Belle Plaine Canning Co.*, 78 Iowa, 161; 16 Am. St. Rep. 429, and note. Where a bill of exchange was signed "Chas. F. Hale, Prest.," the

addition of the word "Prest." was held not to shift the responsibility from him to a company of which he was president, so far as the holder was concerned: *Rand v. Hale*, 3 W. Va. 495; 100 Am. Dec. 761. See, also, *Rendell v. Harriman*, 75 Me. 497; 46 Am. Rep. 421; *Liebscher v. Kraus*, 74 Wis. 387; 17 Am. St. Rep. 171, and note; *Tilden v. Barnard*, 43 Mich. 376; 38 Am. Rep. 197

CASES
IN THE
SUPREME COURT
OF
IOWA.

GREEN v. WILKIE.

[98 IOWA, 74.]

NEGOTIABLE INSTRUMENTS — WHEN VOID FOR FRAUD—INNOCENT PURCHASER.—An illiterate person, who is fraudulently induced to sign a note and mortgage for a large sum, supposing that he is signing a lease and note for a much smaller sum to a different payee is not liable on the mortgage note in the hands of an innocent purchaser, unless he is guilty of negligence in signing it. In such case, the note has never had an existence, in the sense of the minds of the parties meeting, to give it validity, and such maker cannot be deemed to have been a party to it.

NEGOTIABLE INSTRUMENTS VOID FOR FRAUD.—One who is ignorant of the contents of a note from inability to read, and who signs it without intending to, is not bound unless chargeable with negligence in not ascertaining its character.

A. C. Daley and T. F. Bradford, for the appellant.

Binford & Snelling, for the appellee.

76 GRANGER, J. This action is on a promissory note for one thousand dollars, and to foreclose a mortgage given to secure the same. The note and mortgage were given to one Lena Fuerth, April 1, 1893. The note was assigned by Lena Fuerth to plaintiff, who resides in Massachusetts, about May 5, 1893, for a consideration of nine hundred and fifty dollars. The defendant does not deny that he signed the note and mortgage, but he bases his defense thereto on substantially the following facts: That Joe Fuerth is the husband of Lena Fuerth, and a real estate agent at Marshalltown, Iowa; that he (defendant) was about to sell a piece of land given him by his father, and purchase another piece; that he went to the office of Joe Fuerth, who was acting for the man to whom he was selling,

and the sale and the purchase were completed; that, as to the land given him by his father, his father had a lease, or contract, by which defendant was to pay a certain rent therefor, while he remained single; that, to enable defendant to sell the land, the lease, or contract, was released; that afterward Fuerth suggested that defendant give his father a lease of the land purchased, and a note in lieu of the one released, which defendant agreed to do; that defendant is illiterate, and cannot read writing or printing, and can only write his name; that Fuerth, instead of making the note and lease, wrote the note and mortgage in suit, which defendant signed, thinking them to be the note and lease agreed upon; that he never received anything from Lena Fuerth for said note, and never agreed to make any such note. The purchase of the note in suit was made by William Andrews, as agent for the plaintiff, and it appears that the plaintiff knew nothing of the note until after it was purchased. The facts as to the fraudulent execution of the note are not in dispute. It may be stated as a fact that, when defendant signed the note and mortgage, he supposed he was signing a lease to his father, and a note for one hundred dollars.

There is something of a hopeless conflict of authorities touching the liability of persons whose names appear to negotiable paper through fraudulent means, and the paper is in the hands of innocent holders. It would be useless to attempt a reconciliation of them. There are numerous cases in which parties, intending to sign a contract, have, through fraudulent misrepresentation, placed their signatures to negotiable instruments, which have fallen into the hands of innocent purchasers. There is a very respectable line of authorities holding that, in the absence of negligence, the maker of such an instrument is protected: *Whitney v. Snyder*, 2 *Ians.* 477; *Walker v. Ebert*, 29 *Wis.* 196; 9 *Am. Rep.* 548; *Anderson v. Walter*, 34 *Mich.* 113; *First Nat. Bank v. Lierman*, 5 *Neb.* 247; *Puffer v. Smith*, 57 *Ill.* 527. See, as bearing somewhat on the question, *First Nat. Bank v. Zeims*, 93 *Iowa*, 140. This case is thought to be distinguishable from those because of the fact that in this there was an intent to give a promissory note. In this respect, also, there is something of a conflict of authority, but it is not so marked. The rule is many times stated that there is a distinction between cases in which a party, through fraudulent misrepresentations, signs an instrument which he intends to be a negotiable promissory note, and where, through such misrepresentation, he signs what he does not intend to be such an instrument; and much is claimed in this case because defendant intended to give a

note: See *Whitney v. Snyder*, 2 Ians. 477. The case of *Douglass v. Matting*, 29 Iowa, 498, 4 Am. Rep. 238, is cited ⁷⁸ by appellee as explanatory of *Chapman v. Rose*, 56 N. Y. 137; 15 Am. Rep. 401. The latter case announces the rule that before one whose name is fraudulently obtained to a note, upon misrepresentations that the instrument is something else, can be held, it must appear that it was not the result of negligence on the part of the signer. It will be well to notice in this connection that in *Douglass v. Matting*, 29 Iowa, 498; 4 Am. Rep. 238, the rule of the case is announced on the theory of the culpable carelessness of the maker of the instrument. It is there said: "Now, it would be manifestly unjust to permit the maker, while admitting the genuineness of his signature, to defeat the note, on the ground that, through his own culpable carelessness while dealing with a stranger, he signed the note without reading it, or attempting to ascertain its true contents. *Hopkins v. Hawkeye Ins. Co.*, 57 Iowa, 203, 42 Am. Rep. 41, is a case between the parties to a note, as was also *McCormack v. Molburg*, 43 Iowa, 561, and hence they are not as directly in point as other cases. In *Fayette Co. Sav. Bank v. Steffes*, 54 Iowa, 214, a note was given for a greater amount than agreed upon, through a fraud of the payee, and it was assigned before maturity. The issues did not involve the question of negligence in its execution. It is there said that it was incumbent on the maker to show freedom from negligence. It is then said that it is not certain that he could be allowed to set up fraud as against the plaintiff (an innocent holder), even by showing that he was free from negligence. It cites *Whitney v. Snyder*, 2 Ians. 477, and, later, cites *Griffiths v. Kellogg*, 39 Wis. 296, 20 Am. Rep. 48, in which a note intended to be given for forty-seven dollars and fifty cents was, by fraud, made to read seventy-six dollars and twenty-five cents. The note passed into the hands of an innocent indorsee. It is said in the opinion that the note "was as little hers as if the transaction between her and the lightning-rod man had not ⁷⁹ taken place, and he had forged the note. If not forgery, it was akin to forgery." The liability of the maker was made to turn, when the fraud was established, on the fact of her negligence in placing her name to the paper. The case copies from *Chipman v. Tucker*, 38 Wis. 43, 20 Am. Rep. 1, as follows: "The inquiry in such cases goes back to the questions of negotiability, or of the transfer of the supposed paper to a purchaser for value, before maturity, and without notice, challenges the origin or existence of the paper itself, and the proposition to show that it is not in fact

or in law what it purports to be, namely, the promissory note of the proposed maker."

The facts of this case come within the rule of the Wisconsin cases, and do not contravene any rule announced in our own state. The defendant was an illiterate man, who could not read nor write, except that he could barely write his own name. He had no contractual relations whatever with Fuerth or his wife. There was nothing to put him on his guard against fraud being practiced upon him. The note and mortgage that he gave, he had never contemplated in any way, and the doing of such a thing was as foreign to his purpose as if he had merely intended to lease or contract to his father without any note. It seems that the papers were prepared in the absence of defendant. In his testimony, he says, speaking of Fuerth: "I met him on the street one day, and he said to me, 'The lease is already drawn up, and all you have to do is to sign it.' I went into the office with him, and asked him to read it. He said he was in a hurry, and wanted to go to dinner, and had some other business to attend to after dinner. I asked him if it was just a straight lease to my father for so much rent, and he said; 'Yes, it is. You can rely on my honor and word for it.' I then asked him to read it, and he said it was no need. I signed what he called ^{so} a note and lease." This is in no way contradicted, and we are warranted in accepting it as truth. It is not denied in argument. There was nothing at that time to awaken suspicion as to Fuerth, and the case is peculiar in this that as the business was between defendant and his father, there could be no motive for Fuerth to make the papers in any way except as agreed upon. In most of the cases where negligence is considered, the party relieved has had an adverse interest, because of which one might the more readily anticipate that advantage would be taken. This was a case remarkably free from reason for, or grounds of, suspicion. What was really done would not have been anticipated by any discreet person. In fact, the situation was such as to disarm one of suspicion, because of Fuerth's absolute want of interest in the business to be done. We think the case is free from negligence on the part of defendant. This being so, he comes within the rule by which a party may be protected. It is to be remembered that the rule we apply is not the usual one in which innocent holders of negotiable papers are protected against fraud in the inception of a note. In such cases there is a note, but the bona fides of it is questioned. In this case the note has never existed in the sense of the minds of the parties meeting to give it validity, and there is no negli-

gence to render the defendant liable on other grounds. In *Trambly v. Ricard*, 130 Mass. 259, it is said: "A party who is ignorant of the contents of a written instrument, from inability to read, who signs it without intending to, and who is chargeable with no negligence in not ascertaining the character of it, is no more bound by it than if it was a forgery. There has been no intelligent assent to its terms," etc. The case cites *Selden v. Myers*, 20 How. 506, and *Walker v. Ebert*, 29 Wis. 194; 9 Am. Rep. 548. Under these authorities—and they have strong support—we think ⁸¹ the defendant is not liable on the note, because he was never a party to such a contract, and he has been guilty of no negligence by which the plaintiff has been misled. He has violated no legal obligation, because of which another is injured. The plaintiff's petition should be dismissed.

Reversed.

NEGOTIABLE INSTRUMENTS—FRAUD—RIGHTS OF PURCHASERS—NEGLIGENCE OF MAKER.—A negotiable note procured to be executed by a person unable to read or write, by representing to him that it was an entirely different contract, is void, even in the hands of a bona fide holder, if the maker of the note was not under the circumstances guilty of negligence: *Willard v. Nelson*, 35 Neb. 651; 37 Am. St. Rep. 455, and extended note.

SCOTT v. MERCER.

[98 Iowa, 258.]

LIENS FOR SERVICES.—One who takes, keeps, and trains a horse under contract with the owner, has a common-law lien for the labor, expense, and skill bestowed.

J. E. Cook and R. E. Leach, for the appellant.

E. E. Hasner and Porter & Porter, for the appellee.

²⁵⁸ GRANGER, J. A rehearing having been granted, this case is before us for consideration a second time. The plaintiff seeks possession of the horse as the owner thereof, which ownership is not denied. Defendant, in his answer, shows that he is a professional trainer of horses for speed, and that in December, 1891, he entered into a contract with the plaintiff, by which he was to take the horse in question to keep and handle for the season of 1892, and was to receive therefor two dollars and fifty cents per day, and that he kept and handled said horse during that season, two hundred and fourteen days. He further says that, by mutual agreement, he kept and trained said horse during the season of 1893, on the same terms and conditions. He

says that when he took said horse he was comparatively worthless, but by his skill in developing ²⁵⁹ him, he is worth the sum of three thousand dollars. Defendant says that plaintiff tendered him the sum of one hundred and eighty-five dollars, which is the balance due for the season of 1892, but has tendered nothing for the keeping of the horse for the winter of 1892 and 1893, nor for keeping and training the horse for the season of 1893, and he claims a lien on the horse for his labor and expenditures. On motion of the plaintiff, the defensive part of the answer, being that on which a lien is claimed, was stricken out under a claim that the contract was entire, and the law in such a case gives no lien. The defendant elected to stand on his answer, and judgment was entered for plaintiff. On the former hearing (63 N. W. Rep. 325), we held that the statute gave no lien in such a case, and declined to consider the question as to a common-law lien, because of which a rehearing was granted, and that question is now before us.

In view of the fact that the appellant seems to make no contention for a lien except at the common law, we pass the question of a statutory lien, with the statement that there is none. In *Jones on Liens*, section 731, it is said: "By the common law, a workman who by his skill and labor has enhanced the value of a chattel has a lien on it for his reasonable charges, provided that the employment be with the consent, either express or implied, of the owner." Among other citations in support of the rule is *Nevan v. Roup*, 8 Iowa, 207. It is further said in this section: "It exists in favor of any bailee for hire who takes property in the way of his trade or occupation, and by his labor and skill imparts additional value to it." In the Iowa case cited, the lien was in favor of the thrasher for threshing grain. It is said to exist in favor of a tailor for making a coat, a shoemaker for mending shoes, a jeweler for setting a gem, a wheelwright for repairing a wagon, a harness maker for oiling a harness, ²⁶⁰ in favor of a farrier for shoeing horses, etc. In *Story on Bailments*, section 440, speaking of the obligation of the bailee to return the thing after the work has been done, it is said the duty has a qualification, for "every bailee for hire has a lien on the thing for the amount of his compensation, and therefore he is not, unless it is specially otherwise agreed, bound to restore the thing bailed, until the compensation is paid." In *Schouler on Bailments*, section 122, it is said: "One, at all events, who trains a horse for racing, has a lien at common law." The case cites among others, that of *Harris v. Woodruff*, 124

Mass. 205, 26 Am. Rep. 658, where a rule is stated as follows: "A person has a lien for the expense and skill bestowed upon a horse delivered to him to be trained for running races for bets and wagers in this commonwealth." In 2 Kent's Commentaries, page 858, it is said: "It is now the general rule that every bailee for hire, who, by his labor and skill, has imparted an additional value to the goods, has a lien upon the property for his reasonable charges. . . . The same right to a particular or specific lien applies to a miller, printer, tailor, wharfinger, warehouseman, or whoever takes property in the way of his trade or occupation, to bestow labor or expense upon it." The facts of this case bring the defendant within the general rule announced, and, wherever the rule has been invoked, under the particular facts of this case, as to the kind of labor performed, it has been sustained. We may further say that such an application of the rule is equitable, and it is hard to imagine a reason why it should be applied in many cases where it unquestionably is, and not in this. We think that in striking out the answer of defendant on motion, the district court erred, and the judgment is reversed.

LIEN FOR SERVICES—COMMON LAW.—At common law the principle was recognized at an early day that the artisan or tradesman who had contributed to enhance the value of goods delivered to his custody, by bestowing his labor thereupon was entitled to a lien upon them for his reasonable charges: Extended note to McIntyre v. Carver, 37 Am. Dec. 522, 523. See Grinnell v. Cook, 3 Hill, 485; 38 Am. Dec. 663, a nd note; Fitzgerald v. Elliott, 62 Pa. St. 116; 42 Am. St. Rep. 812, and note.

BROWN v. COOPER.

[98 Iowa, 441.]

RES JUDICATA.—AN INTERLOCUTORY DECREE, although consented to, establishing and confirming the respective interests of the parties in and to certain property, and appointing referees to make partition thereof, is not conclusive on appeal from a final decree confirming the report of the referees, of the right to have the property divided in kind rather than by sale.

JUDGMENTS—APPEALABLE ORDERS.—An interlocutory decree or order directing the construction of weirs at large expense, for the partition of water, and also directing that valuable improvements be made to facilitate partition in kind, involves the merits of a contest for the partition of a water power, and may be appealed from, although no final decision has been rendered.

PARTITION.—The object of partition proceedings is to enable those who own property as joint tenants, coparceners, or tenants in common to put such end to the tenancy as to vest in each tenant a sole estate in specific property or an allotment of the lands or tenements. It contemplates an absolute severance of the indi-

vidual interests of each joint owner, and, after partition, each has a right to enjoy his estate without supervision, let, or hindrance from the other. Unless this can be accomplished, the joint estate must be sold, and the proceeds divided.

PARTITION—WATERS—JURISDICTION.—In a suit to partition water power, it is beyond the power of the court in approving the recommendation of referees to decree the appointment of an inspector or supervisor, to divide the water, keep up weirs, and otherwise superintend the property for the joint benefit of the owners after partition by allotment in kind. If, in such case, partition in kind is impracticable without such decree, the property must be sold and the proceeds divided to effect a partition.

PARTITION — WATERS — IMPROVEMENTS.—Part owners of a water power cannot be compelled to contribute to the building of weirs at great expense, or to making valuable improvements to facilitate the apportionment of the water, and thus enable a partition in kind by allotment of the water.

COTENANCY.—IMPROVEMENTS, not in the nature of repairs, cannot be made by one cotenant upon the common property, and the expense of any part thereof charged to his cotenant.

Proceeding to partition a water power on the Cedar river, at the city of Cedar Rapids consisting of a dam, bulkheads, raceways, retaining walls, etc.

M. P. Brown, for the appellants.

M. P. Mills, for the appellee.

417 DEFMER, J. At the time of the commencement of this action, Susan Brown owned fifty-seven sixty-fourths, N. E. Brown, two sixty-fourths, W. S. Cooper, four sixty-fourths, and the Anchor Mill Company, one sixty-fourth of the dam and water power referred to in the above statement of the case. The appellants are mother and son, and their interests are united. They commenced this action to partition the water power among the respective owners, and asked that the shares of each be established and confirmed, and that referees be appointed to make partition, or if it is apparent that the same cannot be equitably divided, then that a sale of the property and a division of the proceeds be made between the parties according to their respective interests. The defendants answered, pleading their interests in the property. They each objected to a sale, and asked that the property be repaired, and that the share of water belonging to them be delivered. On the first day of November, 1889, the court, on these pleadings, entered an interlocutory decree, establishing and confirming the shares of the respective parties in and to the property, and decreed that each was liable to contribute at all times, in proportion to his respective interest, to the expense of maintaining the property in good condition; that the plaintiff was entitled to have the water power and property partitioned and admeasured, so that each owner should

receive his proper share, and no more, of the water and water power, and no more at any and all stages of water, and in whatsoever ⁴⁴⁸ condition said power or improvements may be. The court also appointed James Emmerson, of Williamette, Massachusetts, Samuel Sherwood, of Independence, Iowa, and P. Mullaly, of Cedar Rapids, Iowa, referees, to make partition; directed them to set apart the respective interests and shares of the parties; ordered them to make such recommendations for further maintenance and use of the interests of the parties as they might deem advisable, and continued the action for further proceedings. Afterward, a change was made in the personnel of the referees, and Clemens Herschel, of New York City, a hydraulic engineer, Professor Williams, of Mt. Vernon, Iowa, a civil engineer, and Samuel Sherwood, of Independence, Iowa, a practical miller, were substituted in place of the referees originally appointed. On the twenty-seventh day of January, these referees reported that an actual partition or division of the property into the required fractional parts was impracticable, without an indefinitely continuing intelligent operation and supervision of the appliances that might be erected, and that, if such supervision was had, the attendant expense and difficulties involved would render such method inadvisable and inexpedient; that it would materially injure and diminish the rights of some of the owners of the property; and that, in their judgment, a sale of the property and a division of the proceeds was the only practical method of partition. The appellees, Cooper and the Anchor Mill Company, filed objections to this report, and moved to set it aside; and the other parties moved to confirm the same, and for an order for the sale of the property. The motion to confirm was overruled, and appellees' objections to the report were sustained, and the Browns excepted to these rulings. Afterward, J. T. Fanning, W. Y. Clark, and A. H. Conner were appointed referees, to make partition in kind, ⁴⁴⁹ and on the 25th of October, 1893, they filed their report, proposing a plan and recommendation for partition. They recommended the erection of adjustable measuring weirs, to be made permanent and adjustable, so as to measure out to each owner the share of water to which he was entitled. The expense of such an erection they estimated at eight thousand dollars. They also recommended that the court direct the owners of the property to employ a competent inspector of the weirs, who should, as often as necessary, see that they were kept in proper adjustment and repair, and that they did in fact partition the water in proper proportion at all stages or ready available flow of the river. They also found

that the dam was not then in good condition, and that partitioning the flow under such conditions would not be warranted, without the expenditure of large sums of money for repairing and bettering the condition of the property. They therefore recommended that the crest of the dam be raised, that the dam itself should be strengthened and made permanently stable in its present position; that it should be made water tight, and that leakage in the head-races should be stopped. The estimated cost of making the repairs and improvements suggested by the referees is from seven thousand dollars to twelve thousand dollars. Upon the coming in of this report, the plaintiffs moved to set the same aside, and for an order directing the referees to proceed with a sale of the property and a division of the proceeds thereof, or that the cause be referred to other referees for final disposition. The defendants filed an application for an order directing the repairs of the property in accord with the recommendations of the referees. The plaintiffs filed a resistance to this last-named application. The motion of plaintiffs to set aside, and the application of defendants for an order to repair, were submitted to the court, and the ⁴⁵⁰ former was overruled, and the report of the commissioners approved, and the application for an order directing the repairs was in effect sustained. To each and all of these rulings the plaintiffs excepted. They now appeal to this court, and in their arguments question the validity of all the orders and rulings made by the district court. They complain more particularly of the order for the construction of the weirs and gates, and for the appointment of an inspector, and strenuously insist that the court had no power to make the order for repairing and improving the dam.

Before proceeding to a discussion of the questions presented, it is perhaps advisable to state some of the facts a little more explicitly. It appears that N. E. Brown owns a lot on the east side of the river, on which stands a mill. Susan Brown owns a lot adjoining that of her coplaintiff, and also lots on the west side of the river adjoining the raceway. The defendants, Cooper and the Anchor Mill Company, each own lots on the east side of the river, on which their mills are situated, Cooper's being furthest north, or up stream, and the mill company's furthest south, or down stream. It further appears that the share of water owned by Cooper or the mill company is not sufficient to run either of their mills, and for many years they have been using largely of the water belonging to appellants. The dam and bulkheads have been standing for many years, and the mills are all old. The rise and fall of the water in the Cedar river

is quite variable, the volume ranging from six hundred and forty to twelve hundred and eighty cubic feet per second. The referees first appointed found, among other things, that partition of the property in kind was "not practically possible, without an indefinitely continuing intelligent operation and supervision of the appliances that might be erected, conducted, moreover, in a judicial ⁴⁵¹ spirit." The referees last appointed made practically the same finding, for they recommended the appointment of a superintendent or inspector to control the apparatus, and measure out to each owner his share of the water. We may now proceed to a consideration of the various questions presented by the record. It is to be observed that the appellants do not question that partition of a water power may be had in a proper case. Indeed, they are not in position to make any such claim, for they instituted the action, and are now insisting that partition be made. Moreover, the question was put at rest, so far as this court is concerned, by the case of *Cooper v. Cedar Rapids Water Power Co.*, 42 Iowa, 398, which involved a partition of the very water power we are now considering. Their contention is, that under the showing made in this case, partition cannot be made in kind, but must be brought about by a sale and division of the proceeds. They further claim that if partition could be made in kind, the orders and decree of the court in this case, in so far as it directed the repair and improvement of the property, the building of the weirs, and the appointment of a supervisor or inspector, are erroneous, and should be reversed.

At the threshold of the case, we are met by a claim from appellees' counsel that we cannot consider the points made by appellants, for the reason that the original decree rendered in the case is an adjudication that partition could be made of the property in kind, and that appellants are not, for that reason, in position to complain. This original decree, as we have said, was an interlocutory one. It established and confirmed the respective interests of the parties in and to the property, and appointed referees to make partition. The referees first appointed reported that they could not do so in kind, and they recommended the sale of the property. This report ⁴⁵² was set aside, and new referees appointed. They made a report recommending partition, as heretofore stated. This last report was approved, and the referees were directed to construct the weirs, and make the improvements and repairs of the property as recommended by them. We do not think that the original decree, although it seems to have been consented to by appellants, is conclusive of the question as to how the partition should be

made; that is to say, whether it should be made in kind, or the property sold, and the proceeds divided. It certainly is not true that partition should be made in kind, under this decree, if the referees appointed discovered, upon investigation, that it could not be done. It seems to us that the finding was no more than the ordinary interlocutory decree in such cases, establishing and confirming the interests of the various parties and appointing the referees to make partition. Whether it should be made in kind, or the property sold, and the proceeds divided, was left for decision after the referees had made their report as to the practicability of a partition in kind. Certain it is, that if the referees had found it entirely impracticable to divide the property among the several owners, the court was not bound hand and foot by the original decree. In such a case, it would have ordered the referees to make a sale and divide the proceeds. Of this, it seems to us, there can be no question. But, if we are wrong in this, it does not follow that the order of the court, directing the repairs of the property, the building of weirs, and the appointment of an inspector, can be sustained. The original decree did not provide for any such thing, and the question as to whether or not these things should be done did not arise until the referees reported, recommending them.

Appellees further contend that there has as yet been no order from which plaintiffs may appeal. It is ⁴⁵³ said that "none of the questions involved the merits of the case, or affect the final decision, because the first two are only the suggestions of the referees as to what should be done, and the third in no manner affects the final decision, for the reason that the order was proper, in order to save the balance of the property sought to be partitioned." In this we think the appellees are in error. It is true the final decision has not yet been passed. But the court did direct the construction of the weirs, which will cost in the neighborhood of eight thousand dollars, and further directed that the property be repaired and improved at an estimated expense of from seven thousand to twelve thousand dollars, preliminary to the final decree in the case. Manifestly, these orders materially affected the final decision and involved the merits of the controversy. The ruling of the court was, in effect, a holding that the property could be partitioned in kind, and that a sale should not be had. This was really the only question in the case. All else was largely ministerial or administrative. As sustaining our conclusions, see *Burnham v. Thompson*, 35 Iowa, 421, and *Brown v. Harper*, 54 Iowa, 546.

It is further argued on behalf of appellees that defendants can-

not complain of the order of the court setting aside the report made by the referees first appointed, for the reason that no appeal was taken therefrom within the six months required by law. We do not think a decision of this question is necessary to a disposition of the case, and therefore will not consider it.

The controlling point in the case is the correctness of the ruling approving the report of the referees last appointed, the direction given them to make repairs and incur the expense necessary to make the partition effective, and the refusal of the court to ⁴⁵⁴ order the sale of the property. It has already been noticed that the referees and the court found it necessary to involve the parties in an expense of more than sixteen thousand dollars before partition of the property could be made. The referees also found that, after making this expense, the partition would not be effective without the personal supervision of some overseer, who should equalize the flow of the water, and direct it into proper channels, and so divide it that each one of the parties in interest should receive his proper share. This report, with a recommendation of such a person, was fully approved by the court. We are clearly of the opinion that these orders and rulings of the court, made upon the recommendation of the referees, cannot be sustained.

The object of partition proceedings is to enable those who own property as joint tenants, or coparceners, or tenants in common to so put an end to the tenancy as to vest in each a sole estate in specific property or an allotment of the lands or tenements. It contemplates an absolute severance of the individual interests of each joint owner, and, after partition, each has the right to enjoy his estate without supervision, let, or hindrance from the other. Unless this can be accomplished, then the joint estate ought to be sold, and the proceeds divided. Courts should be, and are, adverse to any rule which will compel unwilling persons to use their property in common. Now, it seems to be practically conceded by all parties that, to make partition in kind effective in this case, there must be an inspector or supervisor appointed, whose duty it will be to divide the water, keep up the weirs and otherwise oversee the property for the joint benefit of the owners thereof. It seems to us that this is not a partition of property, and that, when such an appointment is required in order that ⁴⁵⁵ each owner may receive his proportion of the water, from this fact alone it is apparent that a sale should be made. By what authority, we inquire, could such an inspector make improvements of the property for the benefit of the owners thereof if they owned it in severalty? What right would

such an inspector have to go upon the property of one for the benefit of another after partition in kind should be made? By what authority could he make repairs, and charge the expense thereof, or any part thereof, to the one not consenting thereto? It seems to us that an order contemplating such a procedure is not a partition at all. It is nothing more than the appointment of an agent to divide the water and to see that each of the joint owners gets his proper share thereof. It is simply taking the management of the property out of the hands of the joint owners and placing it in charge of an officer of court. No allotment is made of an aliquot part of the estate to anyone. In the case of *Cooper v. Cedar Rapids Water Power Co.*, 42 Iowa, 398, we said: "The rules governing the partition should be certain, definite, and self-adjusting, so they will readily apply to the future state and condition of the power." On account of the variable flow of water in the Cedar river, it is perfectly clear that no partition could be made which would "readily apply to the future state and condition of the power." It seems to be agreed by all the experts who have had anything to do with the case that division of the property is not practicable "without an indefinitely continuing intelligent operation of the appliances that might be erected." The case of *McGillivray v. Evans*, 27 Cal. 93, is closely in point on this proposition. The court there, in speaking of much such a case as we have here, said: "The only partition that the court can make which will definitely and permanently end the dispute of the parties, and do justice between them, is to order a sale and ⁴⁵⁶ distribute the proceeds." Again the court said, "An attempt to do it [divide the water] would be, not to end, but to encourage and multiply litigation to an unlimited extent": See, also, *Higginbottom v. Short*, 57 Am. Dec. 198.

The most serious objection to the order of the court is the direction therein given to the referees to expend more than eight thousand dollars in the repairs of the property, and almost an equal sum in the construction of weirs, etc., in order to partially effectuate the partition, and this against the express wishes and desires of the owners of the larger part of the property. It cannot be that one may thus be compelled, against his express wishes and desires, to pay for improving his property for the benefit of his neighbor. Such an order is an infraction of the rights and principles which are guaranteed to us by our form of government. It is a blow at the liberty of the individual, and does not comport with our ideas of the rights of property. Why should the property of appellants be taken in order that certain

advantages may flow to the appellees? Can one be made the debtor of another, without his consent, express or implied?

It is argued by appellees, however, that as one joint tenant or tenant in common may make repairs and charge a proportionate amount of the expense thereof against a cotenant, the order of the court, in this case, is proper and legal. The fallacy of this argument is exposed, however, when we consider that the building of the weir was not a repair of the property. It was in the nature of a permanent improvement, twelve-thirteenths of the expense of which must be borne by the appellants in order that appellees may enjoy one-thirteenth of the water power. We do not think it is the law that one cotenant may make improvements upon the common property, ⁴⁵⁷ and charge the expense, or any part thereof, to his cotenant: See Freeman on Cotenancy and Partition, sec. 262. That he may make needed repairs in some cases, and charge a proportionate part of the expense thereof to his cotenant, may be conceded; but such is not this case. We do not think there was any authority in the court to authorize the expenditure of eight thousand dollars in the building of the weirs in order to effectuate the partition. The case of *Field v. Leiter*, 117 Ill. 341, is strongly in point on this proposition, and the reasoning of the court in that case is quite conclusive of the proposition here considered: See, also *Dyer v. Lowell*, 30 Me. 217. We need not decide whether the court may not, in any case of partition, direct the referees to make needed repairs of the property sought to be divided. It is enough to say here that it quite clearly appears that the repairs were directed, not for the purpose of saving or caring for the property, but in order to accomplish the partition—to raise the level of the water so that each of the parties might be given his proportionate share thereof. We are satisfied that such an order is without authority of law.

Our consideration of the case leads us to the conclusion that this is not a case where there can be a fair division of the property in kind. The only way in which partition can be made is to sell the property and divide the proceeds. On account of the condition of the property, the inconsiderable interest of the appellees therein as compared with that held by appellants, the variability of the flow of water in the river, and other matters not necessary to be enumerated, it seems to us that partition by allotment in kind is absolutely impracticable. What we have said is not in conflict with the case of *Cooper v. Cedar Rapids Water Power Co.*, 42 Iowa, 398. We have held that there may be partition, but we think it must be accomplished by a sale rather

than a division of the estate. True, there are some suggestions made in the case just cited as to how partition may be accomplished, but the record in this case shows conclusively that it is impossible to make partition by following the methods there pointed out. These suggestions are not binding upon us, for they are no part of the law of the case.

For the reasons pointed out, the judgment of the district court is reversed.

APPEAL—WHAT ORDERS ARE APPEALABLE.—Judgments or orders from which an appeal will lie, are those which either terminate the action itself, or operate to divest some right in such a manner as to put it out of the power of the court making the order to place the parties in their original condition after the expiration of the term: *Harrison v. Lebanon Waterworks*, 91 Ky. 255; 34 Am. St. Rep. 180, and note. No appeal lies from a judgment to which the appellant consented: *Schmidt v. Oregon Gold Min. Co.*, 28 Or. 9; 52 Am. St. Rep. 759. See extended note to *Davie v. Davie*, 20 Am. St. Rep. 173, 174.

PARTITION — SALE OF PROPERTY — WHEN DECREED.—When partition in kind cannot be conveniently made, the court may either allot the entire subject matter to the tenant offering the largest sum for the whole, or may order the sale of the whole and a distribution of the proceeds among the tenants: *Corrothers v. Jolliffe*, 32 W. Va. 562; 25 Am. St. Rep. 836, and note. In such a case, partition otherwise than by sale is manifestly inequitable, and should be denied: *Wilson v. Bogle*, 95 Tenn. 290; 49 Am. St. Rep. 929, and note. See *Higginbottom v. Short*, 25 Miss. 160; 57 Am. Dec. 198, and note; *Steedman v. Weeks*, 2 Strob. Eq. 145; 49 Am. Dec. 660.

COTENANCY—IMPROVEMENTS—RIGHT TO CHARGE COTENANT.—At the common law a tenant in common who made permanent improvements as distinguished from ordinary repairs, could not recover from his cotenants any part of his expenditures made for that purpose, unless they were made at the request, or with the consent, express or implied, of the latter: *Cosgriff v. Foss*, 152 N. Y. 104; 57 Am. St. Rep. 500, and note. See monographic note to *Ward v. Ward*, 52 Am. St. Rep. 924-941.

LEEDS LUMBER COMPANY v. HAWORTH.

[98 IOWA, 433.]

LIMITATION OF ACTIONS—ABSENCE FROM STATE.—An action to foreclose a mechanic's lien, not barred by the statute of limitations against the principal debtor by reason of removal from the state before the statute has fully run, and constant nonresidence thereafter, is not barred as to others holding liens upon the premises who have been residents of the state during the entire period.

Action to establish and foreclose a mechanic's lien against Eva M. Haworth, who for the two years immediately preceding the commencement of such action had been a nonresident of the state, so that service of process could not be had upon her

within the state. The Fidelity Loan and Trust Company had been a resident of the state during the whole period since the contract for the material furnished was made and the mechanic's lien accrued. Such company held the legal title to the premises in dispute as trustee in a deed of trust and was, therefore, made a party defendant and demurred on the ground that the right to foreclose the mechanic's lien was barred by limitation. The demurrer was overruled, and the court rendered judgment in favor of plaintiff, holding its lien superior to that of the trust company. The latter appealed.

Kean & Sherman and S. E. Hostetter, for the appellant.

T. B. Robinson, for the appellee.

464 KINNE, J. The sole question presented by this appeal is, whether an action to foreclose a mechanic's lien, not barred by the statute of limitations against the principal debtor by reason of her removal from the state before the statute had fully run and her constant nonresidence thereafter, is barred as to other persons holding liens upon the premises, who have been residents of the state during the entire period. Our statute provides that the following actions may be "brought within the times herein limited, respectively, after their causes accrue, and not afterward, except when otherwise specially declared: Actions to enforce a mechanic's lien within two years from the time of filing the statement in the clerk's office": Code, sec. 2529, subd. 2. It is also provided that "the time during which a defendant is a nonresident of the state shall not be included in computing any of the periods of limitations above described": Code, sec. 2533. Appellants were not parties to the contracts between plaintiff and the Haworths. They are in no way privy to it. The statute was not set in operation by any act 465 of theirs. The debt was Eva M. Haworth's, and such debt, under the statute, gave the right to the lien which plaintiff seeks to assert. A mechanic's lien, in a sense at least, is an incident of a debt, the result of a contract. We have held that when, by reason of the nonresidence of the defendant, an action upon a promissory note is not barred, an action to foreclose a mortgage securing the note is not barred as against subsequent purchasers and junior lienholders, who have been residents of the state during the entire statutory period; that so long as the mortgage is enforceable as against the original debtor, the statute is no bar to its enforcement against the subsequent lienholders: *Clinton County v. Cox*, 37 Iowa, 570; *Shearer v. Mills*, 35 Iowa, 500; *Robertson v. Stuhlmiller*, 93 Iowa, 326. The doctrine announced

in these and other cases is applicable to the case at bar, and, following it, the district court properly overruled the demurrer.

Affirmed.

Of the Effect of the Bar of the Statute of Limitations when Some but not all of the Parties to an Obligation are Protected by It, and of the Liability of a Debtor to Contribution, though no Action can, because of Such Statute, be Sustained against Him on the Original Liability.

Joint Debtors.—In an early action of assumpsit against several joint defendants, it was decided that it was no answer to the plea of the statute of limitations that one of them, within the statutory period from the accruing of the action, departed from the state and continued absent until the commencement of the suit, and it was further held that all of the persons liable upon a joint contract must depart from the state in order to arrest the running of the statute against the demand: *Brown v. Delafield*, 1 Denio, 445. In the subsequent case of *Bogert v. Vermilya*, 10 N. Y. 447, it was held that a defendant sued separately on a joint and several obligation could not avail himself of the statute of limitations, by reason of the residence of his copromisor within the state during his absence from it. In the later case of *Denny v. Smith*, 18 N. Y. 567, the court of appeals refused to follow the ruling in *Brown v. Delafield*, 1 Denio, 445, and maintained a contrary doctrine, namely, that the absence of one joint debtor from the state suspended the running of the statute of limitations against him, although his codebtor remained all of the time within the state. In this case Allen, J., said: "It stands admitted by the pleadings in this action that while the defendant Hull was always a resident of the state, the defendant Smith after the making of the joint note, departed from and resided out of the state for so long a period that his liability still survives. The court, on the trial, denied a motion for a nonsuit, on the ground that it was no defense for the defendant Smith, in answer to the allegation that he had resided out of the state so long that his liability on the note was not barred by the statute of limitations, to allege and prove that his codefendant had remained in the state. By the provisions of the Revised Statutes, which are to govern this case, an exception is made in relation to the case of absent or nonresident debtors, as follows: If, at the time when any cause of action specified in this article shall accrue against any person he shall be out of the state, and if, after such cause of action shall have accrued, such person shall depart from and reside out of this state, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action. It is insisted that the word 'person,' as here used, shall be deemed to include 'persons,' so that the statute should read 'person or persons,' and that, therefore, in the case of joint debtors, both must reside out of the state the length of time required to avoid the statute. It is true that, in the case of *Brown v. Delafield*, 1 Denio, 445, the supreme court so held, and upon the ground that, as one of the defendants continued to reside within the state, both might have been sued at any time under the act relating to joint debtors; and the plaintiff would thus have had judgment against both. That on the return of the absent defendant, an

action of debt might have been brought against him and his codefendant on the judgment, and, if he should plead the statute, a replication would be good, that he had been out of the state, . . . I think it was the manifest intention of the legislature to subject every debtor, during a period of six years after the accruing of a debt, to the reach of civil process at the suit of his debtor. Such has been the recent decision of the court of queen's bench in England in the case of *Fannin v. Anderson*, 7 Q. B. 811; 53 Eng. Com. L. 821; and such was the construction arrived at by the chancellor in the case of *Didier v. Davison*, 2 Barb. Ch. 477-487, when the point was directly before him, and where he decided that the return of one of two joint debtors into the state after the right of action had accrued against both did not bar the right of action against the survivor, who does not come within the state until within six years of the time when the suit was brought against him. He well remarked that to have brought a suit in that case against the debtor first coming into the state, who had no property either of his own or of the firm, would have been perfectly useless, and he cited with approbation the case of *Fannin v. Anderson*, then recently decided, as containing the true and reasonable construction to be given to our statute. The resident debtor, as remarked, might be insolvent and the plaintiff obtain nothing, or he might be residing in the state without the knowledge of the creditor, or he might be discharged by proceedings in insolvency or bankruptcy, as in the present case, and the plaintiff be unable to obtain a judgment against him. I think that the judgment should be reversed, and judgment rendered for plaintiff for the amount of the note and costs": *Denny v. Smith*, 18 N. Y. 569-571. The rule thus laid down, that the absence of one joint debtor from the state suspends the running of the statute of limitations as to him, though his codebtor remains within the state, has been followed in *Cutler v. Wright*, 22 N. Y. 471, *Merritt v. Scott*, 3 Hun, 657, and *Brewster v. Bates*, 81 Hun, 294, and has now become the settled doctrine in New York state. In *Merritt v. Scott*, 3 Hun, 658, it was said that, "after much judicial conflict, it is the settled law of this state as to joint debtors, that in respect of the defense of the statute of limitations, each stands upon his own bottom, and it therefore does not follow that because one of such debtors cannot interpose the statute as a defense, others may not." This language was iterated and the doctrine applied in *Brewster v. Bates*, 81 Hun, 294-299. The rule announced by the later New York cases has been followed in Wisconsin in the case of *Caswell v. Engelmann*, 31 Wis. 93-96, where the court, in passing upon the question, remarked that it was a new one in that state. In the case of *Reybold v. Parker*, 7 Houst. 526, it was decided that in an action against several joint debtors, one of the defendants having been absent from the state at the time of the accruing of the cause of action, such absence will prevent the statute of limitations from running in favor of his codefendants, remaining within the state, until his return into the state in such manner that by reasonable diligence, he may be served with process. In this case *Houston, J.*, said:

"When this case, the first of its kind in this state, came up for a hearing in the court below, I was very much struck, as other judges

often have been in similar cases, with the singular fact, when first learned in it by me, that it was an action of assumpsit on a verbal contract between the plaintiff and the four joint defendants named in it, which had not been commenced until some ten years had elapsed after the accruing of the cause of action, and that two of them were men of large wealth and had been residing ever since in this state and in this city, whilst the third one of them had been residing but comparatively a few miles beyond the limits of them, and during that time had repeatedly been in the state and in this city, and that the fourth one of them only, Mr. George A. Parker, had been residing out of the state, and as far from it only as the city of Boston in the state of Massachusetts, and had not been in the state in the mean time, nor until the commencement of the action against them all jointly. The primary limitation by the statute to such an action is three years simply, but thrice three years and more had stolen in silent slumber over what assumed now very much the aspect of a stale demand when so presented for the first time to my imperfect apprehension and surprise at the novelty of it. The replication to the plea was that the said George A. Parker, one of the four joint defendants, when the said cause of action accrued against them was out of the state, and that the said action was commenced against them within three years after the said George A. Parker, the said defendant, first came into the state thereafter in such manner that, by reasonable diligence, he could be served with process, the secondary limitation of the statute therein referred to being in the following words: 'Sec. 14. If, at the time when a cause of action accrues against any person, he shall be out of the state, the action may be commenced within the time herein limited therefor, after such person shall come into the state, in such manner that, by reasonable diligence, he may be served with process': Rev. Code, 730. This being the first case of the kind that has ever arisen under this provision of our statute of limitations, and the striking hardship of its application to three out of the four defendants who could have been served with process in the state at almost any time within that long period of ten years, at once gave rise to the grave and serious question presented in the demurrer, and ably and elaborately argued by the learned counsel on both sides, whether such a case as this is within the terms and the true meaning and intention of the saving contained in the fourteenth section of the statute as before stated. The words of the section, 'if, at any time when a cause of action accrues against any person, he shall be out of the state,' it was contended were not only in the singular number, but were intentionally so inserted and employed in it, and were not intended by the legislature to be interpreted or understood in a plural sense, as equivalent to the terms 'person or persons,' or as intended to apply to any case in which there were two or more defendants parties to the cause of action, and one of them only was out of the state when it accrued. For with such a construction given to these words of the section, no such hardship could arise as characterizes this case, or any such gross inequality in the legal condition of defendant as disfigures it, and therefore the legislature could not have intended that the words here used should, in any contingency, have any other meaning than that which

the word 'person' in the singular number plainly and naturally imports. By such a construction of it the court avoids any inherent inconsistency or contradiction in the application of the saving to this or any other similar case, because it involves even an absolute absurdity to hold that it can be applied to save the action as against three of the defendants who, at any time after the accruing of the cause of it, could easily have been served with process in the state, while the sole ground, as given in the statute itself, for applying it to the other defendant is because he was out of the state when the cause of action accrued and did not come into it so that he could have been served with process until ten years afterward, when the action was commenced; and for that very reason the court was bound to consider and conclude that the legislature did not intend that the saving should ever apply to such a case as this: *Copelle v. Baker*, 3 Houst. 344. And such being the inclination of my mind on that point, at the same time it occurred to me that, under the long-established practice in the superior court of this state, it was competent for the plaintiff below, at any time after the cause of action accrued, to commence the action against all the defendants jointly by having process served on the three, two of whom were living in this state and the other frequently coming into it from his residence in Pennsylvania, not many miles above the boundary line between the two states, and returned by the sheriff served personally on them, and non est as to the fourth defendant, Mr. Parker, who was out of the state, and could not be served with it, and then with such a return of the writ, and the usual recital of it in the declaration as to the defendant who is returned non est and does not appear to it, to proceed in the prosecution of the action, as is the usual custom and practice in such cases in that court, against the other defendants to judgment and execution, if necessary, for the amount of it, leaving them after their payment of it to their legal remedy and redress against their absent codefendant to enforce contribution of his just proportion of it. And if such had been the practice in the courts of this state in such a case as this, then the plaintiff had been under no disability of suing all and recovering judgment against the defendants appearing to the action at any time since the accruing of the cause of it by adopting this method of prosecuting it against them only while their co-contractor was yet out of the state and the jurisdiction of the court in the case, then my opinion was that the plaintiff's right of action in the case was barred by the primary limitation of the statute, that is to say, after the expiration of three years from the accruing of the cause of action in it. But I am now obliged to say that upon a further consideration of both of these points, and the more thorough argument of them in this court, my opinion has undergone a radical change upon each of them, and that I now think that as the contract sued on in this case was a verbal and joint contract merely between the plaintiff and the four defendants named in the action, and was not a joint and several contract between them, as it would have been under our statute (Rev. Code, sec. 9, p. 357) had it been reduced to writing in the same words, unless otherwise expressed in it, for such is the general rule of the common law, that when the action is upon a contract which is a joint contract only,

and not joint and several, and there are several joint parties to it on the one side to be sued upon it, they must all, if still in being, be joined as defendants in the action, and it must not only be commenced, but it must be prosecuted against them all jointly and to a joint judgment against them in case of recovery, for there can be no action against them severally, or recovery of judgment against them severally, or against any one or more of them, less than the whole number of them. There are some exceptions to this rule, but, under its general operation, Mr. Reybold could not maintain an action upon the contract against one or more of the defendants, but was compelled by it to sue them all jointly and recover against them all jointly, or to recover against none of them, and he therefore could not be bound to commence his action against them after the accruing of the cause of it, until the joint process in it with which he had to commence it against them all jointly had been served upon each and all of them in the state, for the design of the act of limitations is to bar such actions only as the party plaintiff has a legal right to effectually maintain and prosecute to recovery of judgment against the party defendant in any case. It was, therefore, wholly unnecessary to provide by statute for limitation and bar of any action commenced without legal right to effectually maintain it. I had also become convinced in the mean time that no such practice as before stated could have obtained in the court below in such a case as this to warrant a recovery of judgment against three of the defendants who could have been promptly served with process after the cause of action accrued without service of it on the other and fourth defendant, who was then out of the state, and was out of it until some ten years afterward, in the mode suggested in my opinion in the court below, and having no statutory provision whatever in this state, such as several of the other states have, to meet such a case involved in such a striking, and to the court, such an embarrassing, contingency as this proved to be. I have, since the argument of the case in this court only been the more convinced, and particularly by the rulings of the court of queen's bench in the case of *Fannin v. Anderson*, 7 Ad. & E. 811 (opinion by Denman, C. J.), and *Towns v. Mead*, 16 Com. B. 123, that I should renounce the opinion which I then entertained and expressed on that point in the case." The above opinion concurred with that of *Saulsbury*, chancellor of the court of error and appeals of Delaware: *Reybold v. Parker*, 7 Houst. 543-556.

Mortgages. — If one, who is a resident of the state, assumes by independent agreement to pay a past due mortgage, the statute of limitations begins to run against the assumer's liability when the assumption is made, and the absence of the mortgagor from the state does not stop the running of the statute as to the liability of such assumer of the mortgage to pay the debt assumed. Such absence, however, suspends the statute as to an action against the mortgagor to foreclose the mortgage: *Robertson v. Stuhlmiller*, 93 Iowa, 326. In California, it has been held that the absence of the mortgagor from the state stops the running of the statute of limitations as to him, but not as to subsequent lienholders: *Wood v. Goodfellow*, 43 Cal. 185, and *Watt v. Wright*, 66 Cal. 202-205, where the court said: "The mortgage debt matured more than five years and nine months after the cause

of action to foreclose it accrued. Meantime, however, as plaintiff alleged, and the court found as a fact, Wright, the mortgagor, on several occasions, temporarily absented himself from the state. The successive temporary absences amounted in all to twenty-two months, during which time the running of the statute of limitations upon the mortgaged debt was suspended as to the mortgagor, and as to him the action was not barred. But, if not barred as to the mortgagor, it is contended that the action is barred as against the other defendants, because the absences of the mortgagor from the state did not suspend the running of the statute of limitations upon the mortgage as to them, and as they had acquired rights in the mortgaged premises by attachment liens, subsequent to the mortgage, it was necessary for the mortgagees, in order to avoid the statute of limitations, to bring this action against them as subsequent encumbrancers or lien claimants within four years after the cause of action accrued, for as the statute of limitations commenced to run when the cause of action accrued, its running was not suspended by any disability as against those who were always within the process of the court. The contention is made upon the authority of *Wood v. Goodfellow*, 43 Cal. 185. That was a case in which it appeared that three mortgages had been given on the premises; the first was given in June, 1860, on the undivided interest of Goodfellow in the premises, the second in October, 1860, upon the entire interest in the premises of Goodfellow and the other two joint owners, and the third in May, 1862, on the same joint interests. About six months after the execution of the last mortgage, Goodfellow left the state, and never returned. Foreclosure of the last two mortgages were obtained in regular proceedings to which the first mortgagee was not made a party. Under these decrees of foreclosure, the mortgaged premises were sold. On the 12th of December, 1862, the purchaser went into possession, and on the 30th of March, 1864, conveyed the premises by deed to the Keystone Quartz Mining Company, which entered into possession under its deed and was in possession on the 11th of May, 1864, when the administrator of the estate of the first mortgagee (who had died on the 4th of March, 1868) commenced an action against the company and Goodfellow, the mortgagor, to foreclose the mortgage. Goodfellow made no defense. The company pleaded the statute of limitations, and as the company had been by itself and its grantors in the actual adverse possession of the mortgaged premises, under a claim of right, which originated in the judicial proceedings upon the subsequent mortgages, for more than five years before the commencement of the action, and more than seven years had run since the cause of action accrued on the mortgage debt, the lower court sustained the plea of the statute of limitations. In affirming that judgment, the late supreme court said: "It is the settled doctrine of this court that when third persons have subsequently acquired interests in the mortgaged property, they may invoke the aid of the statute as against the mortgage, even though the mortgagor, as between himself and the mortgagee, may have waived its protection; and we see no difference in principle between a suspension of the running of the statute resulting from an express waiver, and one caused by the voluntary act of the mortgagor in absenting himself from the state." The doctrine thus announced is made to rest upon the reason -

that interests in mortgaged premises, acquired subsequently to the mortgage, constitute property, and the owners thereof stand in the same relation to the mortgage upon the property by the original owner as if their property was bound as collateral security for the payment of the mortgage debt, but the time for the payment of the debt cannot be extended by any agreement between the mortgagor and mortgagee to which they are not a party, nor by the voluntary act of the mortgagor in absenting himself from the state; and if the mortgagee allows the time of the statute of limitations to run upon the mortgage debt, their property cannot be taken away from them and applied to the payment of the debt which, as to them, is barred by the statute. Assuming, therefore, that the appellants here acquired the mortgagor's equity of redemption by the judicial proceedings founded upon the levy of an attachment on the 5th of August, 1876, on the mortgaged premises, it follows, as the cause of action on the mortgage debt accrued on the 2d of January, 1874, and the action was not commenced until October 15, 1879, more than five years and nine months having run, that, under the rule of *Wood v. Goodfellow*, 43 Cal. 185, the time of the statute had run and the cause of action was barred as to the subsequent lienholders, notwithstanding the twenty-two months' absence from the state had suspended the running of the statute of limitations as to the mortgagor": *Watt v. Wright*, 66 Cal. 205-207. In Texas, it has been held, however, that absence from the state of the maker of a vendor's lien note suspends the statute as well against the lien as against the indebtedness, nor can a purchaser from the vendee with notice avoid the lien by limitation while the debt and lien are valid against the original vendee: *Falwell v. Henning*, 78 Tex. 278.

Two or more persons may be liable upon the same obligation either as joint principals, principal and surety or guarantor, or as co-sureties or coguarantors, and one or more of them may be protected by the statute of limitations against the principal debt while the other is not; and then the question must arise whether the payment by the latter will create a liability in his favor against any of the others.

There is no doubt that when a principal debtor is protected by the statute of limitations so that no enforceable liability exists against him, none exists against his surety or guarantor, and therefore the latter cannot, by voluntarily discharging the obligation, create a liability against his principal to reimburse him for such payment: *Bridge v. Blake*, 106 Ind. 332; *Auchimpaugh v. Schmidt*, 70 Iowa, 42; 59 Am. Rep. 459; *Kimble v. Cummins*, 3 Met. (Ky.) 327; *State v. Blake*, 2 Ohio St. 147; *Cocke v. Hoffman*, 5 Lea, 105; 40 Am. Rep. 23.

If a surety or co-obligor discharges the obligation and seeks indemnity or contribution from a cosurety or co-obligor, the first question naturally presenting itself is, whether his action is upon the indebtedness or evidence of indebtedness which he has discharged, or is it founded upon his act of payment and an implied contract that he be indemnified therefor? If his action is upon the original indebtedness, it would follow that he must bring it within the time prescribed by law for an action upon such indebtedness. In a few cases, this view has been maintained to the extent of holding that where an accommodation indorser or acceptor had been compelled to take

up a bill or note indorsed or accepted by him, that his cause of action was founded upon such note, and therefore that his suit could not be maintained unless brought within the time in which the payee named in the note or bill could have brought an action thereon against the maker: *Kennedy v. Carpenter*, 2 Whart. 344; *Williams v. Durst*, 25 Tex. 667; 78 Am. Dec. 548; *Sublett v. McKinney*, 19 Tex. 438. It is believed that this view is not supported in principle nor to any considerable extent by the reported decisions, and that they, on the other hand, maintain almost unanimously that a cause of action in favor of a surety, guarantor, or co-obligor accrues not upon the original indebtedness or evidence thereof, but from the fact and at the time of its payment, and, therefore, that the statute of limitations in actions thereafter brought by them for contribution or indemnity commences to run at the date of such payment, and neither before nor after: *Wood on Limitations*, sec. 145; *Broughton v. Robinson*, 11 Ala. 992; *Thayer v. Daniels*, 110 Mass. 345; *Scott v. Nicholls*, 27 Miss. 94; 61 Am. Dec. 503, and note; *Burton v. Rutherford*, 49 Mo. 255; *Leak v. Covington*, 99 N. C. 559; *Camp v. Bostwick*, 20 Ohio St. 337; 5 Am. Rep. 669; *Keller v. Rhoades*, 39 Pa. St. 513; 80 Am. Dec. 539; *Beck v. Tarrant*, 61 Tex. 402.

It follows as an inevitable consequence of the principle last stated that the fact that the statute of limitations has run upon an original obligation cannot constitute any defense to a suit brought by a surety, guarantor, or co-obligor to recover indemnity or contribution, provided the bar of the statute had not become perfect before his discharge of the obligation. If a surety brings an action for contribution against a cosurety, it is no defense to the latter that the right of action upon the principal debt is barred. The cause of action in favor of the plaintiff accrues only upon his payment of the debt, and the statute of limitations against his action for contribution could not commence to run prior to that time: *Hooper v. Hooper*, 81 Md. 155; 48 Am. St. Rep. 496. If one of two joint makers of a note pays it, while it is enforceable against both, the statute of limitations in actions brought upon it against his co-obligor for contribution runs from the date of such payment, and he may recover, though the original payee would be barred if he were prosecuting the present action upon the original evidence of indebtedness: *Peaslee v. Breed*, 10 N. H. 489; 34 Am. Dec. 178; *Boardman v. Paige*, 11 N. H. 431.

It may often happen in the case of cosureties or co-obligors that one has been released by the operation of the statute of limitations or by a discharge in bankruptcy, while the other remains liable. In such a contingency, it is clear that no action could be maintained against both by the original creditor, but that he may, nevertheless, maintain an action against the one remaining liable to him for the whole amount of the indebtedness. The latter, therefore, remains under obligation to pay the whole, and, if he does pay it, for the first time a cause of action accrues in his favor against his cosurety or co-obligor, and this cause of action is unaffected by the fact of the exemption of such cosurety or co-obligor from liability to the original creditor. A suit for contribution may, therefore, be maintained by the cosurety or co-obligor, who, thus remaining under liability, has discharged the entire debt: *Thayer v. Daniels*, 110 Mass.

345; *Odlin v. Greenleaf*, 3 N. H. 270; *Camp v. Bostwick*, 20 Ohio St. 337; 5 Am. Rep. 669; *Martin v. Frantz*, 127 Pa. St. 389; 14 Am. St. Rep. 859. If an action is brought by a payee against one of two sureties upon a note before the statute of limitations can be successfully interposed by either party, and judgment is obtained thereon after the time when the statute would have furnished a defense, to a suit then commenced by the maker, and this judgment is satisfied, the surety may, nevertheless, maintain an action against his cosurety for contribution: *Crosby v. Wyatt*, 23 Me. 156. A quite remarkable case is that of *Aldrich v. Aldrich*, 56 Vt. 324, 48 Am. Rep. 791, in which it appeared that two cosureties upon a promissory note residing in the state of Vermont were there protected from liability by the statute of limitations of that state. Afterward, one of them, without the knowledge of the other, but without any fraudulent intent or any purpose to create a liability, went to the state of New Hampshire. An action was there brought against him by the payee of the note, and, there being no statute of limitations operative in New Hampshire constituting any defense to the action, a judgment was recovered, and the surety compelled to satisfy it. He afterward brought an action in Vermont for contribution, and it was held that he was entitled to recover. The court said: "A voluntary payment of an obligation by a surety which he is not under any legal obligation to make does not give a right of action against a cosurety for contribution. But where the payment is compulsory, the rule is different; in such case the payment by one surety gives a right of action against cosureties for contribution. And a payment is deemed in law to be compulsory when the party making it cannot resist it. The payment of a judgment while it is collectible comes within the definition of a compulsory payment. The legal right of sureties as against each other is not governed by the *lex loci contractus*. Neither is there any implied obligation that they shall reside or remain in any particular locality. The right of contribution among sureties is not founded on the contract of suretyship, but is based on an equity arising from the relation of the cosureties."

Clearly, the views expressed in *Stone v. Hammell*, 83 Cal. 547, 17 Am. St. Rep. 272, especially in the concurring opinion of Chief Justice Beatty, are not in harmony with the decision just quoted, nor with the general weight of authority upon the subject. It appeared in that case that a surety remained, because of his absence from the state, liable to contribute to a co-surety, though the right of action against the principal debtor in favor either of the payee or the cosurety who paid the debt had become nonenforceable through the operation of the statutes of limitations. The surety thus remaining liable to his cosurety discharged that liability, and then sought indemnity by an action against the principal debtor, and the supreme court, reversing the judgment of the trial court, held that the action could not be sustained. The appellate court treated the plaintiff as merely paying his own debt. It is true that as between him and his principal he alone was liable to an action therefor by the surety who paid the principal's obligation, but in discharging his liability he satisfied an obligation existing against him as a surety and against which he had no defense whatsoever. Such being the case, he was

not a more volunteer, nor did he discharge his own debt in any other or different sense than that every surety may be said to discharge his own debt when he satisfies an obligation for contribution existing in favor of a cosurety. It is, perhaps, not improper to remark that there is no indication in either of the opinions of the judges of the supreme court of California, above referred to, that the attention of either had been directed to the authorities upon the subject which we have already cited, or to any others, and while, perhaps, it is not proper for us to assume that the court was so inattentive to its duties as to speak upon this subject without fully investigating it, yet we are justified in remarking that the opinions at least evince no intention to criticise or to overrule the cases which we have cited.

TAYLOR v. STATE INSURANCE COMPANY.

[98 Iowa, 521.]

INSURANCE—POWER OF AGENT TO CORRECT POLICY.

An agent authorized to make contracts of insurance may, at any time during the continuance of his agency, though subsequent to a loss, correct a policy issued by him, by inserting therein property included in the original contract, but omitted from the policy by mistake.

INSURANCE—POWER OF AGENT TO WAIVE CONDITIONS IN POLICY.—An insurance agent, whose powers are limited to making contracts of insurance and delivering policies, has no authority, after he has issued a policy, to waive a clause therein expressly providing that additional insurance shall avoid the policy unless written consent thereto should be indorsed thereon, and that no condition therein can be waived except in writing signed by the secretary. Additional insurance taken upon the authority of such attempted waiver by such agent avoids the policy.

INSURANCE—POWER OF AGENT—ADDITIONAL INSURANCE—NOTICE.—An insurance agent, whose powers are limited to making contracts and issuing policies, has no power, after issuing a policy, to violate a condition therein by agreeing verbally with the insured, without the knowledge of the insurer to additional insurance in another company. Notice to such agent of additional insurance is not notice to his principal, and it is not bound thereby nor by such verbal agreement of the agent.

INSURANCE—CONDITIONS—BURDEN OF PROOF.—A clause in an insurance policy providing that taking additional insurance makes it void, unless written consent thereto is indorsed upon the policy, and that no condition of the policy can be waived except in writing signed by the secretary of the company, is, in the absence of statutory regulation, binding upon the assured, who has the burden of proof to show facts exempting from its operation.

INSURANCE—PROOF OF LOSS—DELIVERY.—If a complaint in an action on a policy of insurance alleges notice and proof of loss to the insurer, accompanied by the affidavits required, copies of which are attached as exhibits, and the answer admits that such documents were received, their delivery is shown without formally putting them in evidence.

O. B. Ayres and J. W. Willett, for the appellant.

Struble & Stiger, for the appellee.

⁵²² ROBINSON, J. On the tenth day of April, 1893, the defendant issued to the plaintiff a policy of insurance against loss or damage by fire to the amount of three thousand dollars, of which fifteen hundred dollars were on his brick building, and three hundred dollars on his postoffice and office furniture and appurtenances. The remainder was on property described as follows: "His type, cases, stands, plates, imposing stones, rollers, printing papers, and all other materials not more hazardous, usual to a country printing office, including one steam engine and boiler contained therein." The policy contained the following provisions: "No officer, agent, or representative of this company shall be held to have waived any of the terms or conditions of this policy unless such waiver shall be indorsed hereon in writing." And, "if, without written consent hereon, . . . there is any prior or subsequent insurance, valid or invalid, . . . then . . . this policy shall be void." Also, "this policy is made and accepted upon the above express conditions, and no part of this contract can be waived except in writing, signed by the secretary of the company." The contract of insurance had been made by the plaintiff with a local recording agent of the defendant, named Bowen. On the day of the fire, or, at latest, the next day, the plaintiff discovered that the word "presses" was not used in the description of the property insured, and spoke to Bowen in regard to it. Bowen said it was omitted by mistake, took the ⁵²³ policy to his office, inserted the words "presses" after the word "his," making the description read "on his presses, type," etc., and returned the policy to the plaintiff. On the thirtieth day of March, 1894, during the term of the policy, the property insured, with some exceptions of minor importance, was destroyed by fire. In due time, the plaintiff sent to the defendant a notice, accompanied by an affidavit, showing the loss. The defendant having failed to pay it, this action was commenced to enforce payment. The answer of the defendant contains a general denial of every allegation of the petition not admitted, and pleads as affirmative defenses that the policy it issued was altered without authority, by inserting the word "presses" in the description of the property insured, and that, after the policy was issued, additional insurance in the sum of one thousand dollars was obtained of the Farmers' Insurance Company of Cedar Rapids without the written consent of the defendant. The plaintiff, in his reply, admits the alteration in the policy, but avers that it was made to express the contract actually entered into by the parties. He also admits the additional insurance, but he alleges that it was taken by and with the

consent of the defendant; that it had full knowledge of it, but did not object to it; and that it waived the conditions of the policy respecting subsequent insurance. The verdict and judgment were for three thousand and seventy-five dollars, besides costs.

1. The question of chief importance in this case is, What were the powers and duties of the agent Bowen? It appears that he had an agreement in writing with the defendant, which was not, however, introduced in evidence; hence his authority and duty to act for the defendant must be determined from what he says in regard to it, and the policy in suit. Whatever his powers were with respect ⁵²⁴ to completed contracts of insurance, it is clear that he was duly authorized to make contracts of insurance, and to issue policies, in the name of the defendant, on property like that in controversy. His right to have included the presses in the policy when it was written is not even questioned. It is shown without conflict in the evidence that he and the plaintiff agreed and intended to include the presses in the policy, and that they were only omitted by mistake. That being true, the writing did not express the real agreement; and, since Bowen had the power to express that agreement in writing when it was made, we are of the opinion that the power to do so was not ended by a delivery of the defective policy, but that he might correct it while his agency continued. The fact that the property was destroyed before the correction was made did not affect his right to perfect the policy: *Davenport v. Peoria Marine etc. Ins. Co.*, 17 Iowa, 276; *Hubbard v. Hartford Fire Ins. Co.*, 33 Iowa, 325; 11 Am. Rep. 125. What was done was not a waiver of any condition of the policy, but a correction, by the duly authorized agent of the defendant, to express the true contract. The evidence tended to show that the plaintiff and Bowen acted in perfect good faith in making it. Since the policy was so corrected, there was no occasion to ask a court of equity to reform it, and it may be treated as though issued in its present form. The authorities cited by the appellant on this branch of the case relate chiefly to actions on policies which contained mistakes which had not been corrected, and are not, therefore, applicable to the question under consideration.

2. Bowen was the agent of both the defendant and the Farmers' Insurance Company of Cedar Rapids. After the policy in suit was issued, the plaintiff applied to Bowen for additional insurance, in the sum of one thousand dollars, and he issued a policy of that ⁵²⁵ company for that amount. He knew of, and, as we understand the record, at the time had in mind, the policy

issued by the defendant; but, so far as is shown, he did not report the additional insurance to the defendant, and written consent therefor was not indorsed on its policy. Unless there has been a waiver of the conditions of the policy which required such an indorsement, the taking of the additional insurance without it renders the policy in suit void, for it is admitted that the policy of the Farmers' Insurance Company was valid. It is undoubtedly true that the conditions could have been waived, or that the defendant might have pursued such a course with respect to the additional insurance as to be estopped to rely upon the condition. Whether there has been a waiver, or whether there has been an estoppel upon which the plaintiff can rely, depends upon the powers and duties of Bowen as agent, for it is not claimed that any other person representing the defendant had any actual knowledge of the additional insurance, before the loss occurred. Bowen, as has been stated, was a recording agent of the defendant, with power to bind it by contracts of insurance, including the renewal of policies which were about to expire. Any knowledge of matters affecting property on which he issued policies, which he had at the time of making the contract of insurance, would, in law, be possessed by, and bind, the defendant. He had power, in contracting for insurance, to agree for the defendant that additional insurance in other companies might be carried; and, if he had knowledge of such additional insurance when he entered into a contract of insurance, the defendant might be bound, even though the additional insurance was not mentioned in the policy issued; but questions of that character and authorities respecting them are not applicable to the questions presented here. The ⁵²⁶ evidence does not justify the claim made by the plaintiff that Bowen was the general agent of the defendant, authorized to transact all of its business at the town of Traer, where he resided, with power to change and cancel policies. It is not shown that it was his duty to supervise risks or otherwise act for the defendant after the policy was issued. His authority to represent the defendant in making a contract of insurance appears to have been at an end when the contract was made and the policy was delivered. If, as in this case, a mistake which he might correct was made, the policy might be returned to him for that purpose, but the correction would relate back to the original delivery of the policy, if there were no intervening rights. Thus, in this case, the policy was corrected to make it cover the property which the defendant had agreed to insure; but as there was no agreement when the policy was issued, so far as the evidence shows, to permit additional

insurance, the policy could not be corrected to permit it. The original conditions of the policy with respect to that must prevail. Those provided expressly that additional insurance would make the policy void unless written consent thereto should be indorsed on the policy, and that no condition of the policy could be waived except in writing signed by the secretary. We need not determine whether there could in any case be a waiver in any other manner than that provided by the policy; but we may consider the conditions with the testimony of the witnesses submitted to us, to ascertain the powers of Bowen. The entire record before us makes the conclusion unavoidable that he was not authorized to act for the defendant in waiving any condition of the policy, and that the evidence did not authorize the district court to find that notice to Bowen of the additional insurance was notice to the defendant. There is some evidence to ⁵²⁷ the effect that Bowen was in the habit of contracting for additional insurance after policies were issued. He testified in regard to that as follows: "After a policy was issued, if indorsements of other insurance are desired, I would attach a slip to that effect to the policy, and send a duplicate of it to the home office for approval; all for the approval of the home office. I don't think I ever had any other instance of granting other insurance after the other policy was written." The witness seems to have meant that this was the only case in which additional insurance was desired after the policy was issued, but that, if other cases should arise, he would proceed in the manner stated. That falls short of showing that he was authorized to bind the defendant, after its policy had been issued, by agreeing, verbally, to additional insurance in another company.

The appellee has called our attention to numerous authorities which are said to support his claim that the defendant, through its agent Bowen, had notice of the additional insurance, and waived the conditions of the policy requiring written consent, or is estopped, by failing to cancel the policy, to insist upon the condition. We do not find that any of the authorities cited are applicable to this case. Most, if not all, of them, refer to knowledge possessed by the agent when the insurance was effected, to notices given to agents whose powers and duties respecting the risks did not terminate with the delivery of the policy, or to contracts of insurance which did not contain the conditions which are controlling in this case. In *Hagan v. Merchants' etc. Ins. Co.*, 81 Iowa, 321, 25 Am. St. Rep. 493 (a case more nearly like this than any of the others relied upon by the

appellee), the agent knew at the time the policy was issued that the insured was applying for and intending to obtain additional ⁵²⁸ insurance, and his knowledge was held to be the knowledge of the company.

The conditions of the policy upon which the defendant relies are, in the absence of statutory regulation, valid and binding upon the plaintiff. He has failed to show any facts which exempt him from their operation. Our conclusion finds support in the following authorities: *Ruthven v. American Fire Ins. Co.*, 92 Iowa, 316; *Kirkman v. Farmers' Ins. Co.*, 90 Iowa, 457; 48 Am. St. Rep. 454; *Zimmerman v. Home Ins. Co.*, 77 Iowa, 685; *Hankins v. Rockford Ins. Co.*, 70 Wis. 1; *Clevenger v. Mutual Life Ins. Co.*, 2 Dak. 114; *Cleaver v. Traders Ins. Co.*, 65 Mich. 527; 8 Am. St. Rep. 908; *Knudson v. Hekla Fire Ins. Co.*, 75 Wis. 198; *Carey v. German-American Ins. Co.*, 84 Wis. 80; 36 Am. St. Rep. 907; *Wheaton v. North etc. Ins. Co.*, 76 Cal. 415; 9 Am. St. Rep. 216; *Baumgartel v. Providence etc. Ins. Co.*, 136 N. Y. 547; *Ostrander on Insurance*, 554.

It follows from what we have said that the court erred in holding, as it must have done, that Bowen had authority to waive the condition of the policy in regard to additional insurance, or that the defendant was estopped, by failing to act upon his knowledge of the additional insurance, to insist upon the conditions.

3. The appellant claims that there was no evidence that the notice and proof of loss, required by the statute, were delivered to it. The petition averred that the notice, accompanied by the required affidavit, copies of which were attached to the petition as exhibits, was given; and the answer admitted that the papers thus set out were received. That was sufficient, and it was not necessary to introduce them formally in evidence. For the error ⁵²⁹ pointed out, the judgment of the district court is reversed.

Kinne, J., took no part.

INSURANCE—POWERS OF AGENTS.—Agents of insurers possessing limited power to solicit insurance, deliver policies, and receive premiums cannot waive conditions and forfeitures: *Kirkman v. Farmers' Ins. Co.*, 90 Iowa, 457; 48 Am. St. Rep. 454, and note. See *German etc. Ins. Co. v. Humphrey*, 62 Ark. 349; 54 Am. St. Rep. 297, and note; *Wood v. American Fire Ins. Co.*, 149 N. Y. 382; 56 Am. St. Rep. 733, and note; note to *Ermentrout v. Girard etc. Ins. Co.*, 56 Am. St. Rep. 488. When a policy of insurance contains a condition against additional insurance, without the written consent of the company, and also a condition that no notice to, and consent or agreement by, any local agent shall constitute a waiver of, or affect any condition in, the policy until such consent or agreement is indorsed thereon in writing, the local agent of the insurance company has no authority to verbally waive any of the

conditions in the policy. His oral consent to additional insurance will not bind the company, and such insurance renders the policy void: *German Ins. Co. v. Heiduk*, 30 Neb. 288; 27 Am. St. Rep. 402, and note. But see contra *Morrison v. Insurance Co. of N. A.*, 60 Tex. 353; 5 Am. St. Rep. 63.

INSURANCE — EXCEPTIONS IN POLICY — BURDEN OF PROOF.—In an action on a fire insurance policy, proof on the part of the insurer of the existence of a condition of things imposing a certain duty on the assured, casts upon the latter the burden of proving a compliance with such duty: *Rankin v. Amazon Ins. Co.*, 89 Cal. 203; 23 Am. St. Rep. 460, and note; *Cory v. Boylston Fire etc. Ins. Co.*, 107 Mass. 140; 9 Am. Rep. 14. See *Anthony v. Mercantile etc. Assn.*, 162 Mass. 354; 44 Am. St. Rep. 367, and note.

SCHUTTLOFFEL v. COLLINS.

[98 Iowa, 576.]

HOMESTEADS—EXEMPTION OF PROCEEDS—INTENTION.—If a homestead has been sold with the intention of purchasing another homestead with the proceeds, the latter are exempt for a reasonable time, although the homesteader has shown some slight intention of investing them in another state.

HOMESTEADS—SALE ON TIME—EXEMPTION OF PROCEEDS.—If a homestead is sold on time, with intention to invest the proceeds, when realized in a new homestead, such proceeds are exempt.

HOMESTEADS—SALE ON TIME—EXEMPTION OF PROCEEDS.—If a husband sells his homestead on time, intending to invest the proceeds, when realized, in a new homestead, and dies in the mean time, such proceeds are exempt in the hands of his widow, for the purpose of purchasing a home for herself and her children.

I. T. Martin, for the appellants.

Zink & Roseberry, M. Wakefield, E. S. Lloyd, and I. S. Struble, for the appellee.

577 ROTHROCK, C. J. 1. On the thirtieth day of June, 1894, Thomas Collins was the owner of a farm of one hundred and sixty acres in Plymouth county. He resided on the farm with his wife and two children. On the day above mentioned, he and his wife entered into a written contract with the plaintiff herein, by which they sold the farm to the plaintiff for the sum of six thousand and eighty dollars. A small amount of money was paid in cash at the time the contract was executed. There were two mortgages on the land, for the aggregate sum of four thousand four hundred dollars, which the purchaser assumed to pay. In July of the same year, plaintiff paid to Collins the sum of six hundred dollars, and the balance due was to be paid March 1, 1895. This balance amounted to four hundred and fourteen dollars and ninety-six cents. There is no dispute about this

amount. After the ⁵⁷⁸ written contract was entered into, Collins and his family continued to reside on the farm, until his death, which occurred on the twenty-ninth day of September, 1894. The family continued to occupy the farm as a home until about the 1st of November, in the same year, when the dwelling-house burned down, and they could no longer remain in actual occupancy of the land. After the contract of sale was made and delivered, the defendants Keogan Brothers, O. A. Terpaning, and Henry Schaaf commenced actions against said Thomas Collins, and recovered judgments against him. These judgments were rendered before his death, and while he and his family were residing on the farm. The defendant Ellen Collins was appointed administratrix of the estate of her husband. This action in equity, for a specific performance of the contract, was commenced November 22, 1894, and the administratrix and her children and the said judgment creditors were made parties. No objection was at any time taken to the form of the action. The judgment creditors appeared, and answered by setting up their judgments, and claiming that they were a lien on the land, or on the balance of the purchase money which was yet unpaid. The widow, in behalf of herself and her children, claimed that the transaction in disposing of the farm was but one step in the change of their homestead, and that the proceeds of the sale of the homestead were not liable for the debts of the husband. The widow also claimed that it was her right to be endowed with the unpaid purchase money as being the proceeds of her dower or distributive share of the land.

These being the issues, a stipulation was made by all the parties, by which the farm was conveyed to the plaintiff, and the balance of the purchase money deposited in a bank, to await the decision of the court, as to whether it should be paid to the widow or to the ⁵⁷⁹ judgment creditors. The court awarded it to the creditors. Some question is made in the pleadings as to whether the debts upon which the judgments were founded were contracted before the homestead was acquired, so that the homestead would be liable in any event. But that question was not presented on the trial, nor in argument, and we do not consider it. It appears to be conceded that, if the farm had not been sold, the homestead would not have been liable for the debts. There is some discussion among counsel as to the form of the action, and whether it is in probate, in equity, or at law. This is of no consequence now. The action was commenced as in equity, and it was tried to the court without a

jury, and no objection was at any time made to the proceedings. It will be determined here as an appeal in an equity case.

2. There is but one question which we think necessary to be considered in determining the rights of the parties. It arises under section 2000 of the code, which is as follows: "The owner may from time to time change the limits of the homestead by changing the metes and bounds, as well as the record of the plat and description, or he may change it entirely, but such changes shall not prejudice conveyances or liens made or created previously thereto, and no such change of the entire homestead made without the concurrence of the husband or wife shall affect his or her right, or those of the children." And section 2001 provides that the new homestead, to the extent in value of the old, is exempt from execution in all cases where the former would have been exempt. There was no abandonment of the homestead by the husband. If he had survived, and purchased another home, it would have been exempt the same as the old homestead. The judgments were not liens on the homesteads, nor on ⁵⁸⁰ the purchase money, not then due, nor paid while the husband lived. There was no voluntary abandonment of the homestead by the family. The question of fact in the case is, Was it the intention of the husband and wife to use the proceeds of the sale for the acquisition of a new homestead? If so, the money was exempt from the claims of the creditors of the husband. We will not review the evidence on this question. We think it shows by a fair preponderance that it was the intention of the husband and wife to acquire a new homestead. It is true he went into the state of Minnesota, and examined land, with a possible view of purchasing a home there; and the state of Nebraska was considered. But attention was mainly directed to procuring a home in this state. As the homestead law has always been liberally construed, we do not think it ought to be held, under the facts of this case, that the creditors should take this homestead money, because, if the husband had lived, he might have invested it in another state. When a party sells his homestead, with the intention of purchasing a new one, he will be allowed a sufficient time within which to exercise that right: *Benham v. Chamberlain*, 39 Iowa, 358. The act of acquiring a new homestead, and moving into it, cannot be simultaneous. The owner should be allowed a reasonable time to make the change: *Cowgell v. Warrington*, 66 Iowa, 666. It is not necessary that the old homestead be sold for cash, which is immediately invested in a new one. The sale may be on time,

and, if the intention is to invest the proceeds, when realized, in the new homestead, such proceeds will be exempt: *State v. Geddis*, 44 Iowa, 537. In the last-named case, creditors attempted to garnish the proceeds of the homestead more than two years after it was sold.

⁵⁸¹ Some question is made as to the value of the homestead as compared with the purchase money in controversy. It is true that there is no direct evidence as to the value of the homestead forty acres, apart from the whole of the farm; but it is averred in the answer and cross-petition of the widow that it was of the value of two thousand dollars. Two of the creditors, in their answers, assert that it was worth to exceed fourteen hundred dollars. In view of the fact that the farm was sold for thirty-eight dollars an acre, it may be said that the evidence shows beyond all question that the homestead was worth more than four hundred and fourteen dollars and ninety-six cents, the amount in controversy. Our conclusion is, that Mrs. Collins should be allowed to take this money and apply it in procuring a home for herself and her children, as was intended by her husband and herself.

The decree of the district court is reversed.

HOMESTEAD—SALE OF—EXEMPTION OF PROCEEDS.—The proceeds of a voluntary sale of a homestead are not exempt from execution, though the sale was made with the intention of purchasing another homestead with the proceeds: *Freiberg v. Walzem*, 85 Tex. 264; 34 Am. St. Rep. 808, and note. See extended note to *Morgan v. Rountree*, 45 Am. St. Rep. 237-239. A homestead purchased with the proceeds of a sale of another homestead is not exempt from attachment levied thereon prior to the filing of a declaration of homestead: *Wright v. Westheimer*, 2 Idaho, 962; 35 Am. St. Rep. 269, and note. See contra, *Macke v. Byrd*, 131 Mo. 682; 52 Am. St. Rep. 649. See, also, *Keyes v. Rines*, 37 Vt. 260; 86 Am. Dec. 707.

STATE v. HAYES.

[98 IOWA, 619.]

LARCENY BY FINDER—CORPUS DELICTI—EVIDENCE.

On a trial for larceny by the finder of property so marked as to be capable of identification, proof of the possession and of the immediate subsequent conversion of such property by the finder is admissible to establish the corpus delicti.

LARCENY BY FINDER HAVING KNOWLEDGE OF OWNER.—Under a statute providing that if any person come, by finding, into the possession of personal property of which he knows the owner, and unlawfully appropriates such property, he is guilty of larceny; one may be convicted of the larceny of a pocketbook and contents if, at the time he found it, he knew, or by an examination of its contents might have known, to whom it belonged.

LARCENY—KNOWLEDGE OF OWNER BY FINDER.—If the contents of a pocketbook found by a person are such as to furnish reasonable means of identifying the owner, this is equivalent to actual knowledge of such owner on the part of the finder.

LARCENY BY FINDER—INTENT.—To constitute larceny of the contents of a pocketbook, the intent to appropriate such contents need not exist at the time of finding, if at that time its contents are unknown to the finder. It is sufficient if such intent is formed at the time that the contents are discovered.

D. T. Bauman, for the appellant.

M. Remley, attorney general, for the state.

620 DEEMER, J. The indictment charges the defendant with having stolen a certain purse or pocketbook and the contents thereof, consisting of sixty-eight dollars in money. The evidence shows that one Henry Weis lost a pocketbook containing some sixty-eight dollars in money, three receipts which were executed in his name, and a trunk key, upon the street in front of a saloon in the town of Bellevue, in Jackson county, Iowa, on the afternoon of the third day of July, 1895; that defendant found the pocketbook soon after it had been lost, took it to a barn near the saloon, and, after having extracted the money therefrom, threw the pocketbook into a manger, where it was found the next morning. Defendant concealed a part of the money in his boot, expended some of it for liquor, loaned some of it to his friends, and paid out a part of it for rent. In the evening of the day on which the pocketbook was lost, defendant admitted that he found it, and told where it would be found. It was discovered by a brother of the prosecuting witness at the place where the defendant said he put it, but, when found, it contained nothing but the receipts and the trunk key. The pocketbook contained three compartments, in one of which Weis had placed the receipts, the trunk key and a ten dollar bill, in another some paper money, and in the third some silver. The defendant was, no doubt, convicted under section 3907 of the code, which is as follows: "If any person come, by finding, to the possession of any personal property of which he knows the owner, and unlawfully ⁶²¹ appropriate the same or any part thereof to his own use, he is guilty of larceny, and shall be punished accordingly."

1. His first contention on this appeal is that the court erred in admitting evidence showing the defendant's possession of the lost property, and his subsequent conversion thereof, for the reason that the corpus delicti was not shown. As we understand the claim, it is based upon the thought that there was no evidence showing, or tending to show that the defendant,

at the time he found the property, knew who the owner of it was. It is no doubt true that the finder of lost goods, which have no marks by which the owner could be identified, and who does not know to whom they belong, is not guilty of larceny, even if he does not exercise diligence to discover who the owner of the goods may be. And it is likewise true that the crime must consist in the original taking, and not in a subsequent conversion. But where the property is so marked as to be capable of identification, proofs of the possession and of the immediate subsequent conversion is admissible, and such proof in itself tends to establish the corpus delicti: *Allen v. State*, 91 Ala. 19; 24 Am. St. Rep. 856; *State v. Western*, 9 Conn. 527; 25 Am. Dec. 46; *Commonwealth v. Titus*, 116 Mass. 42; 17 Am. Rep. 138; *Ransom v. State*, 22 Conn. 153-160; *Reed v. State*, 8 Tex. App. 40; 34 Am. Rep. 732. The only distinction made between theft of lost goods and theft of other property seems to be, that at the time of finding, not only must the intent to steal exist, but the finder must know, or have the reasonable means of knowing or ascertaining, the owner: *People v. McGarren*, 17 Wend. 460; *Griggs v. State*, 58 Ala. 425; 29 Am. Rep. 762; *State v. Clifford*, 14 Nev. 72; 33 Am. Rep. 526; 3 *Greenleaf on Evidence*, sec. 159; *Commonwealth v. Titus*, 116 Mass. 42; 17 Am. Rep. 138. The evidence, with reference to the felonious intent of the defendant in taking the property, was ample. On the question as to his knowledge of the ownership, there was testimony ⁶²² tending to show that defendant had seen the pocketbook in the possession of Weis just prior to the time it was lost. And it further appears that the receipts which were in the purse at the time it was found by defendant clearly and unmistakably identified it as the property of Weis. Defendant had "the reasonable means of knowing or ascertaining, by these receipts, who the owner was," and, according to the instructions of the court, this was equivalent to actual knowledge.

2. The instructions of the court are complained of. The sixth defines the crime of larceny independent of the statute before quoted. It is insisted that this was error, because not applicable to the case made by the evidence. There is no force in this objection. It is apparent that the legislature did not intend, by the enactment of section 3907, to create a distinct crime. Section 3902 defines larceny generally, and section 3907 declares a rule of evidence, which, being fulfilled, constitutes the crime as defined in the first section. The indictment charges the crime of larceny under section 3902, and it

was proper, if not necessary, to define the offense charged. Moreover, there was evidence from which the jury may have found the defendant guilty of larceny, independent of section 3907: *State v. Pratt*, 20 Iowa, 267; *People v. Buelna*, 81 Cal. 135. In the ninth instruction the court told the jury that the state must show among other things, that the defendant, at the time he came into the possession of the pocketbook or purse, and its contents, knew that it belonged to the said Weis, or, by an examination of the papers in said pocketbook, might reasonably have known that the said pocketbook with its contents, belonged to, or was the property of, the said Henry Weis. This same thought is repeated in other instructions. It is insisted that these instructions are erroneous for the reason that defendant cannot be convicted ⁶²³ unless it be shown that he actually knew who the owner of the property was, at the time that he found it. That there are a few cases holding to the doctrine contended for will be conceded, but we think the great weight of authority supports the instructions given: See the cases heretofore cited in the first division of this opinion; also *State v. Levy*, 23 Minn. 104; 23 Am. Rep. 678; *Allen v. State*, 91 Ala. 19; 24 Am. St. Rep. 856. The thirteenth instruction told the jury that they were to arrive at the intent of the defendant in taking the property, from his conduct with reference thereto at or closely following the taking of the property, and concluded: "You are therefore to say, from the acts and conduct of the defendant at the time he discovered and took the money from the said pocketbook or purse, whether he did so with the unlawful intent to convert the same to his own use." The part of the instruction quoted is said to be erroneous, because, it is said, the intent to steal must exist at the time of the finding, and not be formed subsequently to the taking. We think the instruction, as applied to the facts in this case, was not erroneous. He did not find the money until he opened the purse and discovered it therein. As soon as he discovered it he immediately took it, and proceeded to convert or conceal the same: *Robinson v. State*, 11 Tex. App. 403; 40 Am. Rep. 790. Moreover, the court explicitly told the jury, in more than one instruction, that they must find that the defendant, when he found the pocketbook, and discovered and took from it the money therein contained did so with intent to convert the same to his own use, and deprive the owner thereof. We see no error in the instructions given.

3. The defendant asked four instructions; and they were each refused by the court. These instructions, in so far as they em-

bodied correct rules of law, were, in substance, given by the court on its own ⁶²⁴ motion. We have examined the whole record, as is our duty, and discover no prejudicial error.

Affirmed.

MR. JUSTICE GRANGER AND MR. JUSTICE ROBINSON dissented, and Granger, J., said: "My objection to the opinion is wherein it holds that, under a statute which makes guilt of larceny by finding dependent upon the finder's unlawfully appropriating the same to his own use, knowing the owner, he may be convicted if he has the reasonable means of knowing or ascertaining the owner. It needs no reasoning to show that under the rule of the opinion a person may be convicted of the larceny of such goods, who does not know the owner. If we accept it as the rule of the opinion that such a conviction can only be had when the property found has on or about it the evidence that would lead to knowledge of the ownership, we have only a modification of what would otherwise be confessedly an erroneous holding, for without the modification the conviction could be had if the finder appropriated the property without knowing the owner, if he had the reasonable means of knowing him, without regard to the kind or character of the means of knowledge. The modification is simply a limitation upon the evidence upon which it can legally be made to appear that he had the reasonable means of knowledge. It still remains that he may be convicted without such knowledge. It is a proposition which is, because of its apparent conclusiveness, difficult of reasoning. The statute says the offense shall consist of an unlawful appropriation by one who knows the owner. The court is saying that it may consist of such an appropriation by one who has certain means of knowing the owner. It is not pretended that such means of knowledge is the legal equivalent of knowledge, and hence the effect is an unmistakable and material change in the law. The difficulty is, because some authorities hold to a common-law rule, as announced in some of the states, making the offense within the rule of the majority opinion. But the common-law rule in those states furnishes the added provision, and not the courts. Our statute defines the crime, in terms, and does not attempt a re-enactment of the common law. The case of *State v. Dean*, 49 Iowa, 73, 31 Am. Rep. 143, is one for the larceny of lost property, but not having about it evidence of who the owner was; and the case holds against any rule of diligence to know the owner, and quotes approvingly the rule from 2 Bishop's Criminal Law, fifth edition, section 882, as follows: 'The doctrine, therefore, is that if, when one takes goods into his hands, he sees about them any marks, or otherwise learns any facts by which he knows who the owner is, yet with felonious intent appropriates them to his own use, he is guilty of larceny; otherwise not.' It will be seen from that rule that, to show guilt, the finder must see the marks or learn the fact by which he knows who the owner is. I think the rule of the opinion is without support in any known authority."

LARCENY OF LOST PROPERTY.—The finder of a lost pocket-book containing money and papers, the latter furnishing reasonable means of discovering the owner, was under obligation to use due diligence to discover him, and his failure to do so, and subsequent appropriation of the property to his own use, is larceny: *Allen v. State*, 91 Ala. 19; 24 Am. St. Rep. 857, and note; *Hunt v. Commonwealth*, 13 Gratt. 757; 70 Am. Dec. 443. See monographic note to *State v. Homes*, 57 Am. Dec. 283, 284.

LARCENY OF LOST PROPERTY—INTENT.—In order to stamp the conduct of the finder of lost property with larcenous character, the intent to convert it absolutely to his own use must co-exist with the act of finding. If such intent does not exist at the time of finding, a subsequent concealment or fraudulent appropriation does not constitute larceny: *Allen v. State*, 91 Ala. 19; 24 Am. St. Rep. 856; *State v. Roper*, 3 Dev. 473; 24 Am. Dec. 268. The larcenous intent must have existed at the moment of finding: *Reed v. State*, 8 Tex. Ct. App. 40; 34 Am. Rep. 732, and extended note; extended note to *State v. Homes*, 57 Am. Dec. 283.

EDMUNDSON v. INDEPENDENT SCHOOL DISTRICT.

[98 Iowa, 639.]

JUDGMENTS—COLLATERAL ATTACK—MUNICIPAL INDEBTEDNESS.—A judgment against a municipality cannot be collaterally attacked on the ground that it was rendered on a debt in excess of a constitutional limitation. Such excess was a matter of defense in the action in which the judgment is rendered.

JUDGMENTS—COLLATERAL ATTACK—FRAUD AND COLLUSION.—A judgment against a municipality, fairly obtained, cannot be collaterally attacked in a mandamus proceeding to compel the levy of a tax to pay it on the ground that its affirmance on appeal was obtained by collusion, especially when such attack is made long after the alleged collusion was discovered.

JUDGMENTS—COLLATERAL ATTACK.—A judgment merely voidable or erroneous cannot be collaterally attacked. Such judgment can be corrected only by appeal or some other direct proceeding.

JUDGMENTS—COLLATERAL ATTACK—MUNICIPAL INDEBTEDNESS.—Obtaining a judgment against a municipality is not the creation of a debt against it within the meaning of a constitutional provision fixing a limit to the indebtedness which the municipality may incur. Such judgment is merely conclusive evidence of a pre-existing debt at the time of its rendition, and, if such debt was in excess of such constitutional limit, that was matter of defense to be interposed in the suit in which the judgment was rendered; and, if not so interposed, it is waived and cannot be made the basis of a collateral attack on the judgment.

McMillan & Dunlap, for the appellants.

E. C. Roach, for the appellee.

640 **DEEMER, J.** In the spring of the year 1872, the independent district of Riverside, in Lyon county, was organized as a school district and continued as such until the spring of 1885, when the independent school district of Allison and the

independent school district of Jackson were carved out of the territory theretofore known as the Riverside district. The affairs of the school district of Riverside were very corruptly, extravagantly, and perniciously managed. At the time plaintiff recovered the judgment hereinafter referred to, the assessed valuation of all the property within the district was eighty-four thousand two hundred and ninety-eight dollars and the amount of the outstanding indebtedness against it was fifty thousand dollars. The largest amount of indebtedness it could legally incur under the constitutional limitation was four thousand two hundred and fourteen dollars. In the year 1882, and for some time prior thereto, one Skartvedt was the owner of certain real estate situate within the school district of Riverside. Taxes were levied and assessed against the property, which he neglected and refused to pay, and his land was sold for taxes. Miller and Thompson and plaintiff, Edmundson, purchased the land at tax sale, and at or about the time of the expiration of the period of redemption were proceeding to obtain a treasurer's deed for the land. Skartvedt thereupon brought suit against the school district, the purchasers at the tax sale, the county of Lyon, and the then treasurer thereof, to enjoin and restrain the execution ⁶⁴¹ of the tax deed. Edmundson, and Miller and Thompson appeared and filed an answer and cross-bill against their codefendant, the school district. The suit was based upon the claim that the taxes were excessive and illegal, and that they were levied to pay a debt in excess of the constitutional limitation of five per cent on the assessed valuation of the property within the district. The independent district affirmed the validity of the tax and of the indebtedness. The defendant Edmundson also affirmed the validity of the tax and of the indebtedness, and asked to have the amount he paid at tax sale made a lien upon the land. He further pleaded that the indebtedness for which the levies were made was in the form of negotiable bonds, which were in the hands of innocent purchasers. In his cross-bill against the school district, he pleaded the sale of the land to him under levies made by the district, the payment of large sums by him at the sales, and prayed that, in the event it should be held the taxes were not a lien upon the Skartvedt land, he should have judgment against the independent district for all sums which were held to be illegal, and not a lien upon the land, as for money had and received. The independent district, in its answer to the cross-bill, denied all liability to Edmundson. It will thus be seen that the validity of the tax assessed against the

land of Skartvedt was in issue between all the parties. Upon a trial of the case upon the issues thus joined, the court found that the taxes were not a lien upon the land, and enjoined and restrained the collection thereof. It also granted the injunction against the treasurer of the county, and gave Edmundson a judgment for the sums he paid at the tax sales, amounting in all to the sum of two hundred and twenty dollars and eighteen cents. This judgment and decree was rendered on the fourteenth day of August, 1885. The case at bar ⁶⁴² is an action of mandamus to compel the officers of the two school districts named to levy and collect a tax for the satisfaction of the judgment obtained by Edmundson in the prior proceedings. The defendants' answer to the petition filed in this case pleaded that plaintiff's judgment was obtained through fraud and collusion with the board of directors of the Riverside district; and they further pleaded that the judgment was rendered in violation of law and the constitution of the state, which was well known to the plaintiff and the officers of the school district, but that they wrongfully and fraudulently entered into a collusive agreement by which all knowledge thereof was kept from this court, to which an appeal of the original case was taken, for the purpose of evading the constitution and the laws of the state; and that in pursuance of said fraudulent agreement the appeal of the school district taken in the original case was dismissed. The case went to trial on these issues, with the result already stated.

The following stipulations and agreements were entered into between the parties at the commencement of the trial in the lower court: "It is admitted of record that the independent district of Jackson and the independent district of Allison now compose the territory formerly composing the old independent district of Riverside, the defendant in the judgment of J. D. Edmundson, against the independent district of Riverside. It is admitted that the independent district of Allison and the independent district of Jackson were organized in the spring of 1885 out of the old independent district of Riverside. It is agreed as part of the testimony in said case that if any indebtedness of the old independent district of Riverside exists for which the defendant districts herein are liable, the said independent district of Allison is liable for two-thirds thereof, and the independent district of ⁶⁴³ Jackson one-third thereof." Now, while the defendants in this case have pleaded that the judgment procured by plaintiff in the original case was obtained by fraud and collusion, yet the evidence does not bear

out their plea, and it is not relied upon here. It appears, however, that an appeal was taken from the original judgment and decree, to this court, and that this appeal was dismissed, on motion of the plaintiff therein, on the eleventh day of January, 1887. The real contention is, that plaintiff herein, and the officers of the school district of Riverside, conspired and colluded together to secure the dismissal of the appeal, and that the appeal was dismissed, and the judgment affirmed, because of their corrupt agreement.

There are but two questions of law presented by counsel on this appeal. The first is, Can plaintiff's judgment be impeached in this proceeding by reason of the alleged fraud in procuring the affirmance of the decree in this court? And the second is, Can the judgment be impeached because of the fact that at the time it was obtained the school district was in debt largely in excess of the constitutional limit? A third question in this case is one of fact, and it relates to the sufficiency of the evidence to establish the alleged fraud and collusion. We have seen that there is no claim that the original judgment and decree was obtained through fraud. There seems to have been a determined and vigorous contest over the questions presented, which finally resulted in the judgment and decree referred to. The attorneys for the school district almost immediately gave notice of appeal. Some time after the appeal was taken, a motion to dismiss was filed by Skartvedt. This motion was sustained. Within five or six weeks after the ruling on this motion, the attorneys for the school district learned of the affirmance, and they thereupon filed a motion to ⁶⁴⁴ set aside the order. This motion was also sustained, and they were given leave to file an abstract. Appellants did not then file their abstract, and appellee (Skartvedt) again moved to dismiss the appeal, and his second motion was sustained. As we understand it this motion was sustained on the theory that the appeal was not authorized by the officers of the school district. Within a few weeks after the final order was made, appellants' counsel received notice thereof, and they thereupon consulted with the officers of the school district, and learned that they did not desire to prosecute the appeal. After receiving this information, they made no further effort to reinstate the case. There is no evidence whatever that Edmundson had anything to do with the proceedings in this court. On the contrary, it affirmatively appears that neither he nor his attorney had anything to do with procuring the affirmance of the judgment. It was affirmed before either of them knew that any steps were

being taken in that direction. The proceedings were all had without reference to Edmundson or his attorney. It seems to us quite clear that there is not sufficient evidence of fraud or collusion to justify a court in setting aside the order of affirmance. But if it should be conceded that the evidence is sufficient, it does not follow that this defense is available in this case.

Both the district and this court had jurisdiction of the parties and the subject matter. The affirmance of the judgment, even if had by reason of collusion between the parties, would not be void, unless made to avoid the constitutional provision. Such fact, if established, would be good ground for timely proceedings in this court to set the order of affirmance aside, but would not justify a collateral attack upon the judgment. Moreover, if it did not afford ground for relief, the appellants were ⁶⁴⁵ required to act with reasonable promptness. They could not sit idly by and wait for years, and until the plaintiff attempted to enforce his judgment, and then come in and ask that it be set aside. It is a time-honored and salutary rule that when one is defrauded by the conduct or act of another, he must within a reasonable time after the discovery of the fraud, proceed to have the matter corrected. If he does not do so, he is held to have acquiesced therein. In this case, the defendants and the districts which they represent knew of the alleged fraud within a few weeks after it was consummated, and yet took no steps to correct the results obtained by the fraud until more than nine years after it was consummated. And when they do act they attempt to accomplish it in a collateral proceeding by interposing a defense to the enforcement of the judgment. As we have already said, the judgment was in no event void. At most, it was simply voidable; and it is elementary that such a judgment cannot be collaterally attacked. The case of *Independent Dist. v. Miller*, 92 Iowa, 676, is in some respects much like the case at bar. Miller and Thompson, the defendants in that case, are the Miller and Thompson referred to in the earlier part of this opinion.

2. It is contended that the judgment in favor of Edmundson is void, because it creates an indebtedness against the school district in excess of the limitation fixed by the constitution (Const., art. 11, sec. 3) upon the indebtedness of municipal and political corporations. This contention is based upon the thought that the obtaining of the judgment was the creation of the debt. Manifestly, this is not true. The judgment is simply evidence—conclusive evidence—of a pre-existing debt,

which had been created prior to the time the court rendering it was called upon to act. If the indebtedness, which had ⁶⁴⁶ previously been created, was in excess of the constitutional limit, this was a matter which the defendants should have pleaded in defense to the action brought to recover the amount due. The constitutional provision is not self-executing or self-enforcing. It is purely a matter of defense to recovery upon a contract, which creates a debt in excess of the limitation provided; and if not interposed at the proper time, and in a legal manner, it is waived. We do not mean to hold that the officers of such a corporation may, fraudulently or collusively, permit judgments to be rendered against the municipalities which they represent, which will be conclusive upon the corporation. Nor are we prepared to hold that a judgment so obtained cannot be successfully assailed. What we do say is that, as applied to the facts of this case, the judgment, which is the foundation of this suit, cannot be collaterally attacked, because of the fact that the indebtedness upon which it is founded was in excess of the constitutional limit. It appears that the question as to the validity of the indebtedness of the school district, of the levy and assessments to pay the same, of the sale of Skarvedt's property, and of the right of Edmundson to recover were involved in the original suit, and were determined, in so far as the issues presented in this case are concerned, by the judgment and decree in the original case. In these respects the case differs from *Kane v. Independent School Dist.*, 82 Iowa, 5. The judgment is, therefore, not void, but, according to appellants' contention, simply erroneous, and the only way to correct the error was by appeal. There is absolutely no evidence that the appeal was abandoned by the officers of the school district for the purpose of avoiding the constitutional inhibition. It is, then, simply a plain case of an erroneous, as distinguished from a void, judgment; and it is well settled that such ⁶⁴⁷ a judgment can only be corrected by appeal, or some other direct proceeding: *Thompson v. McKean*, 43 Iowa, 402; *Darrow v. Darrow*, 43 Iowa, 411; *Moore v. Jeffers*, 53 Iowa, 202; *Perry v. Miller*, 54 Iowa, 277; *McCrillis v. Harrison County*, 63 Iowa, 592; *Central Iowa Ry. Co. v. Piersol*, 65 Iowa, 498. The case of *Sioux City etc. R. R. Co. v. Osceola County*, 45 Iowa, 168, is in line with what we have said in this opinion as to the duty of the officers of the corporation to make defense, and as to the validity of the judgment when rendered. Our conclusions also find support in the case of *Thomas v. Burlington*, 69 Iowa, 140, and *Sioux City v. Weare*, 59 Iowa, 95. We see no merit in either

of the defenses interposed by the defendants, and are fully satisfied with the order made by the district court.

Affirmed.

JUDGMENT—COLLATERAL ATTACK.—A collateral attack on a judgment or order cannot be successful unless such judgment or order is void: *Dyer v. Leach*, 91 Cal. 191; 25 Am. St. Rep. 171, and note; note to *Brown v. Wilson*, 52 Am. St. Rep. 239; *Kingman v. Paulson*, 126 Ind. 507; 22 Am. St. Rep. 611, and note; *Springer v. Shavender*, 116 N. C. 12; 47 Am. St. Rep. 791.

MUNICIPAL CORPORATIONS—INDEBTEDNESS—WHAT IS. With respect to the character of the indebtedness courts have made a distinction between that which is voluntary and that which is involuntary, and have, at least in some cases, determined that if the indebtedness did not rest upon the consent of the city, and consisted of a liability which it had no discretion not to assume, that it should not be included in the computation made for the purpose of ascertaining whether the municipal indebtedness had passed the forbidden limit: Monographic note to *Beard v. Hopkinsville*, 44 Am. St. Rep. 234.

MUNICIPAL CORPORATIONS—JUDGMENTS AGAINST—MANDAMUS.—A municipal corporation may be compelled by mandamus to pay a judgment rendered against it: *Olney v. Harvey*, 50 Ill. 453; 99 Am. Dec. 530, and note; *Coy v. City Council*, 17 Iowa, 1; 85 Am. Dec. 539, and note. And equities attaching to the debt are merged into judgment therefor, and cannot be asserted against an application for a mandamus to enforce payment of the same: *Coy v. City Council*, 17 Iowa, 1; 85 Am. Dec. 539.

CASES
IN THE
SUPREME COURT
OF
MAINE.

GOODWIN *v.* GOODWIN.

[90 MAINE, 23.]

SALES—WHAT DELIVERY IS SUFFICIENT.—As against subsequent bona fide purchasers or attaching creditors without notice, an actual delivery is essential to the validity of a sale, but this may be accomplished, where the parties meditate no fraudulent purpose, by the vendor's relinquishment, and the vendee's assumption, of the ownership, control, and possession of the property without any removal of it. The purchaser may have the legal control and possession of the property while it is in the seller's hands as his agent or bailee, and, where a contract of sale is accompanied by an agreement making the vendor the purchaser's bailee, slight acts are sufficient to prove delivery, if there is no evidence of any fraud.

SALES—DELIVERY—POSSESSION BY VENDOR AS BAIL-EE—ATTACHMENT.—If cows are sold, without any fraudulent intent, in the presence of a witness, when all the parties are present, the vendor pointing out the cows with the statement, "I deliver you this stock, free from all encumbrance," and the price is paid, and the seller, for a valuable consideration, becomes bailee for the purchaser, the possession of the cows is no longer in the seller as owner. It is thereafter the purchaser's possession. The delivery is actual, though, perhaps, not a strictly manual delivery, and is good against a creditor of the vendor who subsequently attaches the cows before they are removed from the vendor's possession.

Replevin brought by C. H. Goodwin against F. O. Goodwin to recover four cows which had been sold upon an execution in favor of the defendant against one A. S. Rand as the latter's property. The title was in issue, and both parties claimed under Rand, the plaintiff by virtue of a bill of sale, and the defendant under a sale on his execution. It was contended by the defendant that the sale to the plaintiff was fraudulent as to Rand's creditors. He also contended that there had been no sufficient delivery of the cows from Rand to the plaintiff, as against him, the defendant. At the time of the delivery of the bill of

sale, the cows were in Rand's barn, on his farm in Stetson. The plaintiff did not at that time take away the cows, but claimed to have left them in the care of Rand under the arrangement stated in the bill of sale. The jury were instructed that, if the defendant's contention was true, the sale to the plaintiff was not valid as against him, the defendant. The case was heard on the plaintiff's exceptions.

F. J. Martin and W. S. Townsend, for the plaintiff.

P. H. Gillin, for the defendant.

³⁰ PETERS, C. J. One Rand, by a bill of sale with an agreement included, January 20, 1896, sold five cows to the plaintiff at Rand's barn in Stetson, the bill of sale and agreement being as follows:

"Stetson, Jan. 20th, 1896.

Sold and delivered to C. H. Goodwin. Five cows Standing in my New Barn in the North end of the Barn meaning No-3-5-6-7-8- Three Five Six Seven and Eight all grade Houlstein Color Four Black and white and one Black. I have received One Hundred and Twenty-five Dollars in full payment for the same and I agree to Keep Said Cows for what milk they give without further expense to Goodwin until the twentieth day of March unless Goodwin disposes of them or takes them home before that time.

Wit. H. G. Goodwin.

A. S. RAND."

The evidence of delivery came from the plaintiff himself and from his son who witnessed the bill of sale. The father testified ³¹ that the bill of sale was made at his own house and carried down to Rand's house and signed there; that the signing was done on the next day or within a day or two after the bill was made out and on the day when he took a delivery of the stock, and that he paid Rand every dollar due as the consideration for the sale when the bill of sale was signed.

The son testified to what took place between the parties as follows: "Q. You speak about delivery. I want to find out what they did about that. A. I went into the south part of the barn—into the north part of the barn on the south side of the road, and he pointed the cows out—Mr. Rand did, and he says, 'I deliver you this stock free from all encumbrance.'"

The cows had not been taken from the barn of Rand at his farm on the sixth day of February, 1896, on which day they were seized upon an execution in favor of the defendant against Rand as Rand's property, and at a later date were sold by the

officer to the defendant who took them away. Thereupon the plaintiff replevied the cows from the defendant.

Two questions were submitted to the jury upon which special findings were returned. The jury found that the transaction of sale was not fraudulent as against the vendor's creditors, and also that there was not a valid delivery. The general verdict was therefore necessarily for the defendant. It is contended by the plaintiff that if the testimony on the subject of delivery was believed by the jury, and there is no sign in the case to the contrary, the two verdicts cannot logically stand together, and that the finding as to delivery was erroneous. The plaintiff further contends that a jury committed the mistake in consequence of a partially erroneous interpretation of the law of the case by the justice presiding. Whether that be so or not is the question presented.

It is not denied by the plaintiff that an actual and not merely a constructive, delivery was necessary, but he contends that the delivery was actual, although perhaps not a strictly manual delivery.

³² The reason of the rule requiring delivery throws some light upon the question as to what may constitute a sufficient delivery. In the old case of *Ludwig v. Fuller*, 17 Me. 162, 35 Am. Dec. 245, Shepley, J., comments on the subject as follows: "The reason why a sale, when the price is paid, is not good as respects other parties without a delivery is, that the law regards the purchaser as in fault, and as acting unfairly and fraudulently in allowing the seller, by retaining the possession, to hold out the apparent evidence of ownership, and thereby induce others to purchase or to credit him to their injury." We apprehend that another reason for the rule may be that contracts of sale without delivery are more likely to be uncertain and indefinite as to the property really sold, and that a formal act of delivery would insure a better identity of the articles intended to be covered by the sale. But the learned judge was speaking of the rule as it formerly stood by the old common law, and, while deprecating a change of the rule, remarks further upon it as follows: "It must be admitted that the strength of the reasoning upon which the rule rests, that there must be a delivery as respects other parties, has been greatly impaired in this and other states, where the common law has been so modified as to allow the purchaser to prove that the sale was not fraudulent, where possession did not accompany and follow it. What will amount to proof of delivery has been the subject of much discussion; and it is rendered more difficult, and would

probably be found impracticable to state any general rule applicable to all cases, especially in those states where the law has been so modified as not to require an actual and permanent change of possession, and where delivery is therefore rather nominal and symbolical than actual. But because the reasoning upon which the rule of law was established does not operate as formerly, and the rule itself is less convenient in practice, that does not authorize a court of law, contrary to a uniform course of decisions, to declare that the rule no longer exists. However one may regret that a modification of one rule of law should be found to impair the reason upon which another rule was established, it may afford a lesson, that when one is dealing with the common law, *stare decisis* is judicial wisdom.³³ And if experience has taught that this modification has been productive of litigation, and afforded greater facilities for the commission of frauds, it would lead to a like conclusion."

So far as the likelihood of fraud existing in cases where the articles sold are not taken away by the purchaser, that objection does not lie here; nor could there be any uncertainty of the property intended to be sold, inasmuch as its description is in writing. And there was no after purchaser to be misled by the seller's having an apparent ownership of the property, although there was a creditor to attach it. There certainly was evidence enough to authorize a jury to find an actual delivery. The parties were present with the cows, the sale was expressly made in the presence of a witness, the price was paid, and the seller, for a consideration, became the bailee of the property for the purchaser. The possession of the cows was no longer in the seller as owner. His possession was thereafterward the purchaser's possession and not his own. We do not see how any more formal or particular act of delivery would have been of any consequence. It was a natural mode of consummating the bargain, and anything more demonstrative might well excite a suspicion that the sale was merely pretended and fictitious.

We think the jury may have been led by the tenor of some portions of the charge of the judge to believe that all these acts were not of themselves sufficient to constitute a legal delivery. The illustrations which were given of a watch sold and delivered by going out of the seller's into the purchaser's pocket, and of the delivery of a horse made effectual by the buyer's act of taking the horse and leading him away, would tend to incline the jury to suppose that the purchaser in this case should have taken the cows away in order to constitute an actual delivery. The learned judge emphasized to the jury that, in order to constitute

sale and delivery, there must be a "relinquishment of the ownership and possession of the property by the vendor, and an assumption of these by the vendee." It was further said that the vendee must have the entire control of the property. But it was not explained to the jury that there might be a relinquishment by the vendor ³⁴ and an assumption by the vendee of the ownership, control, and possession of the property without any removal of the property away, and that the purchaser could have the legal control and possession of the property while in the seller's hands as his agent or bailee, if there be no fraudulent purpose meditated by the parties. Although the doctrine found in the charge, as an abstract proposition, was technically correct, still it was an imperfect and rather inadequate presentation of the rules respecting delivery as applicable to the facts of the case before us; especially when we take in view the position taken in behalf of the plaintiff at the trial. The instructions were absolutely sound as applicable to a case of sale where no explanation is given or attempted to be given for the possession remaining in the seller's hands, indicating an apparent ownership in him. But the bill of sale and the agreement incorporated therein give sufficient explanation of that fact, if the transaction was not fraudulent. Numerous authorities maintain the doctrine that when such a transaction is not fraudulent slight acts are sufficient to prove delivery.

In *Stinson v. Clark*, 6 Allen, 340, it is said by Metcalf, J., "that when a contract of sale is bona fide, and payment is made, in full or in part, of the price, slight acts are sufficient to show a delivery that will avail the buyer against the claims of third persons"; and certain pertinent cases are cited in the opinion of the court. The acts in that case showing delivery were not more significant than were the acts here. The statement in that case was that a blacksmith sold to a purchaser sixty horseshoes for forty dollars, and holding up one of the shoes said: "Take them; there are the shoes; I deliver them to you." The shoes, by agreement, were allowed to remain in the shop for some time, and were attached afterward while remaining there by a creditor of the seller. It was held that the delivery was sufficient as against the creditor.

The doctrine of the case just cited is maintained in many cases, a few of which only need be examined in corroboration of our view of the pending question. In *Calkins v. Lockwood*, 17 Conn. 154, 42 Am. Dec. 729, the parties to a sale of iron met at the place where the iron ³⁵ was, and agreed upon the price and

the mode of payment, and thereupon the seller said to the buyer: "I deliver you the iron at that price." The iron remaining a while unmoved a creditor of the seller attached it, but the court held the delivery to be sufficient. In *Cutter v. Copeland*, 18 Me. 127, the court, upon facts not unlike the present, announced the statement that there was no legal objection in a mortgagee's making the mortgagor his agent to hold possession of the goods mortgaged, the court, in effect, remarking that in such case the apparent possession of the one would be the real possession of the other. And this principle was adopted in the subsequent case of *Hotchkiss v. Hunt*, 49 Me. 218, where the question was exhaustively examined, and the following rule as to delivery enunciated: "When, by the term of an agreement of sale, the article sold is to remain in the possession of the vendor for a specific time, or for a specific purpose, as a part of the consideration, and the sale is otherwise complete, the possession of the vendor will be considered the possession of the vendee, and the delivery will be sufficient to pass the title even as against subsequent purchasers." That case was approvingly cited by the Massachusetts court in *Thorndike v. Bath*, 114 Mass. 116, 19 Am. Rep. 318, the court quoting from the opinion in that case and relying on that and quite a number of other pointed and relevant decisions in support of the rule thus enunciated. In the case last cited, it was held that evidence that a person, seeing an unfinished piano in the maker's shop, offered to purchase it of him if he would finish it, that the offer was then and there accepted, that a bill of sale was then and there made, and that the price was paid at a subsequent day, the piano being left to be finished, will authorize a jury in finding a delivery of the piano sufficient to pass the title as against a subsequent purchaser. The case of *Barrett v. Goddard*, 3 Mason, 107, is apropos. In that case, goods lying in a warehouse were sold by marks and numbers, and paid for, it being a part of the bargain that the goods should remain at the option and for the benefit of the buyer at the seller's warehouse, rent free, for the time being; and it was held by Judge Story that, on these facts, the delivery was sufficient as against subsequent ³⁶ purchasers. To the same effect is *Beecher v. Mayall*, 16 Gray, 376, where steam boilers were purchased and left in the seller's possession for the accommodation of the purchaser. And many other significant cases might be added. But we deem these cited to be sufficient.

Exceptions sustained.

SALES—DELIVERY—RETENTION OF POSSESSION BY VENDOR.—As to creditors and subsequent bona fide purchasers, a delivery is indispensable to complete a sale: *Note to State v. Wernwag*, 47 Am. St. Rep. 876. In other words, a sale of personal property unaccompanied by change of possession, is, ordinarily, fraudulent and void as to them: *Stephens v. Gifford*, 137 Pa. St. 219; 21 Am. St. Rep. 868; *note to Renninger v. Spatz*, 15 Am. St. Rep. 694; *Calkins v. Lockwood*, 17 Conn. 154; 42 Am. Dec. 729; *Crouch v. Carrier*, 16 Conn. 505; 41 Am. Dec. 156. A buyer may, however, employ the former owner to care for the property purchased: See monographic note to *Clafin v. Rosenberg*, 97 Am. Dec. 344, on change of possession sufficient as against creditors and subsequent purchasers; but, while parties to a sale of a chattel may make such terms and conditions as are convenient to them, if they are prejudicial to others, or are calculated to mislead the public, they are void as to those who would otherwise be injuriously affected by them: *Stephens v. Gifford*, 137 Pa. St. 219; 21 Am. St. Rep. 868. There are many cases holding that the thing sold may remain in the hands of the seller, and yet that the title may pass effectually to the buyer, as where horses, cattle, and hogs have been left by the buyer in the custody of the seller: See cases cited in *Thorndike v. Bath*, 114 Mass. 116; 19 Am. Rep. 318; *note to Clafin v. Rosenberg*, 97 Am. Dec. 342. See monographic note to *Shindler v. Houston*, 49 Am. Dec. 335, on sufficiency of delivery and acceptance to take verbal sale of goods out of the statute of frauds: *Webster v. Anderson*, 42 Mich. 554; 36 Am. Rep. 452.

THE QUESTION OF DELIVERY, in sales, is noticed in *Cummings v. Gilman*, 90 Me. 524. It is, in fact, the principal point involved in that case, which was an action of trover for forty-five barrels of apples. There was a verdict for the defendants. The apples were raised by one Ingham. The plaintiff, Cummings, contended that Ingham had sold the apples to Gordon & Henry, traders at Readfield, who, in turn, had sold them to the plaintiff. The defendants, Gilman and another, asserted that Ingham had sold and delivered the apples to them, that they were bona fide purchasers with no notice of any sale by Ingham to any other party, and that they had paid in full for the apples. In holding that the defendants were entitled to the apples, the court said: "Although the general rule is that, as between seller and purchaser, and as against strangers and trespassers, the title to personal property passes by sale without delivery (when no question arises in relation to the statute of frauds), nevertheless the same rule does not operate against subsequent bona fide purchasers, attaching creditors without notice, and others standing in like relation. To render a sale valid against these there must be delivery of the property sold: *Ludwig v. Fuller*, 17 Me. 162; 35 Am. Dec. 245; *Vining v. Gilbreth*, 39 Me. 496; *McKee v. Garcelon*, 60 Me. 165; 11 Am. Rep. 200. When, therefore, the same goods are sold to two different purchasers, by conveyances equally valid, it is well settled that he who first lawfully acquires the possession will hold them against the other: *Lanfear v. Sumner*, 17 Mass. 110; 9 Am. Dec. 119; *Jewett v. Lincoln*, 14 Me. 116; 31 Am. Dec. 36; *Brown v. Pierce*, 97 Mass. 46; 93 Am. Dec. 57.

"In this case, the apples remained in the vendor's possession until the defendants hauled them away. The sale under which the plaintiff claims title was to Gordon & Henry, while the apples were lying

in a bin, unpacked. They never paid for the apples, and the only expense they had been to was the packing. The barrels belonged to Ingham. The court, under proper instructions, presented the contention of the parties to the jury. Defendants claimed that the first alleged sale was conditional, that the conditions never having been complied with, it became merely an executory contract, unfulfilled by the parties to it. If it was a conditional sale, and anything further remained to be done by either party as a condition precedent to the passing of the title, then there was no completed sale. All questions of fact in relation to the contract of sale by Ingham to Gordon & Henry, and of delivery, were left to the jury, and from an examination of the evidence we see no reason for disturbing the verdict."

WYMAN v. GAY.

[90 MAINE, 136.]

EXEMPTION—WAIVER OF, BY SALE.—To claim property as exempt is a personal privilege of the debtor, but he may waive such privilege, and does waive it, when he conveys the property to another, especially when with fraudulent intent.

EXEMPT PROPERTY, SALE OF IN FRAUD OF CREDITORS—RECOVERY BY INSOLVENT'S ASSIGNEE.—Although certain chattels and policies of life insurance where the annual premium on each is less than one hundred and fifty dollars, are exempt from attachment while in the hands of an insolvent debtor, yet, if he conveys such property to a particular creditor, so as to give him a fraudulent preference over other creditors, it is placed without the protection of the statute of exemptions, and the debtor's assignee in insolvency may recover the property, or its value, including the value of the policies, for the benefit of all the creditors.

Trover by Samuel D. Wyman, the assignee of an insolvent debtor named Alfred W. Huston, against Gilbert E. Gay, for the conversion of certain personal assets, namely, a horse, calf, sleigh, robe, blanket, cow, harness, pung, etc., sold by Huston to Gay. Two policies of life insurance were also assigned by the debtor, at the time of the sale, to the defendant. The case was reported to find out whether the plaintiff could recover, and, if so, for how much.

W. H. Hilton, for the plaintiff.

T. P. Pierce, for the defendant.

38 HASKELL, J. Trover, by the assignee of an insolvent debtor against a creditor to recover the value of chattels conveyed to him by the debtor in fraud of the insolvent law.

The case found the conveyance to have been fraudulent, but the defendant claims that the chattels, when conveyed to him, were exempt from attachment and therefore do not belong to

the assignee. This defense is groundless. Exempted property is a personal privilege of the debtor. He may waive it, and certainly does waive it when he conveys it to another. His interest in the property is then gone. He cannot reclaim it or recover it. If it serves a fraud, his assignee may do so and thereby prevent an unequal distribution of his assets among his creditors. *Nason v. Hobbs*, 75 Me. 396, is directly in point. There the assignee sued to recover the value of a yoke of oxen, sold by the debtor ³⁰ before his insolvency in fraud of creditors. Exemption of the oxen from attachment was set up as a defense. The court says at the date of the insolvent proceedings the debtor "did not then own the oxen, for he had sold them the day before to the defendant, and he could not legally claim sold oxen as exempt." The jury found the value of the chattels on the day of their conveyance to the defendant to have been one hundred and forty-seven dollars and thirty-five cents, which sum the plaintiff may recover with interest from the date of conversion.

The plaintiff also sues to recover three hundred and forty-five dollars and fifty-two cents, the agreed value of two policies of insurance on the insolvent's life, conveyed by him to the defendant in fraud of the insolvent law, and thereby converted to his own use. The same defense as to the chattels is interposed. Revised Statutes, chapter 49, section 94, is invoked. That section exempts all such policies where the annual premium is less than one hundred and fifty dollars, meaning on each one, from "attachment and from all claims of creditors, during the life of the assured." This statute means to allow the assured such property, while he holds it, free from the claims of creditors, but, when he sells it for cash he will have received its equivalent, and the purchaser will hold an investment, a security that is just as much a part of his estate as a bond or promissory note would be.

So when the insured assigns his policy in payment of a debt, the policy becomes assets in the hands of a creditor, and he should not thereby be permitted to gain a fraudulent preference in his own favor over other creditors of the same debtor. When the assured parts with his policy, he places it without the protection of the statute. It then becomes the same as any chattel, and the title goes to the assignee in insolvency, rather than to work a fraud. Any other doctrine might be made to thwart the equality of creditors and make it possible for a dishonest debtor to give his property to a single creditor. He might take his entire assets and procure numerous policies of insurance, with annual premiums of not over one hundred and fifty dollars on each

as in this case, and appropriate the whole of them to a favored creditor.

We think the defense of exemption does not apply to the policies any more than to the chattels, and that the plaintiff may ⁴⁰ recover for their conversion the agreed value of three hundred and forty-five dollars and fifty-two cents; but as the case does not show when that value attached, it must be presumed as of the date of the verdict, from which time interest should be added.

Judgment for plaintiff.

WAIVER OF EXEMPTION—FRAUD.—The right to exemption from execution is a personal privilege which the debtor may waive: *Brown v. Leitch*, 60 Ala. 313; 31 Am. Rep. 42. The owner of property exempt from execution may confer a clear and valid title to it by sale or gift: *Carhart v. Harshaw*, 45 Wis. 340; 30 Am. Rep. 752. He may convey or exchange it even after the delivery of the execution to the officer: *Paxton v. Freeman*, 6 J. J. Marsh. 234; 22 Am. Dec. 74. If the gift or sale is valid when made, creditors cannot afterward impeach it as fraudulent: *Carhart v. Harshaw*, 45 Wis. 340; 30 Am. Rep. 752.

IF PROPERTY IS EXEMPT BY LAW from attachment and execution, the creditors of its owner cannot be prejudiced by any disposition he may make of it. Its transfer, therefore, cannot defraud them; nor can it be regarded as an agreement that it shall be taken under execution against its former owner, or a waiver of the right to insist that it is not subject to execution. The decision in the principal case must, of course, be accepted as establishing the law upon the subject in the state of Maine. It is contrary to both reason and precedents: *Freeman on Executions*, sec. 153; *Carse v. Reticker*, 95 Iowa, 25; 58 Am. St. Rep. 421; *Bank of Versailles v. Guthrey*, 127 Mo. 189; 48 Am. St. Rep. 621; *Pipkin v. Williams*, 57 Ark. 242; 38 Am. St. Rep. 241; and outside of the state in which it was pronounced should be regarded as a mere judicial freak.

UNION WATER POWER COMPANY v. AUBURN.

[90 MAINE, 60.]

TAXATION OF WATER.—Water is not a distinct subject of taxation. As an element, it is not property any more than air; but, when used, its potential power becomes actual by operating upon real property, thereby giving it value, and that value is the basis for the purposes of taxation.

TAXATION OF WATER FOR MILL PURPOSES.—Water for mill purposes is not a distinct subject of taxation until so applied. It then becomes the main element of value, not as water, not as power, but as an integral part of the mill itself, and is indirectly the subject of taxation as a part of the mill property.

TAXATION OF WATER, AND OF LAND EXCLUSIVE OF WATER.—If a corporation owns a dam on a river which runs between two cities, and has its established place of business in one city, where the water power from the dam is applied, its water power in the other city is merely potential, and not taxable, except in-

directly in the valuation of mills with which it is used, but the dam and the land upon which it stands in the latter city may be properly taxed there at a reasonable valuation exclusive of the water power created thereby.

Abatement of a tax. The Union Water Power Company owned a dam across the Androscoggin river at Lewiston Falls. The river was the dividing line between the cities of Lewiston and Auburn. The company's established place of business was in Lewiston where the water power from the dam was applied; but the assessors of Auburn assessed a tax in that city upon the dam and water rights of the company. The company filed a petition for an abatement of the tax, which was refused by the assessors. The company then filed its petition in court, which was passed on by the presiding justice, who found as a matter of fact, and ruled as a matter of law, that the water power in question was appurtenant to the dam and to the real estate of the company flowed thereby, in the sense that the capacity of the dam and real estate for valuable use was fully considered in fixing their valuation in the city of Auburn; but that it was not appurtenant to such dam and real estate in the sense that the water power, which was taxed in connection with the mills in the city of Lewiston, could be a distinct subject of taxation in the city of Auburn. The case was heard on the defendant's exceptions.

W. H. White, S. M. Carter, and J. A. Morrill, for the plaintiff.

N. W. Harris, J. A. Pulsifer, W. W. Bolster, A. R. Savage, J. W. Symonds, D. W. Snow, and C. S. Cook, for the defendant.

64 HASKELL, J. This is an appeal from the action of the assessors of Auburn in refusing an abatement of taxes. It comes up on exceptions to the rule for valuation applied below to a dam from the center of the river to the Auburn shore holding back water that is taken by canal on the opposite shore in Lewiston and there used for mill power.

It is contended that Auburn may assess the power created by the dam within its own limits although applied elsewhere. This contention seems to have been partially sustained by the court below, and we think it erroneous. Water power until applied to mills is potential, not actual, in the sense that it is property subject to taxation. When applied to the mills it becomes a part of the property, thereby giving them value, the proper subject of taxation. It then becomes the main element of value, not as water, not as power but as an integral part of the mills themselves. Without it, what value could a water mill have? If the rule should be held otherwise, it would overturn the present

method of taxation throughout the state. We have three principal rivers, taking their rise in lakes in the northern wilderness. At the outlet of these lakes immense dams hold back and store water for the use of mills below. If the rule of taxing the potential use of water should be adopted, it would send the principal part of the power of these rivers for taxation into unorganized and remote districts, and deprive cities and towns of that element to be considered as estimating the value of water mills for purposes of taxation. Under that rule, their value might be almost nominal, ⁶⁵ because their power is the controlling agency that makes value. But it is said that the owner of the dam may not be the owner of mills. That he simply stores up water for sale to the millowner. That should make no difference. The water itself is not property, although he alone may use it. When he does so, the power it produces attaches to the mill and becomes an element in the value of the mill. When he sells it, the same result follows as if he applied it to his own mill. The mill, where it is applied, becomes the more valuable thereby. It there, indirectly, becomes the subject of taxation as a part of the mill property. The water in a mill pond cannot be regarded as property apart from the mill that uses it, and separate ownership makes no difference. Water as an element is not property any more than air. When used, its potential power becomes actual by operating upon real property and thereby giving it value, and that value is the basis for the purposes of taxation.

The first case brought to our notice is *Boston Mfg. Co. v. Newton* (1839), 22 Pick. 22, the facts of which were precisely like the facts in the case at bar in all material particulars. The plaintiff owned a dam across Charles river, one-half in Newton and the other half in Waltham. The mills were wholly in Waltham. Newton assessed one-half the dam and one-half the water power. The tax was paid under protest, and suit brought to recover it back as an unlawful assessment upon the water power. Mr. B. R. Curtis was of counsel for the plaintiffs, and Mr. Rufus Choate counsel for the defendants. The opinion of the court was by Chief Justice Shaw, and the court says: "Water power for mill purposes is not a distinct subject of taxation. It is a capacity of land for a certain mode of improvement, which cannot be taxed independently of the land.

"But the objection to this mode of taxation is not the only or the principal objection to the tax in question. The court are of opinion that the water power had been annexed to the mills, that it went to enhance the value of the mills, and could only

be taxed together with the mills, as contributing to increase their value. As the mills were wholly situated in Waltham, and were taxable ⁶⁶ there, they were not liable to be taxed in Newton." That doctrine has been recognized in Massachusetts ever since.

In *Lowell v. County Commrs.*, 6 Allen, 131, a corporation owned certain canals with appurtenances, whereby it was enabled to furnish certain mills, owned by its stockholders, water for power. For nine months in the year it had a surplus of water for sale to other takers, and the court held that the canals were assessed in the valuation of the mills to the proportion of the power furnished to them, and that their value for retaining the surplus of water, if any, might be directly assessed to the corporation, but does not authorize the assessment of water power per se. In this state, very likely the canals would be assessed wholly to the owner, and the power included in the assessment of the mills only.

In *Pingree v. County Commrs.*, 102 Mass. 76, it was held that a dam and structures were taxable independent of the water power which they had created. The court says: "They are capable of being estimated by a reasonable valuation, not dependent upon nor including the worth of the water power with which they are connected." It explains *Lowell v. County Commrs.*, 6 Allen, 131, by saying: "There was no diversity of right or jurisdiction in that case, which made it necessary to determine whether the canals and land adjoining them could be taxed to the millowners as water power against a conflicting interest."

Fall River v. County Commrs., 125 Mass. 567, holds that right of flowage is an easement in land that cannot be taxed independently, and the court say that it forms part of the water power which is taxed in connection with the mills, as enhancing their value.

Flax Pond Water Co. v. Lynn, 147 Mass. 31, holds that one who owns the right to maintain a dam and sluiceway upon the land of another, and is in the enjoyment thereof, may be deemed as in possession of real estate for the purposes of taxation, and that the soil may properly be taxed to him. This is the doctrine of *Paris v. Norway Water Co.*, 85 Me. 330; 35 Am. St. Rep. 371.

Lowell v. County Commrs., 152 Mass. 381, holds that land enhanced by the ownership and use of the water power appurtenant ⁶⁷ thereto may be so taxed, notwithstanding existing statutes.

The plaintiff's dam and the land upon which it stands within the city of Auburn may be properly there taxed at a reasonable valuation, exclusive of the water power created thereby. That is

potential and not taxable, except indirectly in the valuation of mills with which it is used. The doctrine held in *Paris v. Norway Water Co.*, 85 Me. 330, 35 Am. St. Rep. 371, is analogous.

We are aware that a different doctrine prevails in New Hampshire, but do not think it so well comports with our state polity, and would give so just and equal basis for taxation as the one we are constrained to adopt: *Cocheco Mfg. Co. v. Strafford*, 51 N. H. 455; *Winnipiseogee Lake etc. Co. v. Gilford*, 64 N. H. 337; *Amoskeag Mfg. Co. v. Concord*, 66 N. H. 562.

Although the ruling below seems to be incorrect, yet, as it is more strongly in the defendant's favor than it is entitled to have, the exceptions must be overruled.

Exceptions overruled.

EMERY, J., DISSENTED. He said: "I find myself unable to fully acquiesce in the reasoning of the learned opinion, though it seems to have support in the cases cited from Massachusetts. The case bears to me a different aspect, and, in view of the great importance of the question in a state like Maine, a consideration of the case in this aspect may not be useless. I venture, therefore, to express my views in a separate opinion.

"I do not see the necessity, and I doubt the expediency, of undertaking to determine whether what is called 'the water power' is wholly appurtenant to the dam, or wholly appurtenant to the mill, or partly appurtenant to each, or whether it is incorporated into either.

"If, by the term 'water power,' is meant the 'waterfall,' or the 'mill privilege,' then it is simply a parcel of land over which a stream of water flows and falls, and is to be taxed in the town in which it is situated. So far as the land is more valuable by reason of the stream and fall upon it, so far are these to be considered in the valuation of the land, and no farther. This consequent increase of value is a question in commercial economics and requires for its determination the consideration of possible revenues to be drawn from the land and the possible price to be obtained for it.

"If, by the term 'water power,' is meant the force, energy, or, to quote from the opinion, the 'potentiality' of falling water, then it is not appurtenant to, nor annexed to, nor an integral part of, any particular parcel of real estate. It is just force, as gravitation is force. It may be exerted by or upon some material object, but it is no part of that object, either as an appurtenance or otherwise. Gravitation affects all matter, but it is not in nor appurtenant to matter.

"The intensity of the force exerted by falling water is according to the height from which it falls. While this force is exerted to some extent throughout the whole length of a river, it is usually only at comparatively few places that the fall is sufficiently sharp to develop intensity enough to be made practically serviceable as a mechanical power. It is only at these places, these 'falls' thus formed

by nature, that successful efforts have so far been made to utilize this force.

"But under our law such utilization can be made only by leave of the owner of the land under and abutting the falls on either side. However great the intensity of the force exerted by the water at the particular falls in question, however easy its utilization, however great the demand and imperative the need for its utilization, the owner of the land holds the indispensable key. He can impose his own terms for its use. This rule of law may often give a monopoly of great value. The falls upon his land may be the only one on a large river and within a wide territory. He has, in such case, not a monopoly of the force exerted by the water of the river, but a monopoly of the only practical means or opportunity for its utilization.

"This monopoly, thus valuable, is an incident of the ownership of the land and may often be the principal element in the value of the land. Large revenues may often accrue to the landowner solely from this monopoly. This monopoly, this revenue or chance of revenue from it, should be included in an estimate of the value of the land. The whole value of the land with all these incidents is to be assessed and taxed in the town in which the land is situated.

"The Union Water Power Company owns land in Auburn under and abutting the falls on the Androscoggin river known as 'Lewiston Falls.' Upon this land it has erected dams for the utilization of the force exerted by the water in plunging over the falls. The force thus utilized is of immense power, and is in great demand in that neighborhood for the propulsion of the machinery of numerous large factories. The force is great enough to furnish power for much additional machinery, if ever needed. The Union Water Power Company has the monopoly not strictly of the force, the power, but of the land upon which must be placed the essential appliances to utilize it. The company owns, not strictly the power, but the gateway through which alone the power can be captured and led out. It can thus impose such toll as it will upon all use of the power. It can make every mill and machine using the power a tributary to its exchequer. This monopoly, this power of exacting tribute from the increasing needs of the community, may be of much more value than the cost of the dam and the value of all the other incidents of the land. This monopoly value is an incident of the land, and should be included in an estimate of the value of the land for taxation in Auburn. If only part of the land is in Auburn, there should be a proportional division of the whole value. The determination of this monopoly value is likewise a question in commercial economics.

"I do not see, therefore, the need or expediency of declaring whether 'water power' thus made available through the company's land is appurtenant wholly or partly to that land, or whether it passes on down the canal and becomes annexed to, or incorporated in, the mills below. As well try, it seems to me, to determine whether the force of the electric current is appurtenant to the dynamo, or to the lamp, or motor; whether the force that propels a cannon ball is appurtenant to the cannon or to the target; whether

the wind is a part of the bellows or of the fire. The force is being continually expended, if continually renewed.

"As to the mills, all that can be annexed to, or incorporated in, them as to water power is the somehow acquired right against the owner of the dam to have the water power transmitted to them. If such a right has been acquired by the millowners, either personally or as an incident of the ownership of the mill, the value of such right is to be estimated in assessing the owner or the mill. The existence of a contract or covenant between the owner of the mill and the owner of the dam, which contract runs with the mill and the dam, may add to the value of each instead of subtracting from the value of either. It should not be assumed that taxing in Lewiston the right of the mill to have water power from the dam in Auburn should reduce the tax in Auburn upon the corresponding right of the dam to receive compensation therefor. The water power is not to be taxed in either town. The increased value of the real estate by reason of the incident natural monopoly, or incident acquired rights, is to be taxed in the town in which the real estate is situated.

"The request of the city of Auburn was that the presiding justice consider the water power as appurtenant to the dam, and as properly taxable in the same municipality. The presiding justice declined to do this in terms, but I infer from the language of his finding that, in fixing the valuation of the real estate of the Union Water Power Company in Auburn, he did fully consider and include its capacity for valuable use as indicated in this note. I think this was all the city could require of him. His estimate of that value after considering and including all the proper elements is conclusive. There is no provision for an appeal therefrom. Exceptions overruled."

TAXATION.—RIGHTS IN A RESERVOIR OF WATER are real estate, and taxable where the land by which the reservoir is created is situated, and not where the rights are utilized for producing a water power: See note to *Paris v. Norway Water Co.*, 35 Am. St. Rep. 377.

CUMBERLAND COUNTY v. CENTRAL WHARF STEAM TOW-BOAT COMPANY.

[90 MAINE, 95.]

SHIPPING—TUGBOAT OWNERS—NEGLIGENCE IN TOWING.—A company owning a steam tug engaged in towing a vessel, is, as to third parties, the active, directing, and responsible agent controlling the movements of the vessel it is undertaking to tow; and, if injury is caused to third parties by its negligence in managing the tow, it is answerable to them for it, even if those upon the vessel, by their fault, contribute to the injury.

SHIPPING — NEGLIGENCE IN TOWING — BAR TO ACTION.—If the master of a steam tug is negligent while towing a vessel, and injury results therefrom to a third party, a suit against the owner of the tug for such injury is not barred because of an action

pending against the owner of the vessel for the same injury, as the plaintiff can recover compensation from either the vessel or the tug, if each has been guilty of a fault causing the injury.

SHIPPING — NEGLIGENCE IN TOWING — INJURY TO THIRD PERSON—PROXIMATE CAUSE.—If the master of a steam tug with a vessel in tow causes injury to a bridge across tide water while towing a vessel, the fact that the bridge owner has not fully complied with the requirements and conditions of his authority to build and maintain the bridge, as by having the draw from fifteen to twenty inches less than the required width, will not prevent him from recovering damages for the injury, where it appears that the variation in the width of the draw was not one of the real and proximate causes of the injury.

Action brought by the inhabitants of Cumberland county against the Central Wharf Steam Tow-Boat Company for injuries to the Portland bridge, caused by the three-masted schooner "Viator" striking the western corner of the bridge seat, while in tow of the defendant's steam tug, "Salem." On the day following the accident, the county commenced an action against the owners of the schooner, and that action was pending when the present action was brought about two weeks afterward. There was a verdict for the plaintiff against the towboat company, while the action against the owners of the schooner was still pending, for the full cost of restoring the bridge. The defendant moved to have the verdict set aside, and filed exceptions.

Charles A. True and Richard Webb, for the plaintiff.

Benjamin Thompson, for the defendant.

⁹⁶ EMERY, J. The undisputed facts are these: The schooner "Viator" was lying at the Eastern Railroad dock in Portland harbor, up Fore river above the second bridge. She was in ⁹⁷ charge of the mate, but had a full crew on board. The defendant company, a corporation engaged in the business of towing vessels for hire, sent one of its servants, Captain Howe, in the steam tug "Warren," accompanied by the steam tug "Salem," to tow the "Viator" from its dock down through the bridges to the outer harbor, preparatory to her going to sea. Arriving at the dock, the "Warren" made fast to the schooner's starboard quarter, while the "Salem" took a line from her starboard bow. The two tugs thus towed the schooner off from the pier, and took her down to the upper or railroad bridge. The draw of this upper bridge being too narrow for the tug and schooner to pass through abreast, the "Warren" cast off and fell behind, while the "Salem" went on ahead towing the schooner behind with a twenty-fathom hawser. After passing through the upper draw in this manner, the draw of the lower bridge, the Portland bridge, was in plain sight about seventeen hundred feet distant. The

"Salem," after a momentary stop, kept on towing the schooner by the hawser, while the "Warren" followed behind the schooner, but disconnected. The wind was blowing rather across the river from the Portland or left-hand side.

As they thus approached the Portland bridge draw, Captain Griffin of the "Salem" called back to the schooner that he would go through the Portland side of the center pier of the draw and for the schooner to follow him. Captain Howe of the "Warren," then astern, called out for the schooner to keep up to the windward, i. e., toward the Portland shore. To do this required a somewhat starboard helm. The "Salem" passed midway through the draw all right, but when very near the draw the helm of the schooner was put farther to starboard, and she suddenly sheered to port in toward the abutment on the Portland side.

When this sheer was seen, orders were at once shouted from the tugs for the schooner to put her helm to port, but, before these orders could take effect, she struck the abutment of the bridge on that side with her port bow, inflicting damage to the bridge.

There was some contention as to whether the manner of towing through the draw (i. e. by the "Salem" going ahead and towing with a twenty-fathom hawser, while the "Warren" cast off and ^{as} merely followed behind) was decided upon by the master of the schooner or the master of the tugs. This question we think is practically immaterial, as will appear further on.

The real cause of the starboard helm of the schooner and her consequent sudden sheer to port at the critical moment of entering the draw was also much in dispute. This question is essentially material, for unless this cause was in some fault of the defendant's servant, the master of the tugs, the defendant cannot be held liable, since no other sufficient ground appears in the evidence. The plaintiff contended, and there was evidence tending to show, that this movement of the helm and consequent sheer of the schooner was in obedience to orders from Captain Howe of the "Warren," who was in charge of the operation. The defendant contended, and there was evidence tending to show, that no such orders were given from the tugs, and that if the helmsman had any such order it came solely from those on the schooner. Whatever be our own belief, the jury have found for the plaintiff on this issue, and we are constrained to say that their finding is not so unmistakably wrong as to justify us in disregarding it. Captain Howe admittedly gave a general direction to the schooner to keep to windward, and hence it is not very improbable that he may have enforced this general direction by a special one of the same tenor. It must be assumed, therefore, that Captain

Howe of the "Warren" did give the order which brought about the disaster. The jury further found that the giving such an order at that time under those circumstances was a negligent act, and hence an actual fault on the part of the defendant. This finding, also, must be assumed to be correct.

The legal propositions applicable to the above state of facts can be briefly stated.

1. The defendant company was engaged in a regular, well-known, distinctive business—in a recognized separate branch of the business of navigation—the towing of sailing vessels from sea to dock and from dock to sea, and from place to place and in rivers and harbors. In such towing it was, as to third parties, the active, ⁹⁹ directing agent controlling the movements of the vessel it was undertaking to tow. As such active agent it was liable to third parties for any injury caused them by its negligence in managing a tow: *Sproul v. Hemmingway*, 14 Pick. 1; 25 Am. Dec. 350; *New York etc. Trans. Co. v. Philadelphia etc. Co.*, 22 How. 461. That it adopted suggestions from the vessel in tow would not relieve it from liability to third parties.

The fact that those upon the sailing vessel were also in fault in managing the vessel, and by their fault contributed to such injury to third parties, does not exempt the defendant, the owner of the tugs. The third party thus injured can recover compensation from either the vessel or the tug, if each has been guilty of a fault causing the injury. The fact that the plaintiff has a separate suit pending against the owners of the schooner "Viator" for the same injury, in which suit the fault of the vessel is alleged as the cause of the injury, does not bar this suit against the owner of the tug: *The Mabey etc.*, 14 Wall. 204; *The Atlas*, 93 U. S. 303; *The Civilta etc.*, 103 U. S. 699; *Lake v. Milliken*, 62 Me. 240; 16 Am. Rep. 456.

Applying these principles to this case, if the plaintiff was not also guilty of a contributing fault, it is clearly entitled to recover of the towboat company by reason of the proven fault of the latter in misdirecting the helm of the schooner.

2. The defendant, however, insists that the plaintiff was guilty of a contributing fault in that it did not provide in its bridge a draw of the full width of seventy feet from pier to abutment. There was evidence tending to show that the plaintiff's authority to build, or at least maintain, this bridge across tide water was accompanied by the requirement that the width of the draw between pier and abutment should be full seventy feet. There was also evidence tending to show that, at the time of the accident at least, the actual width was from fifteen to twenty inches less

than seventy feet. As the contention of the defendant and the rulings of the presiding justice were based on this evidence, we must for the present assume its truth.

¹⁰⁰ The defendant contended that this failure to comply with the requirements and conditions of the authority given the plaintiff to maintain this bridge left the bridge an illegal structure as to the defendant, so that no action could be maintained for the defendant's injury to it. The defendant further contended that if the main part of the bridge was not an illegal structure, such part of it as was within the seventy feet limit was illegal and without legal protection, and, if such part contributed to the collision, the plaintiff could not recover. Upon these points, the presiding justice instructed the jury that upon the evidence as to the width of the draw there was "an unlawful obstruction, but that would not necessarily deprive the plaintiff of his right to recover as against a stranger who had inflicted this damage, if it appeared that this mere variation from the seventy feet was not one of the real and proximate causes of the injury." Under this instruction, the jury must have found that the variation in the width of the draw from the required seventy feet down to sixty-eight feet and some inches was not one of the real and proximate causes of the injury.

The instruction was in accordance with the principle stated by the United States circuit court in *Missouri River Packet Co. v. Hannibal etc. R. R. Co.*, 2 Fed. Rep. 285. In that case, the defendant was authorized to maintain a railroad bridge across the Missouri river, but with a clear distance of one hundred and sixty feet between piers. The actual distance between the piers was a few feet less than one hundred and sixty feet. The plaintiff's boat, while passing under the bridge, was driven by the current against one of the piers and was damaged. The plaintiff contended that the mere fact of the distance between the piers being less than the required one hundred and sixty feet rendered the bridge an unlawful structure, and deprived its owner of any defense against the consequences of such a collision. The jury, however, were instructed as follows: "Though you may find from the testimony that the width between the piers as constructed is less than the act of Congress requires, yet this violation of the law by the defendant in this construction of its bridge is not available to the plaintiff in recovering damages, unless it caused or contributed to the injury by the plaintiff complained of."

¹⁰¹ A motion for a new trial was heard before the full circuit bench, which declared through McCrary, circuit judge, that the

above instruction stated the true rule upon the subject. In *Dimes v. Petley*, 15 Q. B. 276, the owner of a wharf claimed damages, as here, from the owner of a vessel for his negligence in running his vessel against the wharf. The defendant claimed, as here, that the wharf as against him was an illegal structure. It was held by the court that the offered defense was not sufficient—that he would still be liable if, by the exercise of reasonable care and with reasonable convenience, he could have avoided the collision.

The principle is also exemplified in *Damon v. Scituate*, 119 Mass. 67, 20 Am. Rep. 315, where it was held that the mere fact that the plaintiff was traveling on the wrong side of the road in violation of the statute did not defeat his action for injuries from a collision with the defendant's team, if that fault did not contribute to the injury. So in *Steele v. Burkhardt*, 104 Mass. 59, 6 Am. Rep. 191, it appeared that plaintiff, a drayman, had backed his team against the curb and across the street, in violation of the city ordinance, and was thus illegally partially obstructing the street. The defendant, in driving past on the other side, ran his wagon over the fore feet of the plaintiff's horse. It was held that the mere fact that the plaintiff's team at the time was an unlawful obstruction did not bar the plaintiff's action, if that circumstance did not contribute to the injury.

When carefully studied, the cases cited by the defendant (except perhaps *Missouri River Packet Co. v. Hannibal etc. R. R. Co.*, 79 Mo. 478) will be found not to conflict with the principle as applied here by the presiding justice. They mainly go to the conceded proposition that a plaintiff cannot recover damages for a disaster that his own illegal or wrongful conduct helped bring about.

The exception to this instruction must be overruled. The other exceptions upon the same subject matter naturally fall with this one, including that in relation to damages. That part of the bridge within the required space of seventy feet was the plaintiff's property. The jury have found that it did the defendant no harm, and was not a factor in the legal cause of the disaster. Hence it is not without the pale of the law.

¹⁰² 3. The request for a ruling that the "dolphins" at the ends of the draw pier tended to justify the mode of towing by hawser is not urged in argument. The question seems to have become immaterial.

Motion and exceptions overruled.

SHIPPING—TUGBOAT OWNERS—NEGLIGENCE IN TOWING. The master of a tug employed to tow a vessel is the agent of the owners of the tug, and, if a collision is caused by his carelessness, they are liable therefor: See monographic note to *Sproul v. Hemmingway*, 25 Am. Dec. 354, stating the rule how to determine whether the owners of the tug or those of the towed vessel are liable for such an injury. The same rule is also discussed in the extended note to *Broadwell v. Swigert*, 45 Am. Dec. 56, under the sub-head "Tug and Tow." A tug and her tow are regarded in law as one vessel: See monographic note to *Baker v. Lewis*, 75 Am. Dec. 601, 610, on the rights and duties, not founded on contract, of vessels in navigable waters.

NEGLIGENCE—PROXIMATE CAUSE—CONTRIBUTORY NEGLIGENCE.—Contributory negligence when a proximate cause of injury, bars the right of recovery: *Cline v. Crescent City R. R. Co.*, 43 La. Ann. 327; 26 Am. St. Rep. 187; but it cannot be invoked as a defense unless it is a proximate cause of the injury: *North Birmingham etc. Ry. Co. v. Calderwood*, 89 Ala. 247; 18 Am. St. Rep. 105; *Virginia etc. Ry. Co. v. White*, 84 Va. 498; 10 Am. St. Rep. 874. Although the person injured was guilty of contributory negligence, yet if the defendant might have avoided the injury by ordinary care, and did not, damages are recoverable: *Troy v. Cape Fear etc. R. R. Co.*, 99 N. C. 298; 6 Am. St. Rep. 521; note to *Vallin v. Milwaukee etc. R. R. Co.*, 33 Am. St. Rep. 28.

PERKINS v. PENDLETON.

[90 MAINE, 166.]

TORTS—PROCURING CONTRACT TO BE BROKEN.—AN ACTION lies against a third person for wrongfully procuring a party to break his contract with the plaintiff, to the latter's injury, and the employment of unlawful or improper means to induce him to do so is unlawful. This principle applies where the employer breaks his contract, as well as where it is broken by the employé, and is not, in fact, confined to contracts of employment.

DAMAGES—ACTION FOR PROCURING DISCHARGE OF EMPLOYÉ.—A person is liable in damages for inducing, by threats or other unlawful means, an employer to discharge his employé even when the terms of the contract of service are such that the employer may do this at his pleasure, without violating any legal right of the employé.

DAMAGES — MEASURE OF, FOR PROCURING DISCHARGE OF EMPLOYÉ.—If a person, by means of fraud or intimidation, procures either the breach of a contract, or the discharge of a plaintiff from an employment, which but for such wrongful interference would have continued, he is liable in damages for such injuries as naturally result therefrom. The rule is the same whether, by these wrongful means, a contract of employment definite as to time is broken, or an employer is induced, solely by reason of such procurement, to discharge an employé whom he would otherwise have retained.

TORTS—INDUCING DISCHARGE OF EMPLOYÉ—ACTIONABLE WRONG.—Merely to induce another to leave an employment or to discharge an employé, by persuasion or argument, however whimsical, unreasonable, or absurd, is not in and of itself unlawful; but to intimidate an employer, by threats of such a character as to produce this result, and thereby cause him to discharge an employé, whom he desires to retain, and would retain except for such unlawful threats, is an actionable wrong.

Action on the case against Pendleton and others for wrongfully causing the plaintiff, Perkins, to be discharged while an employé of the Mount Waldo Granite Company. The injury specially set out in the declaration was the plaintiff's inability to procure work after his discharge. A demurrer to the declaration was overruled, and the defendants excepted.

P. H. Gillin and R. F. Dunton, for the plaintiff.

W. H. Fogler and W. P. Thompson, for the defendants.

170 WISWELL, J. To the plaintiff's declaration, which appears in full in the statement of the case, the defendants filed a general demurrer, which was overruled by the justice presiding at nisi prius, and the declaration adjudged good. The case comes to the law court upon exceptions to this ruling.

The plaintiff alleges that upon a certain day he was, and for twenty-two years prior to that time had been, in the employ of the Mount Waldo Granite Company as a stone cutter, working by the piece; that he was making large profits out of his employment; that he would have continued in such employment from the day named until the date of his writ, "but for the wrongful acts, inducements, threats, persuasions, and grievances committed by said defendants against the said plaintiff as hereinafter set forth"; that on the day named, and "at divers other times thereafter until the date of the plaintiff's writ," the defendants "did unlawfully and without justifiable cause molest, obstruct, and hinder the plaintiff from carry on his said trade, occupation, or business as a stone cutter for the said Mount Waldo Granite Company, and wrongfully, unlawfully, and unjustly had him discharged without any justifiable cause from the employment of the said Mount Waldo Granite Company by willfully threatening, persuading, inducing, and by other overt acts compelling, the said Mount Waldo Granite Company, against its will and without any desire on its part so to do, to discharge the said plaintiff from its employ for the sole reason that the plaintiff would not become a member in the order of the Mount Waldo Branch of the Granite Cutters' National Union"; whereby he suffered the injury specially set out in his declaration. Does this statement of facts sufficiently set out an actionable wrong upon the part of the defendants? That an action lies under certain circumstances for procuring a third person to break his contract with the plaintiff has been frequently decided by the courts of England and of this country.

In *Lumley v. Gye*, 2 El. & B. 216, decided in 1853, the action

¹⁷¹ was for knowingly and maliciously inducing an opera singer to break her contract with the plaintiff to perform exclusively for a certain time in his theater. The right of action was sustained by a majority of the court.

In *Bowen v. Hall*, L. R. 6 Q. B. Div. 333, decided in 1881, a person had contracted to manufacture glazed bricks for the plaintiff and not to engage himself to anyone else for a term of five years, the English court of appeals held that an action could be maintained against the defendant for maliciously procuring a breach of this contract, provided damage accrued, and that to sustain the action it was not necessary that the employer and employé should stand in the strict relation of master and servant. It was said by the court in this case: "That wherever a man does an act which in law and in fact is a wrongful act and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie. . . . If these conditions are satisfied, the action does not the less lie because the natural and probable consequence of the act complained of is an act done by a third person or because such act so done by the third person is a breach of duty or contract by him, or an act illegal on his part, or an act otherwise imposing an actionable liability on him. . . . Merely to persuade a person to break his contract may not be wrongful in law or fact, . . . but if the persuasion be used for the indirect purpose of injuring the plaintiff or of benefiting the defendant at the expense of the plaintiff, it is a malicious act which is in law and in fact a wrong act and therefore an actionable act if injury ensued from it."

The doctrine of these cases has been very generally adopted, and the cases themselves very frequently cited by the courts of this country: *Walker v. Cronin*, 107 Mass. 555; *Bixby v. Dunlap*, 56 N. H. 456; 22 Am. Rep. 475; *Noice v. Brown*, 39 N. J. L. 569; *Haskins v. Royster*, 70 N. C. 601; 16 Am. Rep. 780; *Daniel v. Swearengen*, 6 S. C. 297; 24 Am. Rep. 471.

In view of these authorities and others which it is not necessary to refer to, it must be conceded that for a person to wrongfully, ¹⁷² that is by the employment of unlawful or improper means, induce a third party to break a contract with the plaintiff, whereby injury will naturally and probably, and does in fact, ensue to the plaintiff, is actionable; and the rule applies both upon principle and authority as well to cases where the employer breaks his contract as where it is broken by the employé—in fact it is not confined to contracts of employment.

But in this case the plaintiff does not allege that the Mount Waldo Granite Company was induced by the wrongful means adopted by the defendants to break a contract, nor that there was any contract between the plaintiff and the employer for any definite time. We must therefore assume that there was none, that either party had the right to terminate the employment at any time, and that the act of the Mount Waldo Company in discharging the plaintiff was lawful, and one which the company had a perfect right to do at any time. The question presented then is, whether a person can be liable in damages for inducing and persuading, by threats or other unlawful means, an employer to discharge his employé when the terms of the contract of service are such that the employer may do this at his pleasure, without violating any legal right of the employé. The question is a novel one in this state, but it has already arisen and been passed upon by the courts of some other states.

In *Walker v. Cronin*, 107 Mass. 555, the plaintiffs alleged that the defendant did "unlawfully and without justifiable cause, molest, obstruct, and hinder the plaintiffs from carrying on" their business of manufacture and sale of boots and shoes, "with the unlawful purpose of preventing the plaintiffs from carrying on their said business, and willfully persuaded and induced a large number of persons who were in the employment of the plaintiff," and others "who were about to enter into" their employment, "to leave and abandon the employment of the plaintiff, without their consent and against their will," and alleged that the plaintiffs lost the services of said person and the profits and advantages they would otherwise have made, and suffered losses in their business. It will be noticed that there is no allegation here of any definite contract as to time ¹⁷³ between the plaintiffs and their employés who were induced to leave their employment, and one ground of action was that certain persons who were about to enter into their employment, but who had not commenced at the time, were induced to leave and abandon the employment of the plaintiffs. But the court held, in an exhaustive opinion which has been frequently cited by other courts in this country, and which was cited by counsel in the argument in *Bowen v. Hall*, L. R. 6 Q. B. Div. 633, that the action could be maintained. It is said in the opinion: "This (declaration) sets forth sufficiently (1) intentional and willful acts (2) calculated to cause damage to the plaintiffs in their lawful business, (3) done with the unlawful purpose to cause such damages and loss, without right or justifiable cause

on the part of the defendant, (which constitutes malice), and (4) actual damage and loss resulting." The court quotes the general principles as announced in Comyns' Digest, Action upon the Case: "In all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages." And goes on to say that "the intentional causing of such loss to another, without justifiable cause, and with a malicious purpose to inflict it, is of itself a wrong." Later in the opinion the court uses this language: "Everyone has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance, or annoyance. If disturbance or loss come as a result of competition or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with. But, if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing, and falls within the principle of the authorities first referred to."

This case was not decided upon the ground that the plaintiffs could recover for the loss of the value of actual contracts, by reason of their nonfulfillment, because, so far as the case shows there was no breach of contract, but the gravamen of the action was, as ¹⁷⁴ expressed by the court, "the loss of advantages, either of property or of personal benefit, which, but for such interference the plaintiff would have been able to attain or enjoy."

In *Chiple v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 367, the court decided that, although no contract existed between the master and servant and no legal right as between them was violated, still the servant may maintain an action for damages against a third person who has maliciously procured his discharge. The court in its opinion, after quoting freely from *Walker v. Cronin*, 107 Mass. 555, and after referring to numerous other authorities, says: "From the authorities referred to in the last preceding paragraph, and upon principle, it is apparent that neither the fact that the term of service interrupted is not for a fixed period, nor the fact that there is not a right of action against the person who is induced or influenced to terminate the service or to refuse to perform his agreement, is of itself a bar to an action against the third person maliciously and wantonly procuring the termination of or a refusal to perform

the agreement. It is the legal right of the party to such agreement to terminate it or refuse to perform it, and in doing so he violates no right of the other party to it; but so long as the former is willing and ready to perform, it is not the legal right, but is a wrong on the part of a third party to maliciously and wantonly procure the former to terminate or refuse to perform it."

In *Lucke v. Clothing Cutters etc. Assembly*, 77 Md. 396, 39 Am. St. Rep. 421, decided in 1893, the action was to recover damages for the wrongful and malicious interference of the defendant, by means of which the plaintiff was discharged from his employment and thereby deprived of his means of livelihood. The defendant, a labor organization, gave notice to the plaintiff's employers that in case the plaintiff, a nonunion man, was longer retained, it would be compelled to notify all labor organizations of the city that their house was a nonunion house. The work of the plaintiff was entirely satisfactory to his employers, who intended to retain him permanently, but who in their contract reserved the right to discharge him at the end of any week. The court decided that the action could be maintained and damages recovered from the defendant ¹⁷⁵ for maliciously and wantonly procuring his discharge. In that case, the declaration alleged the procurement of a breach of contract by the wrongful acts of the defendant; the court held that the evidence did not sustain the declaration, but allowed an amendment, saying: "If there was no agreement for any particular period of time, but the employment was one in which the agreement was that plaintiff should be given employment as long as he performed his work satisfactorily, and he has been discharged from it solely through the malicious and wrongful procurement of the defendant, and injury has resulted, he should have laid his case accordingly." We also quote from the same opinion the following: "The appellant, by the action of the appellee, lost his place in the month of February, and, although persistently in quest of a position, he did not succeed in obtaining work until the following April, when he secured employment with a merchant tailor at five dollars less per week than he was receiving when he was discharged. It would be strange, indeed, if the law, under such a state of facts as this record exhibits, provided no remedy." In this latter case *Chipley v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 367, is quoted and expressly approved.

In *Raycroft v. Tayntor*, 68 Vt. 219, 54 Am. St. Rep. 882, decided in 1896, it was held that one who procures the dis-

charge of an employé, not engaged for any definite time, by threatening to terminate a contract between himself and the employer, which he had a right to terminate at any time, is not subject to an action by the employé for damages, whatever may have been his motive in procuring the discharge. But the doctrine of the latter cases cited in this opinion was expressly recognized and approved by the court in this language: "The authorities cited for the plaintiff clearly establish that if the defendant, without having any lawful right, or by an act or threat aliunde the exercise of a lawful right, had broken up the contract relation between the plaintiff and Libersont, maliciously or unlawfully, although such relation could be terminated at the pleasure of either, and damage had thereby been occasioned, the party damaged could have maintained an action against the defendant therefor."

¹⁷⁶ In *Johnston Harvester Co. v. Meinhardt*, 24 Hun, 489, the court said: "A distinction has been sought to be made between the cases where there has been an unexpired time contract and cases where the services were by the day, or by the piece, but I do not think such distinction rests upon any sound reason. . . . In such case, the injury to the property and business of the employer would not consist so much in breaking the contract which existed as in the loss of profits derived from the work of the laborer if he continued in the employment, and the probability or certainty of such loss would be in each case a question of fact."

The same principle has been applied to the procurement, by wrongful means, of the breach of contracts of sale. For instance, in the case of *Benton v. Pratt*, 2 Wend. 385, 20 Am. Dec. 623, the plaintiff had made an oral contract for the sale of chattels; the contract was not enforceable because within the statute of frauds; the defendant fraudulently represented that the plaintiff did not intend to carry out the contract and deliver the chattels, and thereby procured a breach of the contract by the other party to it. It was said by the court: "It is not material whether the contract of the plaintiff with Seagraves & Wilson was binding on them or not; the evidence established beyond all question that they would have fulfilled it but for the false and fraudulent representations of the defendant."

And in *Rice v. Manley*, 66 N. Y. 82, 23 Am. Rep. 30, one S. had contracted by parol to sell and deliver to the plaintiff a quantity of cheese, but being made to believe, by the fraud of the defendant, that the plaintiff did not want the cheese, sold it to the defendant. The contract was not binding because

within the statute of frauds, but it would have been performed by S., had it not been for the fraud of the defendant. The court held that an action was maintainable against the defendant therefor.

Our conclusion is, that wherever a person, by means of fraud or intimidation, procures either the breach of a contract or the discharge of a plaintiff from an employment, which but for such wrongful interference would have continued, he is liable in damages for such injuries as naturally result therefrom; and that the rule is the same whether by these wrongful means a contract ¹⁷⁷ of employment definite as to time is broken, or an employer is induced, solely by reason of such procurement, to discharge an employé whom he would otherwise have retained.

The case of Heywood v. Tillson, 75 Me. 225, 46 Am. Rep. 373, in no way conflicts with this result. There the court simply decided that the defendant was not liable for doing what he had a perfect and absolute right to do, even if in doing this he was actuated by a malicious motive against the plaintiff. Many cases were cited to the effect that "malicious motives make a bad act worse, but they cannot make that wrong which in its own essence is lawful."

We think that the important question in an action of this kind is as to the nature of the defendant's act and the means adopted by him to accomplish his purpose. Merely to induce another to leave an employment or to discharge an employé, by persuasion or argument, however whimsical, unreasonable, or absurd, is not in and of itself unlawful, and we do not decide that such interference may become unlawful by reason of the defendant's malicious motives, but simply that to intimidate an employer, by threats, if the threats are of such a character as to produce this result, and thereby cause him to discharge an employé, whom he desired to retain and would have retained, except for such unlawful threats, is an actionable wrong. Nor do we differ from the recent decision of the Vermont court, in the case above referred to, which holds that a threat to do what the defendant had a right to do would not be such a one as to make a defendant liable in an action of this kind.

It is the opinion of the court that the plaintiff's declaration fairly sets out a cause of action in accordance with these principles; that the question is one of proof rather than of pleading; and that if the plaintiff can prove the essential allegations contained in his declaration, he is entitled to recover.

Exceptions overruled.

TORTS—INDUCING EMPLOYER OR EMPLOYEE TO BREAK HIS CONTRACT—DAMAGES.—Every wrongful act of a man which causes temporal loss or damage to another subjects him to an action upon the case: *Graham v. St. Charles Street R. R. Co.*, 47 La. Ann. 214; 49 Am. St. Rep. 366. One who knowingly and willfully induces a servant to violate his contract with his master is answerable to the master for the injury: See monographic note to *Webber v. Barry*, 11 Am. St. Rep. 474, on the liability of a person who interferes between employer and employè, either to occasion the latter to be discharged or to voluntarily leave their employment. So, a labor union procuring the discharge of a person from his employment because he is a nonunion man acts wrongfully, and is liable for the consequent injury to him: *Lucke v. Clothing Cutters'* etc. Assembly, 77 Md. 396; 39 Am. St. Rep. 421. Though no contract exists between the master and servant, and no legal right as between them is violated, still the servant may maintain an action for damages against a third person who has maliciously procured his discharge: *Chipley v. Atkinson*, 23 Fla. 206; 11 Am. St. Rep. 367. If a contract would have been performed but for the false and fraudulent representations of a third person, an action will lie against him although the contract could not have been enforced by action: *Lucke v. Clothing Cutters'* etc. Assembly, 77 Md. 396; 39 Am. St. Rep. 421. Compare *Raycroft v. Tayntor*, 68 Vt. 219; 54 Am. St. Rep. 882. That an action may be maintained for an interference with, or injury to, a lawful business, see *Vegelahn v. Guntner*, 167 Mass. 92; 57 Am. St. Rep. 443; *Graham v. St. Charles Street R. R. Co.*, 47 La. Ann. 1656; 49 Am. St. Rep. 436.

SAWYER v. RUMFORD FALLS PAPER COMPANY.

[90 MAINE, 354.]

MASTER AND SERVANT—PERSONAL INJURY TO SERVANT IN PAPER MILL—PROXIMATE CAUSE—NEGLIGENCE—LIGHT.—If an old and much worn dynamo belt breaks, thus suddenly extinguishing the electric lights of a papermill, and leaving it in complete darkness, with no temporary lights provided for such an emergency, though of frequent occurrence and known to the company, and a person employed as a "third hand" in the machine room is directed by the machine tender to pull broken paper off one of the presses, while such room is in darkness, but, in doing so, finds that the paper is choked between the roll and the "doctor," and, in his exertions to draw out the choked paper, it breaks, and he attempts to save himself from falling from the step on which he is standing by seizing a rod or lever near by, but fails to grasp it, by reason of the absence of light, and is injured, the omission of the papermill company to exercise reasonable care and diligence in keeping the room lighted in the night-time, and not the unexpected breaking of the paper, must be regarded as the real, efficient, and proximate cause of the injury, and the company is, therefore, answerable for it.

APPEAL—SETTING ASIDE VERDICT AS EXCESSIVE—REDUCING AMOUNT.—If a verdict, in an action to recover damages for personal injuries, is supported by some evidence, a court, on appeal, is not justified in saying that it is manifestly wrong and must be set aside as excessive, but it may reduce the amount.

Action to recover damages resulting from personal injuries sustained by the plaintiff while employed in the defendant's

paper mill at Rumford Falls. On the trial, the defendant's motion for a nonsuit was denied and he rested upon the evidence presented by the plaintiff. A verdict of four thousand two hundred and fifty dollars was obtained by the plaintiff.

F. L. Noble and R. W. Crockett, for the plaintiff.

G. A. Wilson and H. C. Smyth, for the defendant.

³⁵⁷ WHITEHOUSE, J. The plaintiff obtained a verdict for four thousand two hundred and fifty dollars as compensation for personal injuries sustained while employed in the papermill of the defendant company at Rumford Falls. The case comes up on a motion to have this verdict set aside as against the evidence relating to the question of the defendant's liability, and also because the damages are excessive.

The case was presented to the jury on the testimony of the plaintiff and his witnesses, no testimony being introduced by the defendant.

The accident occurred on the seventh day of December, 1894, while the plaintiff was engaged in the service of the company in the ³⁵⁸ capacity of "third hand" in a gang of four on the No. 2 paper machine in the defendant's mill. At that time he was twenty years old and had been employed in the mill about eighteen months in the aggregate, viz., about five months as a helper in setting up machines, about five months as a "fourth hand," and about seven months as a "third hand" on the No. 2 machine. The mill was operated day and night, and on the occasion in question he was on the night gang. About 4 o'clock in the morning of December 7th, by reason of the breaking of the dynamo belt, the electric lights by which the mill was lighted were suddenly extinguished, leaving the machine room where the plaintiff was employed, as well as the rest of the mill, in complete darkness. What then happened the plaintiff described in his testimony as follows: "When the light went out I was where the winder is, and I was sitting down with the fourth hand, and the machine tender was down to the wet end, lighting a match once in a while. Six or seven minutes after the light went out the machine tender whistled, and he lighted a piece of paper and we went down, the fourth hand and I; and he gave me the order to pull the broke [the broken paper] off the second press; so I went and I stand on that step and I begun to pull off the broke, and the broke was choked. . . . When I stepped up on that stand I went to pull the broke, and I went to pull it out, and the paper gave way in my hand and I fell backward, and I went to stop myself from falling and I went

to put my hand on the rod or lever, some call it a rod, and I missed that rod and I fell, my hand on the top of the felt, and my hand went between the rolls, and it caught my hand here and you see how it cut it." As the result of the accident the plaintiff lost three fingers and a portion of the forefinger of his left hand, and a portion of the outside of the hand itself.

There was evidence tending to show that the dynamo belt was old and much worn, and, being used in a wet place, its strength had become so impaired that it was no longer suitable for use.

It also appears that, from different causes, the electric lights had frequently been extinguished prior to this time on an average two or three times a week, and that they had twice been out for a few ³⁵⁹ moments on the night in question before the time when the accident happened. In anticipation of these contingencies, a supply of lanterns had been provided for temporary use while the electric lights were out in the room where the paper machines were located; but for several months prior to December 7, 1894, none of these lanterns appear to be in existence, and no others had been furnished to take the place of those broken or carried away.

There was, however, on each press of the paper machine what is termed a friction clutch, which was used to stop one or more of the presses while the machines were still running; and orders had been given by the superintendent to all of the machine tenders to stop the presses whenever the lights went out, and the paper broke in the night-time. But there was evidence that this order was disobeyed by the machine tender, who had charge of the operating of machine No. 2, and had been disobeyed by others prior to that time.

In view of this evidence, it is contended for the plaintiff that there was actionable negligence on the part of the defendant company in at least these three particulars: 1. The continued use of a defective dynamo belt with full knowledge of its condition; 2. The omission to provide any temporary lights to supply the place of the electric lights which were known by the defendant to be frequently extinguished; and 3. The retention of a disobedient machine tender after the knowledge of his alleged inefficiency and incompetency. It is confidently urged that, as a practical result of these conditions, the plaintiff was required to labor in total darkness in connection with dangerous machinery, and that on the occasion in question, while faithfully and zealously performing his master's work, the plaintiff sustained an injury which he would not have received

if the room had been suitably provided with light or with means for lighting it. It is claimed that although the unexpected breaking of the choked paper which the plaintiff was struggling to draw out of the machine may have been the immediate occasion of his fall, the absence of light was the reason why he failed to seize the lever to save himself from falling; that such an occurrence might reasonably be expected to result from ³⁶⁰ such a cause, either in the way it did happen or some similar way, and that it must be regarded as the real and proximate cause of the injury.

On the other hand, the learned counsel for the defendant company as confidently argue that there was no causal connection between the temporary absence of light in the machine room and the plaintiff's injury; that the injury was not the ordinary or probable result of the darkness in the room, but was due to the breaking of the choked paper, a wholly unlooked-for and unexpected event, and must be deemed a purely accidental occurrence causing damage without legal fault on the part of anyone.

It is also suggested that, as the machine tender was only a fellow-servant, his failure to stop the rolls of the press by the use of the friction clutch was but the negligence of a fellow-servant, for which the defendant is not responsible, if indeed the failure to use it was not the negligence of the plaintiff himself.

It is further contended that the plaintiff was under no obligation to obey directions from anyone to labor in an unsuitable and dangerous place, and that if he continued to labor in such a place, or obeyed an order to perform a special service in such a place, with full knowledge and appreciation of the dangers, he must be held to have assumed all the risks incident to the service under such circumstances.

Finally, it is insisted that the plaintiff should be precluded from recovering by his own want of ordinary care and prudence; that after the lights went out he sat for six or seven minutes in a place of perfect safety; if he had remained there no accident would have befallen him; and that the act of stepping from such a place of security into close proximity to the running machinery and of reaching over it to perform a dangerous service in the midst of total darkness, was imprudent and reckless, and must be deemed contributory negligence on the part of the plaintiff.

The principles of law applicable to these several contentions of the parties, on the one side and the other, have been so fully

considered and carefully distinguished in the recent decisions of this court that no further discussion of them can be required on the ³⁶¹ motion here presented for a new trial as against evidence. They were elaborately stated and aptly illustrated by the presiding justice in the instructions to the jury to which no exceptions have been taken.

The evidence all came from the testimony of the plaintiff and his witnesses, and must receive all the probative force to which it is fairly entitled when thus uncontradicted and unmodified. The evidence tending to show inefficiency and incompetency on the part of the "tender" of the plaintiff's machine is not sufficient to establish the liability of the company on that ground. But the defendant had knowledge that it was a common occurrence for the electric lights to go out, and it is admitted the men were expected to keep the machines in operation and carry on the work during these periods of temporary darkness, provided the paper did not break. It is obvious that there was the same liability that the paper would "break," and also that it would gather and "choke" between the roll and the "doctor" in the night-time as in the daytime, but with less probability of seasonable discovery. Under ordinary circumstances, however, it involved more trouble, difficulty, and delay to stop the presses by means of the friction clutch for the purpose of removing the broken paper and relieving the "choke" on the doctor than it did to accomplish the same thing while the presses were running. Hence it does not appear that the workmen were ever reprimanded for disobeying the order to stop the presses under such circumstances. The plaintiff had but a limited and imperfect acquaintance with the operation of the machine on which he was working. He had never handled the paper when choked, and had received no special instructions touching his duty when the paper broke, except to go upon the platform or step and remove the broken paper while the presses were running. He had several times performed this service without injury or apparent knowledge of danger. On the occasion of the accident, when directed to "pull the broke off the press," he had no knowledge that the paper was choked on the doctor, and only a partial appreciation of the peril involved in his attempt to remove it in the darkness. When he stepped upon the platform, in obedience to the order of the tender, ³⁶² he understood that he was simply required to render the ordinary service of removing the broken paper which he had before successfully and safely performed. He anticipated no unusual or extraordinary service requiring greater risk or

peril. He doubtless understood that there was a general order that the presses should be stopped at night if the paper broke while the lights were out, but he also knew that this was a custom more honored in the breach than the observance. He was under no obligations to obey an order to remove broken paper while the press was in motion in the darkness, but he evidently believed that he was expected to do it if requested by the machine tender. No accident had happened in so doing prior to that time. He obeyed that instinctive impulse to follow the direction of his superior which is the characteristic of a faithful, resolute, and loyal servant, and his conduct is entitled to be viewed in the light of reasonable charity.

The removal of broken paper choked between the roll and the doctor, while the presses were in motion, was attended with more danger when the lights were out. That the workman might be thrown from his proper position by the sudden giving away of the paper under the force applied to remove it, or in some similar way, was an occurrence which might reasonably have been anticipated and regarded as likely to happen; but the injurious consequence of such an accident might have been avoided if the defendant had exercised reasonable care and diligence in providing sufficient means for lighting the room in the night-time. The omission of the defendant to exercise such care, diligence, and prudence would thus become the real, efficient, and proximate cause of the plaintiff's injury.

After a careful examination of all the evidence and of the arguments of the learned counsel, it is the opinion of the court that while neither the prudence of the plaintiff nor the negligence of the defendant can be regarded as conclusively established, the verdict of the jury is not so utterly without support from the evidence as to justify the court in saying that it is manifestly wrong and must be set aside.

If the plaintiff will remit all of the verdict above two thousand five hundred dollars, within ³⁶³ thirty days after receipt of the rescript by the clerk, the motion for a new trial is to be overruled. Otherwise the motion will be sustained and the verdict set aside.

Ordered accordingly.

MASTER AND SERVANT—NEGLIGENCE—MASTER'S LIABILITY TO SERVANT.—When injury happens to a servant in the course of his employment, the master is answerable if it was occasioned by his negligence: *Johnson v. Bruner*, 61 Pa. St. 58; 100 Am. Dec. 613. When a servant is employed on, or in connection with, machinery, in the use of which danger may arise, it is the duty of the master to use reasonable diligence to guard against accident to

his employé, and to make such reasonable repairs or changes as may be necessary to prevent accident or to lessen risk: *McDonald v. Chicago etc. Ry. Co.*, 41 Minn. 439; 18 Am. St. Rep. 711. Where the dangerous condition of machinery is foreseen and pointed out to the owner, the duty is imposed upon him to adopt every possible precaution to avoid injury to those working about it. His failure to perform such duty makes him liable for all resulting injury: *Mastin v. Levagood*, 47 Kan. 36; 27 Am. St. Rep. 277. The negligence of a fellow-servant does not relieve a master from liability to a co-servant for injury which would not have happened had the master done his duty: See note to *Patnode v. Warren Cotton Mills*, 34 Am. St. Rep. 284.

NEGLIGENCE.—PROXIMATE CAUSE is one of which the injury is a natural and probable consequence: See monographic note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 809, on proximate and remote cause. It is not necessarily the last act or nearest act to the injury, but it may be such an act, wanting in ordinary care, as actively aids in producing the injury, as a direct and existing cause: *Gonzales v. Galveston*, 84 Tex. 3; 31 Am. St. Rep. 17.

STATE v. BOWMAN.

[90 MAINE, 363.]

GRAND JURY—PRESENCE OF A STENOGRAPHER BEFORE.—The presence of a stenographer before a grand jury while witnesses are being examined, who attends, by express order of the court, to assist the prosecuting attorney in taking down the testimony of witnesses, and who does take stenographic notes of the testimony, but who retires before the jury commence their deliberations, invalidates an indictment found upon the testimony of witnesses given under these circumstances; and the respondent in the indictment may take advantage of such invalidity.

INDICTMENT—OATH TO GRAND JURY—SECRECY—PRESENCE OF STENOGRAPHER.—An oath to a grand jury to keep the "state's counsel" is substantially the same as an oath to observe and keep "the secrets of the cause," and relates to the persons accused and the witnesses, who they are, and what they testify. This injunction of secrecy cannot be waived by the prosecuting attorney or nullified by the court. It is, therefore, not competent for the court to order a stenographer to be present, before the jury, during their deliberations, and take down the testimony of witnesses, where his presence is not authorized by statute or custom.

AN OATH NOT AUTHORIZED BY LAW is extrajudicial and of no binding force.

The case was heard on exceptions taken by the defendant.

G. W. Heselton, county attorney, for the state.

S. and L. Titcomb, for the defendant.

364 **WISWELL, J.** To an indictment charging him with being a common seller of intoxicating liquors, the respondent filed a plea in abatement, in which it is alleged, in substance, that while the grand jury which found and returned this indictment was in session, the presiding judge made and issued the

following order to the official stenographer of the court: "At the request of the county attorney, you are instructed to attend with him before the grand jury, there to assist him in taking down the testimony of witnesses in the case of State v. F. M. Bowman, being investigated by the grand jury. You will not be present during the deliberations of said jury, and you will not disclose any testimony so taken down or heard by you excepting to said jury, or the county attorney, or by order of the court." In obedience to this order, the stenographer, after being sworn to faithfully perform the duties imposed upon him by the foregoing order, attended with the county attorney before the grand jury and took down the testimony of the witnesses for the state in the case against the respondent then being investigated. He left the grand jury room before the jury commenced their deliberations upon the case.

³⁶⁵ To this plea in abatement the county attorney demurred, the demurrer was sustained, the plea adjudged bad, and the respondent took exceptions.

The question presented is, whether the presence of a stenographer before the grand jury, while witnesses are being examined, by express order of court, who takes stenographic notes of the testimony, but who retired before the jury commenced their deliberations, invalidates an indictment found upon the testimony of witnesses given under these circumstances.

It has long been the policy of the law, in the furtherance of justice, that the investigations and deliberations of a grand jury should be conducted in secret. The obvious reasons for this, founded upon sound principles of public policy, are to secure the utmost freedom of disclosure of alleged crimes and offenses; to secure that freedom of deliberation, expression of opinion and of action among the grand jurors which would be impaired if the part taken by each might be disclosed to the accused or to others; to prevent, to some extent, the opportunity of perjury and subornation of perjury by withholding the knowledge of facts testified to before the grand jury; and to conceal the fact that an alleged crime is being investigated, or that an indictment has been found, so as to avoid the danger of the escape of the accused before his arrest.

In accordance with this policy, the oath administered to grand jurors, established by common-law usage, ancient and modern, and prescribed by our own statute, contains this clause: "The state's counsel, your fellows, and your own, you shall keep secret." The expression, "state's counsel" means more than the opinions or advice given by the prosecuting at-

torney to the jury. The injunction of secrecy applies as well to the secrets of the state, the persons accused, the facts testified to which indicate the guilt of the accused of the offense under investigation, and the witnesses who testify to such facts. In the case of *State v. Fasset*, 16 Conn. 457, it is said: "The grand jury swear 'the secrets of the cause, their own and their fellows, they will observe and keep.' The secrets of the cause must relate to the persons accused, the witnesses, who they are and what they testify." We think that the ³⁶⁶ expression "state's counsel," in the oath prescribed by our statute, is equivalent to "the secrets of the cause" construed in the above case.

In view of the fact that public policy requires secrecy, not only as to deliberations of a grand jury, their own counsel and their fellows, but also as to the witnesses who testify, and their testimony, the state's counsel, for the reasons suggested, and as the oath of the jurors, declaratory of this policy, enjoins them to keep secret the state's counsel, was it proper for the court to order a person, other than the county attorney or assistant, to be present while witnesses were being examined before the grand jury and to take down their testimony? We think it was not; that it was contrary to the policy of our laws and to the universally prevailing custom in our state.

It would be of little avail to swear the jurors to keep secret the "state's counsel" and at the same time to open the doors of the jury room to persons unauthorized by law, while the state's counsel is being disclosed to the jury. Although, in this case, the stenographer went through the form of taking an oath "not to disclose any testimony so taken down or heard by you, excepting to said jury or the county attorney, or by order of the court," such an oath was not authorized by law; it was extrajudicial and had no binding force.

It is true that the obligation of secrecy as to the "state's counsel," or state's secrets, may subsequently be removed, and that after the purposes of secrecy have been accomplished any revelations, in this respect, may be made which justice demands. In accordance with this principle, the case of *State v. Benner*, 64 Me. 267, was decided, a leading case upon the subject, in which it is said: "But the oath of the grand juror does not prohibit his testifying what was done before the grand jury, when the evidence was required for the purposes of public justice or the establishment of private rights." And again: "So, in all cases when necessary for the protection of the rights of parties, whether civil or criminal, grand jurors may be witnesses."

But in this case neither public justice nor the establishment

of ³⁶⁷ private rights required that the testimony of witnesses, who testified while the accusation against the respondent was under investigation, should be disclosed in the presence of a stenographer whose presence was neither authorized by statute nor custom. And at that time none of the purposes of secrecy had been accomplished.

Another, and perhaps more difficult question is, whether this is a matter that can be taken advantage of by the respondent. The presence of the stenographer affected only the injunction of secrecy as to the "state's counsel." If this can be waived by a prosecuting attorney, so that it cannot be taken advantage of by a respondent, it was done in this case.

In *State v. Clough*, 49 Me. 573, in which it was decided that the presence of an unauthorized person, who participated as a juror in the proceedings of the grand jury, invalidated the indictment, although twelve competent grand jurors concurred in finding it, it is said: "The mere fact that a stranger was present when the indictment was found would not render it void. Though obviously proper and highly important that the proceedings of a grand jury should be in secret, one who is indicted cannot take advantage of it if they are not." This question was not involved in the decision of the case; the person present in the grand jury room in that case was an unauthorized person who assumed to act as a grand juror; but it is unnecessary to decide whether it is a correct statement of the law, because the stenographer, in this case, was not a mere stranger. He was in the grand jury room by express order of court; he participated in the proceedings to the extent of taking and preserving the testimony.

Although the obligation of secrecy in regard to the "state's counsel," required by immemorial usage, and imposed by the oath of grand jurors prescribed by our statute, was undoubtedly intended for the benefit more particularly of the state, we think that neither the prosecuting attorney can waive it, nor the court nullify its objects. If such an order may be made at the request of the county attorney, we know of no reason why it may not be done without his request or even against his protest. If done under ³⁶⁸ such circumstances, the government could not present the question for review to the law court; it can only be raised in any case by a respondent. We think that in the interests of justice, and in accordance with the principles of public policy, it is wiser to hold that this is a matter which may be taken advantage of by a respondent, than that,

although improper and unauthorized, it cannot be made the subject of review.

Another consideration should not be lost sight of. The object of an investigation by a grand jury is not only to bring the guilty to trial, but also to protect the innocent from groundless accusation. The duties of grand jurors are important and responsible. They should be entirely independent; they should be uninfluenced by any consideration except a desire to "diligently inquire and true presentment make of all matters and things" given them in charge, according to their oaths and their consciences. If it be competent for the court to order a stenographer to be present and take stenographic notes of the testimony of witnesses for such future use as the court might order or the law allow, it might be done in one case only during a whole session, while all other matters were investigated in the ordinary way. Should that be done, we cannot tell what influence such a discrimination might have upon the jurors. We think that in some cases it might affect their independence, and impair the rights of the accused.

Our conclusion is, that for the reasons given, the proceeding is unauthorized and improper and that the indictment so found is void.

The entry will therefore be, exceptions sustained. Demurrer overruled. Plea in abatement adjudged sufficient. Indictment quashed.

INDICTMENT—OATH—SECRECY.—The oath of a grand juror requires him "to keep secret the state's counsel, his fellows," and his own; and none but witnesses "have any business" before the grand jury: See monographic note to *Commonwealth v. Green*, 12 Am. St. Rep. 941 918. on grand juries. The object of administering an oath to grand jurors to keep secret their proceedings is for the protection of the grand jurors and in the furtherance of justice, and not for the protection of witnesses before the grand jury: *State v. Broughton*, 7 Ired. 96; 45 Am. Dec. 507.

TREFETHEN v. LYNAM.

[90 MAINE, 376.]

HUSBAND AND WIFE—HUSBAND'S EXPENDITURES ON WIFE'S PROPERTY—RIGHTS OF HIS CREDITORS.—If a husband, at the expense of his existing creditors, expends his own money with his wife's consent in making a permanent, visible, and appreciable addition to his wife's estate, and to its value, as by building a stable on her homestead, she should not be allowed to retain any such benefit or increment in value, but such prior creditors may, by equitable trustee process, compel her to account for the money or estate thus absorbed, although there was no actual intent to defraud them.

HUSBAND AND WIFE—HUSBAND'S LIABILITY FOR RENT OF WIFE'S PROPERTY OCCUPIED BY FAMILY.—A wife may, at her will, manage and dispose of her own property, including the homestead upon which the family live, but while it is so occupied she cannot, at least in the absence of any agreement, require the husband to pay her rent therefor; and it follows that she cannot insist upon it as against his creditors.

HUSBAND AND WIFE—INVESTMENT OF HIS INCOME IN HER BUSINESS—BURDEN OF PROOF AS TO FAMILY EXPENSES.—If a wife receives money of her husband, it being a part of his income, invests it in her separate business, and then pays family expenses out of the proceeds of that business, the burden is upon her, as against his prior creditors, to show affirmatively the amount actually consumed in such expenses, and that no wrong was worked to her husband's creditors.

HUSBAND AND WIFE—ABSORPTION OF DEBTOR HUSBAND'S PROPERTY FOR FAMILY SUPPORT.—A wife will not be allowed to absorb her debtor husband's property under the cover of family support. Hence, a court will closely scrutinize, even with suspicion, the transfer, by a husband to his wife, of the former's means and earnings, however innocent any such transaction may appear on its surface, if the effect of the transfer is not for the support of the family, but to store the property away from the reach of creditors.

Equitable trustee process. The bill was brought by Trefethen and others against Lynam and others, but was dismissed and the plaintiffs appealed. One portion of the decree appealed from was as follows: "That as Mrs. Lynam owned the real estate, she was entitled to its income, and might justly appropriate to herself from her husband's remittances an amount equal to a fair rental of the premises occupied by her husband's family, which were owned by her; and that the amounts remitted to her by her husband have not exceeded the amount expended for the support of his family, and the fair rental of the premises occupied by his family."

Benjamin Thompson, for the plaintiffs.

J. A. Peters, Jr., for the defendants.

378 EMERY, J. From the documents and the testimony of the various defendants themselves, the following facts appear to be practically undisputed.

In 1859, the defendant, Linda M. Lynam (then Linda M. Clement) was the owner by inheritance from her father of a homestead at Seal Harbor, Mt. Desert, and was living upon it with her mother. In that year she married the defendant, Captain Eri V. Lynam, and the pair began married life upon this homestead and their home has been upon it ever since. The family has consisted of Mr. and Mrs. Lynam, their children and Mrs. Lynam's mother. In 1882, the defendant Robert E. Campbell married a daughter of the other two defendants and lived with her upon the same homestead as a member of the family. Captain Lynam's occupation was that of a master mariner, and he was absent most of the time after 1874 upon foreign voyages.

In 1883, Mrs. Lynam and her son in law Campbell began the enterprise of building and running a summer hotel on her place. ³⁷⁹ One hotel building was erected and furnished in 1884 and a second one in 1887. The money was raised by notes of Mrs. Lynam and her mother, Mrs. Clement, secured by a mortgage of the homestead. In this way money was borrowed as follows: In 1883, \$4,000 at 8 per cent, in 1884, \$6,600 at 8 per cent, in 1887, \$1,500 at 8 per cent, amounting to \$12,100. In addition to the above, \$2,500 were borrowed on note alone at seven per cent in 1887. The business was managed by Campbell for himself and Mrs. Lynam under the name of Lynam & Campbell. Mrs. Lynam and a minor daughter worked in and about the hotel during the season at least. The interest on the loans, aggregating over \$1,000 annually, and occasionally small sums upon the principal were paid from year to year up to 1892. A \$1,000 payment was made in 1889, and another \$1,000 payment in 1893. In 1894, some of the property of Mrs. Lynam was sold to one Cooksey and from the proceeds of that sale the various mortgages were finally paid that year.

During all this time Captain Lynam was away at sea, coming home at infrequent intervals and for short stops only. From time to time he remitted sums of money to his wife, the different remittances varying in amount from \$50 to \$500. They were usually by draft or check. In making these remittances Captain Lynam gave no directions as to what should be done with the money. He seems to have left its disposition entirely to his wife's discretion. The remittances, with but few if any exceptions, were turned over by Mrs. Lynam to Mr. Campbell and by him deposited in the bank to the credit of Lynam & Campbell, in the same account with the hotel business. One draft of \$350 was sent direct to Mr. Campbell who deposited it

to the same account. The aggregate amount of these remittances is much in dispute. The respondents admit that they averaged \$700 yearly. The plaintiffs claim that they were nearer \$1,200 per year. There seems to be no exact account of the amount, and it is to be largely determined by inference from circumstances.

As stated above, nearly all the remittances, whatever the amount, were turned into the funds of Lynam & Campbell. Out ⁸⁸⁰ of these funds of Lynam & Campbell were paid the hotel expenses, the interest on the notes, the partial payments upon the principal, and also the family expenses of the Lynam and Campbell families who were living together. No accounts were kept, and both Mrs. Lynam and Mr. Campbell are utterly unable to state the amount expended for either or both families. The two families comprised five persons, Mrs. Lynam, her mother, and an unmarried minor daughter, with Mr. and Mrs. Campbell. Nor were any accounts kept of the hotel business; but both Mrs. Lynam and Mr. Campbell say there was little or no profit in it. Mrs. Lynam says there was a loss.

At a period about midway between the years 1874 and 1883, Captain Lynam, with his wife's consent, built a stable on the homestead expending thereon about \$300 of his own money. He does not claim to have built the stable with his own labor, and, as he was away at sea the greater part of the time after his marriage, it is a fair inference that the stable was built out of his money.

But all this while, and as early as 1874, Captain Lynam was indebted to the plaintiffs in a sum of over \$1,500, with interest, which he has never paid any part of and has had no property in his name with which to pay it. This indebtedness (now in the form of a judgment) does not seem to have been known to Mrs. Lynam or Mr. Campbell till 1889.

The plaintiffs now bring this bill in equity in the nature of an equitable trustee process under the Revised Statutes, chapter 77, section 6, clause 10, to reach and apply to their judgment the money of Captain Lynam thus appropriated or used in the improvement of Mrs. Lynam's property, and in her business enterprise. They claim that they have shown a direct appropriation of their debtor's money to the erection of the stable, which they say ought, in equity at least, to be appropriated to his debts. While they do not claim to have shown any direct appropriation of any specific sum of their debtor's money to the payments on the hotel erections, they do claim they have shown a general appropriation of nearly all his earnings by the busi-

ness association of Lynam & Campbell, and their incorporation into the fund from which that concern paid the interest, and ³⁸¹ some parts at least of the principal of the hotel mortgages. They further claim that, having shown this, the burden is on the respondents to show that the debtor's money thus taken was in fact expended for his family's suitable maintenance, and that they have failed to do this and hence should submit to its re-appropriation for his debts.

The justice hearing the cause, in the first instance, did not sustain these claims of the plaintiffs, but dismissed the bill upon the following grounds among others: 1. As to the stable, that it was built without any understanding between Captain Lynam and his wife as to its ownership, and so became a part of the wife's realty with no legal or equitable title thereto left in him; 2. That Mrs. Lynam was entitled to deduct from her husband's remittances a fair rental for her homestead occupied by their family; 3. That (making the above allowance for rent) it did not appear that any appreciable or ascertainable part of Captain Lynam's remittances was in fact applied to his wife's property or business. The justice seemed to put on the plaintiffs the burden of showing such specific application. He also seemed to intimate that there was or might be a surplus if the rent were excluded.

On account of the intimacy of the marriage relation, the husband and wife cannot ignore the creditors of either to the extent that two strangers might. A debtor's wife receiving her husband's earnings may entirely consume them in the suitable support of his family, including herself, without becoming in any way answerable to his creditors. She has no right, however, as against his prior creditors, to appropriate her husband's earnings or income to making investments in her own name either for him or herself, or to keeping down or paying off encumbrances on or otherwise improving her own property, or to paying the debts or increasing the profits of her separate business. Nor can she rightfully retain, as against them, the value of permanent additions voluntarily made by him to her property. Outside of the statute exemptions he cannot acquire any property which shall be free from the claims of prior creditors; nor can she acquire such property out of his principal or income. Whenever it appears that she has thus ³⁸² absorbed his money or estate, she can be compelled to account for it by this equitable trustee process. The prior creditor of the husband need not show an actual fraudulent intent on the part of either husband or wife. It is enough for him to show that the wife has acquired some

property or value out of her husband's unexempted principal or income. This value thus obtained should be restored by her for the payment of his prior debts, though the husband or his representatives might have no legal or equitable claim to such restoration. The wife may owe a duty of restoration to her husband's prior creditors without owing any such duty to him. These propositions are deducible from the following cases: *Call v. Perkins*, 65 Me. 446; *Sampson v. Alexander*, 66 Me. 182; *Robinson v. Clark*, 76 Me. 494; *Lane v. Lane*, 76 Me. 526; *Stratton v. Bailey*, 80 Me. 345; *Merrill v. Jose*, 81 Me. 22; *Berry v. Berry*, 84 Me. 541.

1. It is undisputed that Captain Lynam, while in debt to the plaintiffs and having no visible property of his own, directly expended with his wife's consent some \$300 of his own money in making a permanent, visible, appreciable addition to his wife's estate and to its value—not merely keeping up the estate, or carrying it on, but adding to it. This addition (stable) became a part of the wife's realty, and Captain Lynam himself, as found by the justice of the first instance, may have no right in it, or to reimbursement for it.

Under the principles above stated, however, the husband's right is not the test of his prior creditors' right. As to them, neither husband nor wife can erect buildings on her land with his money, and retain the benefit. In the absence of fraudulent intent or active participation upon the part of the wife, it might not be equitable to require her to account for the full sum thus subtracted from her husband's means and appropriated to her property, since the benefit to her estate might not be so much; but she should not retain any benefit or increment in value of his estate made at the expense of her husband's prior creditors. To turn over to those creditors the benefit or increment, if any, thus obtained would cause her no loss of her own property, but would ³⁸³ simply transmit some part of the husband's property to his creditors—a most equitable proceeding.

2. It is undisputed that Captain and Mrs. Lynam and their family lived upon her homestead. It does not appear, however, that there was ever any agreement or understanding between them for the payment of rent by him to her therefor. Without expressing an opinion upon the effect of such an agreement if its existence were shown, it may be safely said that, in the absence of that agreement, the wife has no right to such rent from the husband. It is true the wife may, at her will, manage and dispose of her own property including her homestead upon which

the family live. She may lease it to other parties and recover and retain the rent, but while she occupies it herself with her husband and family she cannot, at least in the absence of any agreement, require the husband to pay to her rent therefor. The relation between them as to such occupancy is that of husband and wife uniting to make a common home. The relation of landlord and tenant is not to be inferred or implied. The occupation is that of both: *Southworth v. Edmonds*, 152 Mass. 203. There are doubtless numberless instances in this country where the husband and wife and family are living upon a homestead owned by the wife; yet no case has been found of a claim made in the courts by the wife against the husband or his estate for the rent, in the absence of an agreement. This circumstance is strong against the validity of such a claim.

If the wife cannot insist on such rent, as against her husband or his estate, it follows that she cannot insist upon it as against his creditors. Her husband's indebtedness does not create for her a new right in his property.

3. A wife simply keeping her own and her husband's home and family need not account to her husband's creditors for any part of his income received by her, so long as it does not appear that she is using any part of it for her separate profit. In this case, however, it does affirmatively appear that the wife with a business associate was engaged in a business for her own profit entirely apart from her husband, and that all or nearly all of her husband's ³⁸⁴ remittances were, in the first instance, turned into his business, to the account of *Lynam & Campbell*. The support of the families of both was drawn indiscriminately from the funds of the business. This procedure was certainly unjust to her husband's creditors--this subjecting their debtor's income, not solely to the support of himself and family, but to the risk of a business from which he was in no event to derive any profit or increase of estate. At least, it has put on the wife and her business partner the duty of showing affirmatively that such absorption of her husband's income into her property and business worked no wrong to his creditors--that an equivalent sum was properly and actually consumed by the husband's family. This they have not done. At the most they only give a guess.

It is urged, at this point, that the justice of the first instance has found this to be the fact, and that his finding of fact is not to be reversed unless clearly wrong. We do not understand the justice to have found this specific fact. His finding was general, including both law and fact. He seemed to concede that the

Lynam family expenses alone, not counting rent, might not have consumed the remittances. He made much account of the rent in arriving at his conclusion.

The lamentable tendency of so many debtors to transfer their means and earnings to their wives' possession or to expend them upon their wives' property, not for the support of the family, but to store them away from the reach of their creditors, renders it necessary for the courts to scrutinize thoroughly, and even with suspicion, any such transaction however innocent it appear on the surface. The wife must not be allowed to absorb the debtor husband's property under the cover of family support: *Robinson v. Clark*, 76 Me. 494; *Seitz v. Mitchell*, 94 U. S. 580. Applying that scrutiny to this case, we are satisfied that at least fifteen hundred dollars of the debtor husband's earnings have been used in additions and improvements upon the wife's real estate with her consent, by which her estate has been increased in value to that full amount.

The plaintiffs are entitled to judgment and execution for that **385** amount and costs against the debtor husband and the defendant wife, to be applied to their former judgment against the husband. The defendant Campbell does not appear to have any interest in the property, and hence the bill should be dismissed as to him but without costs.

Decree below reversed. New decree in accordance with this opinion.

HUSBAND'S EXPENDITURES ON WIFE'S PROPERTY—RIGHTS OF HIS CREDITORS.—If a husband, with intent to defraud his creditors, gives his wife money, which she, with full knowledge of that purpose, accepts, and yields no consideration, she holds it as trustee for such creditors, and must account to them for it in equity, whether it remains in her hands, or has been expended upon her real estate: *Blair v. Smith*, 114 Ind. 114; 5 Am. St. Rep. 593. Materials furnished by a husband, with his own money, and used in improving his wife's property, if he is embarrassed, will be regarded as a gift in fraud of his creditors, who may make the wife's estate liable therefor: *Nance v. Nance*, 84 Ala. 375; 5 Am. St. Rep. 378. That the separate estate of a wife, which has been increased in value by the time, labor, and skill of her husband, is not chargeable in law with his debts, and that he may allow his just obligations to go unpaid while so increasing his wife's separate estate: See *Bogges v. Richards*, 39 W. Va. 567; 45 Am. St. Rep. 938. Compare note to *Trapnell v. Conklyn*, 38 Am. St. Rep. 47.

WHITEHOUSE v. WHITEHOUSE.

[90 MAINE, 468.]

TRUSTS—CONTRACT—CHECK TO BE DELIVERED AFTER MAKER'S DEATH.—If a widower agrees with a woman, much younger than he, that if she will renew an engagement of marriage with him which he has broken, after an engagement of many years, without good cause, he will, if he dies without consummating the marriage, provide her at his decease with enough property for her support for the rest of her life without labor, and some time afterward, not having married her, and being in failing health, he considers the sum of five thousand dollars equal to the provision promised her, and writes his check for that amount, putting it in his office safe, in a sealed envelope, addressed to an uncle of hers in trust for her benefit, after which he says to the uncle, in the office containing the safe, "There is a sealed package in my safe assigned to you, placed there for safekeeping, and that package I deliver to you in trust for Dora M. Whitehouse [the niece to which he was engaged]; I have not named her in my will for the reason that what that package contains belongs to her; my brother knows all about this, and at my death he will open the safe and give the package to you, and I intrust you to give the package to her for the contents belong to her"; to which arrangement the uncle assents, and also the niece when informed of it, the transaction exhibits not only a declaration of trust, founded upon a valuable consideration, with a symbolical or constructive delivery of the package and its contents, but a contract as well as a trust, such contract being a subsisting obligation during the life of the promisor. The check is, therefore, valid, though it does not come to the payee's hands during the life of the drawer, and it is not material that its date, whether by design or mistake, is several months later than the maker's death.

CHECKS—DELIVERY AFTER MAKER'S DEATH—WHAT CONSTITUTES AND ITS EFFECT.—If a check is delivered by the maker, in his lifetime, to a third person, with directions to deliver it to the payee after the maker's death, and such after-delivery is made, the payee's right to the check takes effect at the date of the first delivery, and after the first delivery the payee's demand for the check and a refusal by the custodian thereof to deliver it are, in effect, equivalent to a second delivery.

GIFTS—DONATIO CAUSA MORTIS — DONOR'S OWN CHECK—CONTRACT.—The doctrine that the donor's own check may not be the subject of a donatio causa mortis does not apply when such check is given for a valuable consideration received by the donor in his lifetime, for the transaction is not a gift of any kind, but a contract.

TRUSTS—ENFORCEMENT OF IMPERFECT TRUST INSTRUMENT AS A CONTRACT.—If an agreement is entered into for a valuable and legal consideration, and a trust is intended, the mere form of the instrument is not very material, for if the trust is not perfectly executed or created by the instrument, a court of equity may enforce it as a contract.

CHECKS—ASSIGNMENT OF FUND—RECOVERY OF PROCEEDS OUT OF DRAWER'S ESTATE.—A check is an assignment of so much of the drawer's funds as amount to the sum designated in the check, and, if those funds are wrongfully covered into the estate of the drawer of the check by his executors, both law and equity require that they should be restored to the true owner.

PLEADING—DECLARATION — AMENDMENT—UNAVAILABLE OBJECTION.—An objection to the amendment of a declaration is of no consequence where the verdict is sustained without the aid of any amendment.

Assumpsit to recover the sum of five thousand dollars for money had and received, brought by the plaintiff, Dora M. Whitehouse against Eugene W. Whitehouse and another, executors of the estate of Dr. Benjamin L. Tibbetts, deceased. There was a verdict for the plaintiff, and the defendants moved for a new trial. They offered no evidence, and the case was heard on the motion and exceptions of the defendants.

O. D. Baker and F. L. Staples, for the plaintiff.

L. C. Cornish, E. W. Whitehouse and W. H. Fisher, for the defendants.

⁴⁷² PETERS, C. J. The plaintiff presents a very meritorious claim, in this equitable action of money had and received, for the ⁴⁷³ recovery of the amount of a check on a Waterville bank, running to her for the sum of five thousand dollars, and executed by Dr. Benjamin L. Tibbetts of whose estate the defendants are executors. The consideration for the check was an indebtedness for that sum or more due her from him in his lifetime, the indebtedness growing out of their relations while engaged to be married to each other. The matrimonial engagement had existed between them for sixteen or more years, commencing in her earliest womanhood and ending when he died September 19, 1892. He was a widower during the period of their engagement, and much her senior in years.

During their engagement a day for their marriage had been several times appointed by them, and when such day arrived he had habitually made some excuse for requesting its postponement. Finally, on Thanksgiving Day in 1889, upon his again failing to keep his agreement to be married on that day, feeling that her self-respect would no longer permit such repetitions of broken promises, and being strongly influenced thereto by the wishes of her mother, she resolved to discontinue further relations with him, and refused to again renew or continue their engagement of marriage. Shortly afterward, however, besieged by his apparently sincere promises and protestations, she became induced to consent to a renewal of the engagement, in consideration of his agreement, expressly declared in the presence of her mother, that, if she would consent to a renewal of the engagement and a reasonable postponement of the marriage, and he should die before a marriage between them took place, he would provide her with an amount out of his estate which would be enough for her support for the rest of her life without labor. Thereupon the engagement continued, for better or worse, until he died, and they never were married to each other.

The sequel is told by Mr. Taylor, an uncle of the plaintiff, whose testimony we quote: "I am an uncle to Dora M. Whitehouse. (I am knowing to the fact that for sixteen or seventeen years before his death Dr. Tibbetts was understood to be engaged to Miss Whitehouse) and during all that time was on intimate terms with her and her family; that in the summer of 1892, during ⁴⁷⁴ hot weather, I called one day on Dr. Tibbetts, and he said to me, when I went into his office and passed the time of day, 'Good morning, I am very glad you called for I have some important business with you,' and I replied, 'All right,' then the doctor said to me: 'There is a sealed package in my safe assigned to you, placed there for safekeeping, and that package I deliver to you in trust for Dora M. Whitehouse. I have not named Dora's name in my will for the reason that what that package contains belongs to her; my brother knows all about this, and at my death he will open the safe and give the package to you, and I intrust you to give the package to Dora for the contents belong to her.' I said, 'All right.' Just previous to the words above stated I asked Dr. Tibbetts when I entered his office how he was, and he said, 'Well, poorly; if something don't take place in my favor pretty soon I can't stand it a great while.' That is all the conversation we had on that subject.

"On the morning just after Dr. Tibbetts' death I was at the house and saw the doctor's brother, Samuel Tibbetts, one of the executors, in presence of Dr. Mabry, and I said to Mr. Tibbetts: 'There is a package in that safe belongs to me,' and he replied: 'I have not time to get it now for we are in a hurry laying out the doctor'; said he: 'I am coming down in a short time after the funeral to open the safe, and then I will hand it to you; I will notify you when I am coming—what is your postoffice address?' and I told him it was South Vassalboro. Said I: 'Give me a piece of paper and I will write it down,' and then Dr. Mabry said: 'I know his postoffice address, and if you forget it I can tell you.' I answered: 'All right,' and that ended the conversation with us there. I received no notice of the time the safe was opened, and Tibbetts never did deliver to me the package which was in the safe. Afterward, on or about the 3d of April, 1893, I had a talk with Tibbetts, the executor, in the office and in the presence of E. W. Whitehouse, and then demanded the package and check, but I never got it, as he declined to give it to me. Dr. Tibbetts died September 19, 1892.

"The same day that Dr. Tibbetts delivered to me the package ⁴⁷⁵ in trust when I got home I said to Dora: 'I have got something to tell you,' and she replied: 'What is it?' I said: 'Dr.

Tibbetts has left a package delivered to me in trust for you.' (She replied: 'The doctor told me that if he died before we were married I should be well provided for.') Neither Dora nor I knew what the package contained until after the death of Dr. Tibbetts.

"Dr. Mabry, S. S. Brown, Samuel Tibbetts and S. S. Lightbody were present when the safe was opened and saw Brown take and break open the package."

Upon the interpretation to be given to the testimony of Mr. Taylor, in connection with the other facts previously stated, depends the question whether the present action is maintainable. It may not be amiss, however, to add that the plaintiff for all the time she was engaged to the doctor was attentive to his welfare and interests by a continual service expended in keeping his books and drawing off his accounts, doing his washing, mending and making clothes for him, and other like services.

When the interview was had with the uncle of the plaintiff by the doctor, only about a month before his death, the doctor evidently believed his last sickness was upon him, and he knew that the contemplated marriage was then a most improbable if not impossible thing. There may be some doubt if he ever intended to consummate the engagement by marriage, but her faith in him never failed, although it faltered at a time. But he no doubt sincerely intended to keep his promise to provide sufficiently for her out of his estate. He calculated in his own mind that five thousand dollars would be equal to the provision promised her, and he drew the check for that amount as payment of that sum, or as security for its payment. The act speaks for itself with no uncertainty. He says "this package belongs to her," thereby admitting his indebtedness to her for that amount.

There was, according to this evidence, at least a most significant constructive delivery of the package and its contents to Mr. Taylor, while he was in the office where the safe was in which the package was deposited; he assenting to the confidential instructions ⁴⁷⁶ imparted to him, and, although not knowing exactly what the package contained, believing that the contents were valuable, and appreciating the nature of the trust committed to him. The package thereafter remained in the safe until the doctor's death, the latter intending to make, and undoubtedly supposing he had made, a sufficient and legal delivery of the package to the trustee. The plaintiff approved of the transaction when informed of it.

We might, no doubt, safely stop at this point in the discussion, allowing the validity of the check to depend on a declara-

tion of trust which is exhibited by the case, according to the principle in equity settled in the late case of *Bath Sav. Inst. v. Hathorn*, 88 Me. 122, 51 Am. St. Rep. 382, and *Norway Sav. Bank v. Merriam*, 88 Me. 146. But we think this case has stronger grounds to rest upon than those cases have, and that while he resorted to some of the forms of a trust in order to effectuate his intention, the doctor was endeavoring, by what he did, to secure to the plaintiff the payment of five thousand dollars which he conceived would be due her under his agreement that he would provide her with enough out of his estate to support her without labor on her part during her lifetime. The sum due her from the nature of such a contract would be a claim against his estate after his death; but the contract was a subsisting obligation binding him while he lived. An action would lie on the original contract, or on the check tendered by him as a settlement and payment of such contract, and accepted by the plaintiff accordingly.

To be sure, the check did not come to her hands in the lifetime of the drawer. Nor did it need to in order to be valid by delivery. The delivery to the uncle inured to the benefit of the niece, on the principle that where a deed or other instrument of title is delivered by a grantor in his lifetime to a third person with directions to deliver the same to the grantee after the grantor's death, and such after-delivery is made, the title under such deed or instrument takes effect at the date of the first delivery. This is because of the effect of the relation between the two acts of delivery. Says Chief Justice Shaw, in *Foster v. Mansfield*, 3 Met. 412, 37 Am. Dec. 154, where the principle is clearly discussed: "When the future delivery is to ⁴⁷⁷ depend on the payment of money or the performance of some other condition, it will be deemed an escrow. When it is merely to await the lapse of time, or the happening of some contingency, and not the performance of any condition, it will be deemed the grantor's deed presently." In the case cited it was a deed of land which received a first and a second delivery. But the doctrine is just as logically applicable in the case of the delivery of a bond, check, note, certificate of stock, or any other instrument or muniment of title.

It is argued that the second delivery never took place, inasmuch as the check did not at any time, even after the doctor's death, come into the hands of the plaintiff. The answer to such suggestion is, that her demand for the check and the defendants' refusal to deliver it was in effect equivalent to a second delivery. Equity would have compelled any person having the check to

surrender it to the plaintiff, and the law would allow an action for its conversion against any persons who had secreted or despoiled the same. The defendants are estopped from asserting such a point of defense.

Nor can the defense successfully rely on the doctrine that a check cannot be the subject of a *donatio mortis causa* unless the check be presented and paid in the lifetime of the donor; a check, not supported by value received, being considered under such circumstances as of a testamentary character. That is, a man may not donate what is merely his own naked promise. The objection does not lie here because the check in the present instance was not a gift of any kind, but a contract founded on a full and even overflowing consideration. Mr. Perry, in his book on *Trusts*, volume 1, section 95, says: "Where an agreement is entered into for a valuable and legal consideration, and a trust is intended, the mere form of the instrument is not very material, for if the trust is not perfectly executed or created by the instrument, a court of equity may enforce it as a contract." The case of *Morrill v. Peaslee*, 146 Mass. 460, 4 Am. St. Rep. 334, in some of its features bears a resemblance to the present case. It appeared there that a married woman separated from her husband for extreme cruelty practiced upon her by him, ⁴⁷⁸ and had applied for a divorce and alimony. During the pendency of the divorce proceedings, she was induced to return to cohabitation with him on his giving a note for five thousand dollars, to a trustee for her benefit, the note not to be collected during his lifetime, but afterward out of his estate, provided she cohabited with him thereafter so long as he lived, and she did so. A majority of the court refused to sustain an action brought by the trustee on the note against the executors of the husband, but only on the ground that there was no consideration for the note, inasmuch as it was her duty to return to her husband if she could live with him. Three members of the court dissented in a separate opinion, which Mr. Perry, in the section of his work before cited, characterizes as "far weightier" than the opinion of the court.

The plaintiff was the legal owner of a check, or, if not the legal, surely the equitable, owner, which amounted to an appropriation of five thousand dollars for her use by the drawer of such check, according to the case of *Emery v. Hobson*, 63 Me. 32, and in equity was an assignment of so much of the drawer's funds as amounted to that sum, according to the case of *National Exchange Bank v. McLoon*, 73 Me. 498; 40 Am. Rep. 388; and those funds have been wrongfully covered into the estate of the

drawer of the check by his executors. Those funds should be restored to the true owner, and the law and equity conspire together in requiring such restoration.

It is immaterial that the check turned out, either by design or mistake, to bear a date some months later than the date of the death of the person executing it.

The amendment to the declaration, to which an exception was taken, becomes of no consequence, as the verdict is sustained without the aid of any amendment.

Motion and exceptions overruled.

CHECKS—ASSIGNMENT OF FUND.—Some cases hold that a check drawn upon an existing fund in bank is an absolute transfer or appropriation to the holder of the amount designated in the check, then in the hands of the drawee, and entitles the holder to sue the bank in his own name upon its refusal to pay: *Fonner v. Smith*, 31 Neb. 107; 28 Am. St. Rep. 510; *Abt v. American etc. Sav. Bank*, 159 Ill. 467; 50 Am. St. Rep. 175; *Industrial Trust etc. Co. v. Weakley*, 103 Ala. 458; 49 Am. St. Rep. 45. Contra, *Cincinnati etc. R. R. Co. v. Bank*, 54 Ohio St. 60; 56 Am. St. Rep. 700; note to *Commercial Bank v. Chilberg*, 53 Am. St. Rep. 874. See monographic note to *Hemphill v. Yerkes*, 19 Am. St. Rep. 609-612, on whether a check is an assignment of the fund drawn upon.

CHECKS—DELIVERY OF, AND PRESENTMENT AFTER MAKER'S DEATH.—In *Burke v. Bishop*, 27 La. Ann. 465, 21 Am. Rep. 567, the plaintiff's testator, the day before he died, delivered to the defendant, with the intention of making a gift, a bank check drawn by another to the testator's order, and indorsed in blank by him. It was not presented for payment until after the testator's death. This was held to be a valid gift: See notes to *Sheedy v. Roach*, 26 Am. Rep. 685; *Ray v. Simmons*, 23 Am. Rep. 453. But a check on a banker, given by the drawer in view of death, and who died before it was possible to present it, has been held not to be valid. A check is simply "an order to deliver money, and, if the order is not acted upon in the lifetime of the person who gives it, it is worth nothing": See note to *Brunn v. Schuett*, 48 Am. Rep. 510. The delivery of a check to a payee named as trustee, payable six months after the maker's death, does not constitute a gift nor an enforceable trust: *Appeal of Waynesburg College*, 111 Pa. St. 130; 56 Am. Rep. 252, and note showing that a check containing a direction that it is not to be paid until after the drawer's death makes it testamentary: Compare *Walter v. Ford*, 74 Mo. 195; 41 Am. Rep. 312.

TRUSTS.—NO PARTICULAR FORM OF WORDS is required to create a trust in another: See note to *Martin v. Funk*, 31 Am. Rep. 453; *Ray v. Simmons*, 11 R. I. 266; 23 Am. Rep. 447. A trust differs essentially from a contract, and will be enforced when the latter cannot: *Crawford's Appeal*, 61 Pa. St. 52; 100 Am. Dec. 609.

HODGE v. HODGE.

[90 MAINE, 505.]

EXECUTORS AND ADMINISTRATORS.—AN ADMINISTRATOR DE BONIS NON SUCCEEDS only to the unadministered property of the intestate, that is, the goods, effects, and credits which were of the intestate at the time of his decease and which remained in specie, unaltered or unconverted by any act of the administrator, or the proceeds thereof which have not been commingled with the administrator's own money.

EXECUTORS AND ADMINISTRATORS—MONEY, WHEN "IN SPECIE," AND WHEN "ADMINISTERED."—Money received by a former executor or administrator in his character as such, and kept by itself, will be regarded as remaining in specie, but, if mixed with the administrator's own money, it is considered as converted, or, technically speaking, administered.

EXECUTORS AND ADMINISTRATORS — ACTIONS.—AN ADMINISTRATOR DE BONIS NON cannot sustain an action at law against his predecessor for anything save unadministered effects existing in specie.

EXECUTORS AND ADMINISTRATORS — ACTIONS.—AN ADMINISTRATOR DE BONIS NON cannot maintain an action against the estate of his predecessor for money wrongfully received by him, prior to his appointment as administrator, in the absence of allegation and proof that such money is distinguishable as a part of the intestate's property.

EXECUTORS AND ADMINISTRATORS — DEBTS DUE FROM, AS ASSETS—JURISDICTION.—A debt due from a person to a testator or intestate becomes, by the debtor's appointment as executor or administrator, assets in his hands. The administrator's own debt being assets, it becomes, therefore, an item in his administration account, and the question whether it is due, and the amount of it, is one of probate jurisdiction, to be decided first, both as to law and fact, by the judge of probate, but subject to appeal.

EXECUTORS AND ADMINISTRATORS—REVIVAL OF DEBT DUE FROM—ACTION BY ADMINISTRATOR DE BONIS NON.—An indebtedness from an administrator to the estate, having been converted into assets by his appointment, is not revived by the death or removal of the administrator so that it can be sued by an administrator de bonis non.

EXECUTORS AND ADMINISTRATORS—SUIT BY ADMINISTRATOR DE BONIS NON FOR MONEY WRONGFULLY RECEIVED BY HIS PREDECESSOR PRIOR TO THE LATTER'S APPOINTMENT.—If a wife owns a deposit in a savings bank, standing in the name of a trustee for her sole benefit, and the husband, after her death, procures from the trustee a transfer of the deposit to himself, without consideration, and withdraws a part of it, but is subsequently appointed administrator of his wife's estate, and dies without having included this sum in his inventory, or in any way accounting for it, an administrator de bonis non of the wife's estate cannot maintain an action at law, or a proceeding in equity, against the personal representative of the husband to charge his estate with the money so withdrawn. A bill in equity cannot be sustained upon the ground that the money was received by the defendant's testator charged with a trust in favor of the wife's estate, because, if this was so, the identity of the trust fund has been lost, and the identity of the trust fund, if such it was, having been lost, the cestui que trust can stand in no better position than other creditors.

EXECUTORS AND ADMINISTRATORS—CONSTRUCTION OF STATUTE PERMITTING SUPREME COURT TO GIVE JUDGMENT FOR CLAIM AGAINST ESTATE.—The only object of a statute permitting the supreme judicial court to give judgment for the amount of a claim against the estate of a deceased person, which has not been presented within the time limited by statute, if justice and equity require it to be allowed, and the creditor is not chargeable with culpable neglect in not prosecuting his claim, is to relieve a creditor, under certain circumstances, from the limitation of the statute in regard to the prosecution of claims against the estates of deceased persons. It does not create a cause of action in equity, after the bar of the statute, when there was none at law before.

Bill in equity, heard on bill, answer, demurrer and testimony.

T. P. Pierce, for the plaintiff.

N. and J. A. Morrill, for the defendant.

506 WISWELL, J. Bill in equity by the administrator de bonis non of the estate of Abigail T. Hodge against the executrix of William Hodge, the administrator of Abigail T. Hodge.

The complainant, the administrator de bonis non, is the son of Abigail T. and William Hodge. The intestate died April 8, 1879. Her husband, William Hodge, was appointed administrator upon her estate December 7, 1880, and died June 6, 1892. The complainant was appointed administrator de bonis non on the first Tuesday of October, 1892.

The complainant alleges, in substance, that the intestate at the time of her death was the owner of a deposit in the Cambridgeport Savings Bank of Cambridgeport, Massachusetts; that although such deposit was in the name of one Hannah C. Wilson, it was in fact the money of the intestate, deposited by her in the name of Hannah C. Wilson, in trust for the sole benefit of the intestate; **507** that after her death William Hodge procured from Hannah C. Wilson a transfer of said deposit, without consideration, and that on August 26, 1879, before his appointment as administrator, he withdrew from the savings bank a portion of such deposit, about eight hundred dollars; that he did not include this sum in his inventory as administrator and never in any way accounted for the same; that in withdrawing a portion of such deposit he became an executor de son tort; and he asks that the defendant, as executrix of such administrator, may be compelled to pay the amount so withdrawn, with interest, to him as administrator de bonis non.

The respondent both demurred and answered to the bill, and the case is here upon report of the pleadings and testimony. The defendant contends that the bill cannot be sustained, either upon its allegations or upon the testimony.

It is very clear that if this sum of money had been received

by William Hodge in his capacity as administrator, and had been either administered or converted to his own use, neither an action at law nor a bill in equity could be maintained by the administrator *de bonis non* against him or his estate. As indicated by his title and commission there vests in him, as administrator *de bonis non*, only the unadministered property of the intestate, that is, the goods, effects, and credits which were of the intestate at the time of her decease and which remained in specie, unaltered, or unconverted by any act of the administrator, or the proceeds thereof which have not been commingled with the administrator's own money: American Boards' Appeal, 27 Conn. 344.

"But, at common law, the authority of the administrator *de bonis non* does not extend to any property which has been administered, either fully or partially. . . . It follows from these principles that the administrator *de bonis non* can sustain no action at law against his predecessor for anything save unadministered effects existing in specie": Woerner on Administration, 744, 745.

In *Beall v. New Mexico*, 16 Wall. 535, it is said: "To the administrator *de bonis non* is committed only the administration of the goods, chattels, and credits of the deceased which have not **508** been administered. He is entitled to all the goods and personal estate which remain in specie. Money received by the former executor or administrator, in his character as such, and kept by itself, will be so regarded; but, if mixed with the administrator's own money, it is considered as converted, or, technically speaking, administered."

The administrator *de bonis non* is entitled only to such goods or chattels of the testator as remained in specie in the hands of the executor at the time of his death, or to such money as belonged to the testator's estate, and had been kept by the executor separate and unmixed with his own: *Potts v. Smith*, 3 Rawle, 361. And see the very full notes to this case in 24 Am. Dec. 379. This doctrine was fully and unequivocally sustained by this court in the case of *Waterman v. Dockray*, 78 Me. 141.

But the persons legally interested are not without ample remedy in such a case. An omission by an administrator to include in his inventory any assets of the estate known to him, is a breach of his official bond: *Bourne v. Stevenson*, 58 Me. 499. Or an administrator could be charged with any money belonging to the estate that was received by him, in the settlement of his administrator's account, and a failure to present and settle an

account, after being cited to do so, would also be a breach of his bond, for which he and his sureties would be liable.

Nor do we think that an administrator *de bonis non* can maintain an action against the estate of his predecessor, for money wrongfully received by him, prior to his appointment as administrator, in the absence of allegation and proof that such money is distinguishable as a part of the intestate's property. If this money withdrawn from the savings bank was, in fact, the property of the intestate, at the time of her death, her husband, by receiving it, became a debtor to the estate, and his subsequent appointment and qualification as administrator converted this indebtedness into cash assets in his hands, which, if the allegations of the bill are true, should have been included in his inventory and accounted for as administrator; for a failure to do this, he and his sureties were liable upon the official bond.

500 That a debt due from a person to a testator or intestate becomes, by the debtor's appointment as executor or administrator, assets in his hands, was decided in Massachusetts in the case of *Stevens v. Gaylord*, 11 Mass. 256, and the doctrine of this case has been universally followed by every subsequent decision upon the question in that state: *Winship v. Bass*, 12 Mass. 198; *Hobart v. Stone*, 10 Pick. 215; *Ipswich Mfg. Co. v. Story*, 5 Met. 310; *Sigourney v. Wetherell*, 6 Met. 553; *Chapin v. Waters*, 110 Mass. 195; *Choate v. Arrington*, 116 Mass. 552; *Tarbell v. Jewett*, 129 Mass. 457.

"It is now well settled, whatever may have formerly been the rule of law, that a testator, by making his debtor executor, does not give him the debt, by way of legacy, nor release or discharge it. In this respect he now stands on the same footing with an administrator. But as an executor or administrator cannot demand or receive payment of himself and cannot sue himself, and yet is bound to account for his own debt, that debt must be considered as assets. Where the same hand is to pay and receive money, the law presumes, as against the debtor himself, that he has done that which he was legally bound to do, and charges him with the amount as a debt paid. . . . It is sufficient for the present case that the administrator is bound to account for his own debt, as a debt paid, and as assets, without other acts or ceremony. The administrator's own debt being assets, it becomes an item in his administration account, and the question whether such debt is due, and the amount of it, becomes a question of probate jurisdiction in the first instance, to be decided by the judge of probate, on all questions as well of fact as of

law, subject to an appeal to this court": *Sigourney v. Wetherell*, 6 Met. 553.

In *Stevens v. Gaylord*, 11 Mass. 256, it was said: "The case might have been very different if the defendant had denied that he owed this debt, and had refused to insert it in his inventory, and to account for it as the property of the deceased." And in some other of the Massachusetts cases above cited, the rule as laid down contains the qualification, "when the debt is acknowledged," although we are aware of no case in which this has been decided ⁵¹⁰ to be the law, and we think, upon principle and authority, that there is no difference in the rule, whether the debt is acknowledged or denied.

In *Winship v. Bass*, 12 Mass. 198, the indebtedness was not acknowledged, the executor refused to treat his indebtedness to the estate as assets, claiming that it was extinguished by his appointment. The court held that the debt was not extinguished, but must be treated as assets, and that, as his sureties were liable upon his bond, he need not be removed.

In *Sigourney v. Wetherell*, 6 Met. 553, the indebtedness of the administrator was not acknowledged, but, on the contrary, was strenuously denied.

In *Tarbell v. Jewett*, 129 Mass. 457, it was said: "The note, therefore, became assets of the estate, from which the liability of the estate to the guardian could properly be met, and it is immaterial that it was not named in the inventory or account. . . . The fact that an executor charges himself with his debt in the inventory or account is an important fact; it settles the question that he owes the estate and the amount of his debt, and, in those cases where the debt has thus been accounted for, great stress has been laid upon the fact. . . . But an executor cannot escape his liability, or change the character of it, by failing to charge himself with his own debt; if he could, then by neglecting his duty there would be no remedy for the estate. Nor is charging himself with it the only way in which the fact of his indebtedness may appear or be proved; and if it appears or is proved otherwise, then his liability is established as conclusively as if he had charged himself with the debt in his inventory, and his sureties become responsible if he fails to account for it."

In this state it was early decided in the case of *Potter v. Titcomb*, 10 Me. 53, that an administrator must inventory and account for any debt due from himself to the intestate, even though he should deny that there was such indebtedness. And in *Potter*

v. Titcomb, 7 Greenl. 302, it was held that in order to compel an administrator, on his official bond, to pay the amount of a debt due from him to the intestate, it is necessary that he should first be ⁵¹¹ charged with the amount, in an administration account, by a decree of the judge of probate.

An indebtedness from an administrator to the estate, having been converted into assets by his appointment, is not revived by the death or removal of the administrator so that it can be sued by an administrator de bonis non. In *Tarbell v. Jewett*, 129 Mass. 457, it is said: "We are not aware of any case where it has been held that a debt due from an executor, having once become assets, can be revived, and an action maintained upon it by an administrator with the will annexed; nor of any case where a debt due to the executor has been held not to be extinguished, if sufficient assets come to his hands."

In *Munroe v. Holmes*, 9 Allen, 244, it was held that where an executor had died leaving the estate unsettled, his administrator could not maintain an action at law against the administrator de bonis non to recover a balance due to the executor, but must present an account to the probate court for settlement. And in *Prentice v. Dehon*, 10 Allen, 353, it was held that, upon the same principle, such an action could not be maintained after the resignation of the executor.

Whether the debt is due to or from the executor or administrator, and the principle is the same in the case of either executor or administrator, the debt as such becomes extinguished by the appointment of the debtor or creditor, and is not revived by his death or removal from that position.

No action at law, under the circumstances of this case, could be maintained by the administrator de bonis non against the personal representative of his predecessor for the reasons already considered, and we think that the complainant can have no better nor greater rights, in this respect, in a proceeding in equity.

The defendant was appointed executrix September 6, 1892; this bill in equity was commenced October 5, 1895. By the Revised Statutes, chapter 87, section 19, when a claim has not been presented within the time limited by statute against the estate of a deceased person, this court, if of opinion that justice and equity require it and that such creditor is not chargeable with culpable neglect in not prosecuting ⁵¹² his claim, may give judgment for the amount of the claim against the estate. The only object of this statute is to relieve a creditor, under certain circumstances, from the limitation of the statute in regard to the prosecution of claims against the estates of deceased

persons. It does not create a cause of action in equity, after the bar of the statute, when there was none at law before.

Nor can the bill be sustained upon the ground, as contended, that this money was received by the defendant's testator, charged with a trust in favor of the intestate, because, if this was so, the identity of the trust fund has been lost. There is no attempt here to hold a particular fund or property as charged with the trust; there is no allegation or testimony to the effect that this money can be traced or distinguished from other property or money of the defendant's testator, the original administrator.

The identity of this trust fund, if such it was, having been lost, the cestui que trust can stand in no better position than other creditors: *Goodell v. Buck*, 67 Me. 514; *Portland etc. Steamboat Co. v. Locke*, 73 Me. 370; *Fowler v. True*, 76 Me. 43.

Bill dismissed, with costs for the respondent.

ADMINISTRATOR DE BONIS NON—TITLE AND AUTHORITY.

An administrator de bonis non is entitled to the goods and chattels, rights, and credits of his intestate, which were unadministered: *Kelly v. Kelly*, 9 Ala. 908; 44 Am. Dec. 469; *Swink v. Snodgrass*, 17 Ala. 653; 52 Am. Dec. 190; *Gentry v. Owen*, 14 Ark. 396; 60 Am. Dec. 549; *Stubblefield v. McRaven*, 5 Smedes & M. 130; 43 Am. Dec. 502. He is entitled only to such goods or chattels of the testator as remained "in specie" in the hands of the executor at the time of his death, or to such money as belonged to the testator's estate, and had been kept by the executor separate and unmixed with his own: *Potts v. Smith*, 3 Rawle, 361; 24 Am. Dec. 359. His power is limited to the administration of effects left unadministered: *Stubblefield v. McRaven*, 5 Smedes & M. 130; 43 Am. Dec. 502; *Chamberlain v. Bates*, 2 Port. 550; 27 Am. Dec. 667. The extent to which he can pursue the preceding administrator is discussed in the monographic note to *Potts v. Smith*, 24 Am. Dec. 383, 385, on administrators de bonis non.

ADMINISTRATORS DE BONIS NON—MONEY, WHEN "IN SPECIE," AND WHEN ADMINISTERED.—Money received by the former executor or administrator, in his character as such, and kept by itself, will be regarded as "in specie"; but if mixed with the administrator's own money, it is considered as converted, or, technically speaking, "administered." The administrator de bonis non cannot call upon the prior administrator or executor, directly or indirectly, to account for the value of property converted. Only to articles unadministered existing in specie is he entitled: See note to *Potts v. Smith*, 24 Am. Dec. 384, 385, where the term "administered" is defined.

CASES
IN THE
SUPREME COURT
OF
MARYLAND

MARTIN v. EVANS.

[85 MARYLAND, 8.]

RES JUDICATA, GENERAL RULE OF.—If a question has once been tried and determined on its merits, without fraud or collusion, by a court having jurisdiction of the parties and subject matter, it cannot be again litigated between the same parties in the same or any other judicial tribunal so long as the adjudication remains unreversed and in full effect.

RES JUDICATA—BILL DISMISSED ON TWO GROUNDS.—Where, in a suit in equity, the complainant claims that she was the owner of certain bonds which she sold, and that she lent the proceeds, taking a note and mortgage, to one R., to be held in trust for her, and that, he dying subsequently, his administrators sold the note and mortgage before proceedings could be brought against them to have the trust declared in complainant's favor; and the chancellor in his opinion declares that complainant was not the owner of such bonds, nor of the moneys resulting therefrom, and that no trust existed in her favor, and further that, were his conclusion otherwise, still the suit could not be maintained, because the remedy of the complainant was ample at law, the decree subsequently entered of bill dismissed is conclusive against complainant. Its effect is not limited by the declaration of the chancellor that if the allegations of the bill had been established, still the remedy was at law.

RES JUDICATA.—WHENEVER A DECREE DISMISSING A BILL in equity fails to restrict its own scope, the presumption is, that the issues raised by the pleadings have been disposed of on the merits, and such decree constitutes a bar to further litigation of the same matters between the same parties. The force of this presumption is not avoided by the opinion of the chancellor showing that the bill could have been dismissed because complainant had an adequate remedy at law, as well as on the merits.

RES JUDICATA, CHANGE IN FORM OF ACTION.—Where remedy was sought in a suit in equity to which complainant's ownership of certain bonds was essential, and a decree of bill dismissed was entered, such decree is conclusive in a subsequent action of trover by the same plaintiff against the same defendants seeking to recover for the conversion of the same property.

A. A. Doub and A. A. Wilson, for the appellant.

Benjamin A. Richmond, D. James Blackiston, and George A. Pearre, for the appellee

¶ McSHERRY, C. J. This is an action of trover. The suit was brought by the appellant against the appellees, who are the administrators of James Reed, deceased. The plaintiff seeks to recover the value of certain United States coupon bonds claimed by her as her property, and alleged in the declaration to have been converted by James Reed to his own use in his lifetime. To the declaration three pleas were filed. With the first and third we are not concerned on this appeal; but the second presents the question brought up on the record now before us. The second plea is a plea of *res adjudicata*. It sets forth with particularity and technical precision the proceedings in an equity case at one time pending in the circuit court for Allegany county, between the same parties who are the parties to this suit, and avers that the relief sought in that case was the recovery of the value of the identical bonds for the alleged conversion of which this action was subsequently instituted. It further avers that to the bill in equity the defendants, who are also the defendants here, filed their answer flatly denying that the plaintiff owned, as alleged in her bill of complaint, the bonds therein referred to, and it recites that after a general replication had been filed, testimony was taken, and the equity case was heard and was thereafter decided and determined adversely to the plaintiff on the merits. With the plea, and as a part of it, there were filed a copy of the bill in equity and of the court's opinion and the final order dismissing the bill. To this plea thus setting up the defense that the exact and precise issue raised and controverted in this case had been antecedently passed upon and decided on its merits adversely to the plaintiff by a court of competent jurisdiction in another proceeding between the same parties the plaintiff demurred. The circuit court for Allegany county entered judgment on the demurrer for the defendants and from that judgment this appeal has been taken.

Now, it is not denied, and it could not well be disputed at this day, that if a question has once been tried and determined, ¹⁰ without fraud or collusion, but on its merits by a court having jurisdiction of the parties to the controversy and of the subject matter involved therein, it cannot be again litigated between the same parties in the same or in any other tribunal, so long as the adjudication remains unreversed and in full and operative effect. This doctrine, which is an old axiom of the law, was

dictated by wisdom, and, as observed in *Warwick v. Underwood*, 3 Head, 238, 75 Am. Dec. 767, "is sanctified by age," and was founded on the broad principle that it is to the interest of the public there should be an end of litigation by the same parties and their privies over a subject once fully and fairly adjudicated. Recognizing this, the appellant seeks to avoid its application by insisting that the bill in equity was dismissed for the want of jurisdiction, and that the relief sought under it was denied, not because it was determined the plaintiff had no title to the bonds, but because it was decided there was an adequate remedy at law, and, therefore, that the equity court was without jurisdiction to pass any decree adjudicating the title to the bonds at all. If the plea upon its face shows this state of facts, then, of course, it presents no defense to this action, and would be bad on demurrer. As already stated, a copy of the bill of complaint and of the opinion of the circuit court accompanying its decretal order dismissing the bill, form part of the plea. The bill alleges in substance that the plaintiff therein, who is the appellant here, loaned the Frostburg Mining Company six thousand six hundred and fifty dollars to be secured by a mortgage; that the mortgage was executed to James Reed, who, it was intended, should hold it, though payable to him, in trust for her, she having furnished the amount loaned; that she derived the money from the sale of certain United States government bonds owned by her; that Reed died suddenly, and his administrators, the appellees in this case, assigned the mortgage before she could institute proceedings to have the trust in her favor established. She charged that she was entitled to have a trust declared in her favor as against the assets of ¹¹ Reed to the amount of the mortgage which had inured to the benefit of his estate; and that is the relief she sought. The answer denied that she had, or had had, any interest in the mortgage and disputed her asserted ownership of the government bonds alluded to in the bill. The fundamental inquiry, therefore, in the equity case was whether she did own bonds which Reed converted and invested in the mortgage in his own name. In the opinion, the learned judge went fully into a discussion of the evidence adduced before him on the issue of the ownership of the bonds which, it appears, were claimed to have been an inter vivos gift made by Reed to the plaintiff; and, after a careful and critical analysis and review of all the evidence, he explicitly decided that the bonds were not the property of the plaintiff, but that they belonged to Reed. Having reached that conclusion on the merits, the judge, incidentally it would seem, observed later on in the same opinion: "I

have thus, at the request of the solicitors in the case, gone into the merits and would dismiss the bill without regard to technical objections. But it seems to me to be perfectly clear that this proceeding could not be sustained at any rate, as at best it would be simply a conversion of the plaintiff's property by Reed, for which she had an ample remedy at law. If the bonds were hers she could have recovered in the suit she had on the law side of this court, or she could have instituted an action of trover."

These few sentences are now seized by the plaintiff and are relied on by her to show that the equity court dismissed the bill for the want of jurisdiction to entertain it; and the inquiry comes to this: Do these extracts from the opinion demonstrate, or can they be resorted to for the purpose of showing, that the bill in equity was dismissed, not because there was no decision on the merits, but because the court was without authority to pass upon the merits at all? The merits certainly were considered, discussed, and decided. The opinion, if it can be consulted to measure the scope of the final order leaves no room to doubt this. If the merits ¹² had in reality nothing to do with the ultimate conclusion reached in the equity case, it is difficult to understand why they were considered or decided at all. And if, in fact, the bill was dismissed solely for the want of jurisdiction in the court to grant the relief asked, and not because the evidence did not justify the granting of the relief, there would have been no occasion to advert to the merits. Looking to the record alone, it cannot be affirmed, except in a purely speculative way, which is too inconclusive to be the foundation of judicial action, that the final decision of the equity case was based on the want of jurisdiction to determine its merits, especially as there is nothing to disclose whether such a defense was taken in the answer. The decretal order itself does not show upon what ground the bill was dismissed. It is in these words: "It is adjudged, ordered, and decreed this fifth day of October, in the year 1895, by the circuit court for Allegany county, sitting as a court of equity, that the bill of complaint filed in this case be and the same is hereby dismissed, and that the plaintiff pay the costs to be taxed by the clerk of this court."

Even if the opinion may be looked to for the purpose of ascertaining whether the equity court considered that there was an adequate remedy at law, still there are no qualifying words in the decretal order warranting the inference that the merits were not finally adjudicated, or indicating that the dismissal was founded on purely technical grounds. Whenever a decree dismissing a bill in equity fails to restrict its own scope, the pre-

sumption, according to the great preponderance of decided cases, is, that the issues raised by the proceedings have been disposed of on their merits and they therefore become *res adjudicata*. When "the decree of dismissal is unqualified, it is presumed to be an adjudication on the merits adversely to the complainant, and constitutes a bar to further litigation of the same matters between the parties": *Tankersley v. Pettis*, 71 Ala. 179; *Story's Equity Pleading*, 793; *Adams v. Cameron*, 40 Mich. 506; *Thompson v. Clay*, 3 T. B. Mon. 359; 16 Am. Dec. 108; *Pelton v. Mott*, 11 ¹⁸ Vt. 148; 34 Am. Dec. 678; *Stickney v. Goudy*, 132 Ill. 213; *Kelsey v. Murphy*, 26 Pa. St. 78; *Foote v. Gibbs*, 1 Gray, 412; *Thurston v. Thurston*, 99 Mass. 39; 6 Ency. Pl. & Pr. 993, and the large number of cases there collected. In *Foot v. Gibbs*, 1 Gray, 412, it was said: "There is nothing to indicate the grounds of dismissal in this case, except the fact of dismissal after an appearance for the defendants. But the authorities, both in England and in this country, are decisive that a general entry of 'bill dismissed' with no words of qualification such as 'dismissed without prejudice,' or 'without prejudice to an action at law,' or the like, is conclusively presumed to be upon the merits and is a final determination of the controversy." And so in *Durant v. Essex Co.*, 7 Wall. 107, the supreme court, in speaking of a decree dismissing a former bill between the same parties, said: "The decree dismissing the bill in the former suit in the circuit court of the United States, being absolute in its terms, was an adjudication of the merits of the controversy and constitutes a bar to any further litigation of the same subject between the same parties. A decree of that kind, unless made because of some defect in the pleadings, or for want of jurisdiction or because the complainant has an adequate remedy at law, or upon some other ground which does not go to the merits, is a final determination. Where words of qualification, such as 'without prejudice,' or other terms indicating a right or privilege to take further legal proceedings on the subject do not accompany the decree, it is presumed to be rendered on the merits." And *Walden v. Bodley*, 14 Pet. 156, *Hughes v. United States*, 4 Wall. 237, *Bigelow v. Winsor*, 1 Gray, 301, and *Foote v. Gibbs*, 1 Gray, 412, were cited. The case of *Durant v. Essex Co.*, 7 Wall. 107, was followed and relied on in *Lyon v. Perin etc. Mfg. Co.*, 125 U. S. 698.

The broad terms of the decretal order dismissing the bill cannot be limited, qualified, or restricted by the opinion filed in the equity case. "The opinion of the judge is the expression

of the reasons by which he reaches his conclusions; these may be consistent or contradictory, clear or confused. ¹⁴ The judgment or decree is the fiat or sentence of the law, determining the matter in controversy, in concise technical terms, which must be interpreted in their own proper sense. It would, we think, be of dangerous tendency to make the force and effect of the most solemn official acts depend upon the various interpretations which ingenuity might suggest to the most carefully considered language introducing them": *State v. Ramsburg*, 43 Md. 333. Or as succinctly expressed in *Durant v. Essex Co.*, 7 Wall. 107, the reason for the signing of a decree "is no part of the judgment itself." The decree and not the opinion is the instrument through which the court acts: *Woods v. Fuller*, 61 Md. 460.

Agreeing, as we do, with the circuit court that the controversy involved in this case was fully and finally determined by the decree in the equity case between the same parties, we affirm its judgment with costs.

Judgment affirmed with costs above and below.

JUDGMENT—RES JUDICATA—DOCTRINE OF.—When a court has jurisdiction it has the right to settle every question which occurs in the cause, and, whether its decision be correct or not, its judgment until reversed is regarded as binding in every court: *Barrick v. Horner*, 78 Md. 253; 44 Am. St. Rep. 283, and note. If the same evidence will sustain both the present and a former action between the same parties, the judgment in such action is a bar to a subsequent suit: *Morrison v. Clark*, 89 Me. 103; 56 Am. St. Rep. 395, and note; *Fuller v. Metropolitan Life Ins. Co.*, 68 Conn. 55; 57 Am. St. Rep. 84, and note. See monographic note to *Fahey v. Esterley Machine Co.*, 44 Am. St. Rep. 562-572, on the proof of *res judicata*. All matters presented or presentable under the issue either to sustain or defeat the demand litigated in a prior suit, are concluded by the judgment in such prior suit: Extended note to *Gayer v. Parker*, 8 Am. St. Rep. 229, on what is and what is not *res judicata*. And in a court of chancery at least the form of the proceeding is immaterial, provided the judgment has been reached upon the merits and with a full opportunity for a fair hearing: *Burner v. Hevener*, 34 W. Va. 774; 26 Am. St. Rep. 943.

VOGLER v. ROSENTHAL.

[85 MARYLAND, 37.]

JUDGMENTS IN REM—INSOLVENCY ADJUDICATIONS—EFFECT OF AS AGAINST THIRD PERSONS.—An adjudication of insolvency upon the ground that a debtor has made a transfer to hinder, delay, and defraud his creditors, or to give some of them an unlawful preference, is a judgment in rem, and conclusively establishes as against the transferee that such transfer was made for the purposes found by the adjudication in insolvency. It is necessary, if the transferee wishes to protect his transfer, for him to appear in the insolvency court and resist the adjudication so far as it rests upon any ground which may affect him.

INSOLVENCY PROCEEDINGS—FRAUDULENT TRANSFER, WHEN RESORT MUST BE HAD TO INDEPENDENT SUITS TO VACATE.—When a debtor has been adjudged insolvent on his own petition or upon a petition of his creditors, but not upon a ground upon which it is subsequently sought to attack a transfer made by him, it is necessary for his trustee or assignee in insolvency to resort to an independent suit for that purpose. If, on the other hand, the proceeding is involuntary and upon some ground which, if it exists, renders the transfer void as against such assignee or trustee, the adjudication of insolvency upon that ground establishes it for all purposes, and relieves the assignee of the necessity of resorting to a suit in equity to avoid the transfer.

INSOLVENCY PROCEEDINGS—TRANSFEREES, WITHDRAWAL OF ANSWER OF WITHOUT PREJUDICE—EFFECT OF SUBSEQUENT ADJUDICATION.—If, in involuntary proceedings in insolvency, it is alleged as a ground thereof that the debtor has made a transfer while insolvent, or in contemplation of insolvency, for the purpose of hindering, delaying, or defrauding his creditors, or of preferring some of them, the persons to whom transfers have been made deny that they were made for the purpose alleged, and afterward such persons are permitted by order of court to withdraw their answer without prejudice, and the debtor is then adjudged an insolvent upon the grounds alleged in the petition, such adjudication is conclusive against such persons of the grounds upon which it was based. Their withdrawal of their answers had no other effect than to place them in the same position that they would have been in had they not appeared or answered at all.

Petition by certain persons alleged to be creditors of Louis Buckner, praying that he be adjudged an insolvent and alleging as grounds of the petition that the alleged insolvent had made fraudulent transfers of personal property to Hyman Rosenthal and J. Goldman with intent to hinder and defraud creditors. Buckner filed an answer July 27, 1896. In September, Rosenthal and Goldman filed separate answers. The matter was called for trial in October following, at which time, after a jury had been sworn, Buckner asked leave to withdraw his answer, and submit to being adjudged an insolvent debtor. The petitioning creditors objected claiming that they would, whether such answer was withdrawn or not, be entitled to a trial before the jury on account of the answers of Rosenthal and Goldman remaining in the case. Thereupon these parties gave notice that they would

withdraw their answers, provided they could do so without prejudice. The petitioning creditors objected. Thereafter, however, all the answers were withdrawn, and the court adjudged Buckner to be an insolvent debtor. The petitioning creditors still objected to the withdrawal of the answers of Goldman and Rosenthal, claiming a right to try before the jury the issues presented by such answers. The court, however, declared that the withdrawal of Buckner's answer left nothing for the jury to try. The petitioning creditors thereupon appealed.

Martin Lehmayr and Edwin Harvie Smith, for the appellant.

Howard Bryant, for the appellee, Goldman.

⁴⁰ McSHERRY, C. J. On the 17th of July, 1896, the appellants filed a petition in the court of common pleas praying that Louis Buckner might be adjudged an insolvent debtor. The petition contained numerous paragraphs, each averring some specific act of insolvency on the ⁴¹ part of Buckner. The tenth paragraph alleged that Buckner had, within two weeks prior to the date of the filing of the petition against him, made a fraudulent transfer of personal property to one Hyman Rosenthal; and in the eleventh paragraph it was charged that on the 29th of June he had made a similar transfer of other personal property to a certain J. Goldman, with intent, in each instance, to hinder, defraud, and delay his creditors, and with a design to conceal the said property and to prevent the same from being taken under legal process. Buckner answered the petition and denied its material allegations, and then prayed that the issues arising on the petition and answer might be tried by a jury. Both Rosenthal and Goldman came into the case and filed answers in which they respectively controverted the averments of the tenth and eleventh paragraphs of the petition. Eighteen issues were thereupon propounded by the petitioning creditors to be passed on by a jury. Subsequently these issues came on to be tried, and Buckner, through his attorney, asked leave in open court to withdraw his answer and prayer for a jury trial, to the granting of which the petitioning creditors objected because the answers of Rosenthal and Goldman would still remain in the case. Whereupon Rosenthal and Goldman gave notice that as soon as Buckner's answer and demand for a jury trial were withdrawn and he was adjudicated an insolvent, they would withdraw their answers if they could do so without prejudice; and the creditors gave notice that they would object. The answer of Buckner and his demand for a jury trial being then withdrawn, and there being no further defense made, he was

at once adjudicated an insolvent debtor, and preliminary trustees were appointed. Thereupon both Rosenthal and Goldman, pursuant to the notice they had given, filed petitions asking leave to withdraw their respective answers without prejudice; and the court passed two orders allowing these answers to be withdrawn without prejudice, and to the granting of these orders the creditors objected, and from the orders when passed they have taken ⁴² this appeal. The creditors, both before and after the withdrawal of Buckner's answer and prayer for a jury trial, and before and after his adjudication as an insolvent debtor, claimed the right to have the issues arising out of the answers of Rosenthal and Goldman to the original petition then and there tried by a jury; but the judge held that the withdrawal of Buckner's answer and prayer for a jury trial and his adjudication as an insolvent, coupled with the announcement that Rosenthal and Goldman would retire, left nothing before the court to try.

Had Rosenthal and Goldman the right to withdraw their answers? This is the sole question in the case. Rosenthal and Goldman were not made parties to the proceeding against Buckner, and no process was asked or was issued against them; but they came in of their own accord, as they were entitled to do, for the purpose of upholding the alleged fraudulent transfers of property made to them by the insolvent. They were under no obligation to appear if they did not wish to contest these allegations. Had they failed to appear at all, the adjudication of insolvency against Buckner would have conclusively established the invalidity of these transfers, because the unlawfulness of these transfers was one of the very grounds relied on to bring Buckner within the operation of the involuntary feature of the insolvent law. When a transfer, assignment, conveyance, or other disposition of property is charged to have been fraudulently made by a person who is insolvent or in contemplation of insolvency, with intent to hinder creditors, and the debtor is proceeded against under the provisions of the insolvent law relating to involuntary insolvency, and the transfer, assignment, conveyance, or other disposition complained of is made the basis or ground upon which the machinery of the insolvent court is put in motion and its jurisdiction is invoked, and there is no contest or denial of the averments of the petition by the debtor or by the individual holding the transferred, assigned, conveyed, or otherwise disposed of property, an adjudication that the debtor is an ⁴³ insolvent, and that he has committed acts of insolvency by doing the things

alleged against him, of necessity fixes his status and the status of the property, and conclusively establishes the fact that the transfer, or other disposition of property assailed or impeached, was fraudulently made with intent to hinder and delay his creditors. It would be an anomaly, indeed, if a debtor could be adjudged an insolvent on the ground that he had made an illegal transfer whilst at the same time the transfer thus made is still allowed to stand because in fact, it is not an illegal transfer at all. Such a contradictory position would make the assailed transfer, which is denounced only when it conflicts with the insolvent law, sufficiently unlawful to justify an adjudication of insolvency against the debtor, though sufficiently lawful, under the same law, to protect the person to whom the transfer had been made and to withdraw the transferred property from the reach of the insolvent's creditors. As a result, the transfer would be unlawful as respects the debtor, but lawful as respects the person to whom it was made; and thus the same act would at one and the same time be both lawful and unlawful, denounced and upheld.

Singular as this result may seem, it would nevertheless be entirely possible for it to occur if the adjudication of the debtor in involuntary proceedings does not determine that the allegations upon which the adjudication is founded are incontestably true. For the purpose of illustration assume a case: Suppose the debtor in this case had been proceeded against solely on the ground that he had transferred property to Rosenthal with intent to hinder and delay creditors, and with a view to conceal it and place it beyond the reach of legal process; and without contest Buckner had for that cause been adjudicated an insolvent. Would not that adjudication establish the truth of the averment that he did make such a transfer with such intent? And would it not further determine that, as respects the person to whom the transfer was made, the transfer was unlawful ⁴⁴ because of the absence of good faith on his part? If, however, it would still be necessary for the trustee subsequently appointed to go into a court of equity, for the purpose of having the transfer annulled, and that court should decree that the transfer was not made with a fraudulent intent, but was bona fide both as respects the debtor and the transferee, you would have two flatly contradictory decisions on the same subject by two separate tribunals; and you would have this anomaly, that Buckner had been declared an insolvent because he had done an act which the insolvent court adjudged unlawful but which the equity court decreed to be lawful; and, therefore, either he was wrong-

ly adjudged an insolvent, or the decree sustaining the transfer was erroneous.

If the transfer or conveyance, when made, is not a prohibited transfer, it is not a ground for an adjudication against the debtor; but if, when made, it is a ground for such an adjudication, then it is so because it is an inhibited transfer. But whether it be or be not such a transfer must be determined before the debtor can be adjudged an insolvent. When, therefore, a court having the jurisdiction to decide whether the debtor has, by a given transfer or disposal of his property to another, committed an act of insolvency, does in fact determine that the debtor did by that particular specified transfer make an unlawful disposal of his property, and, in consequence, further adjudges the debtor to be an insolvent, the transfer or disposal decided to be unlawful and made the foundation of the insolvency proceedings and the adjudication must of necessity fall, because the adjudication itself involves and is based on the invalidity of the impeached transaction. If the individual who holds what is alleged to be an unlawful transfer of the debtor's property wishes to rescue the transfer from condemnation in an involuntary insolvency proceeding, he must interpose and make defense in the insolvent court or he will be forever barred by the adjudication there pronounced upon that transaction; because the court, having ¹⁵ jurisdiction to determine whether the thing alleged to be unlawful was or was not a fraudulent transfer or disposal of the debtor's property, having once decided that it was, its adjudication, being in rem, or in the nature of an adjudication in rem, binds all the world until reversed on appeal or set aside by the tribunal that pronounced it.

This has been the uniform ruling of this court when the transaction or instrument assailed in the petition in involuntary insolvency has been one that created a prohibited preference, whether the preference was one that was apparent on the face of the instrument or was disclosed by extrinsic evidence. Thus, in *Brown v. Smart*, 69 Md. 320, affirmed in 145 U. S. 457, where a deed of trust for the benefit of creditors, reciting the grantor's insolvency and giving preferences, was made the basis of an involuntary insolvency proceeding, it was held that the adjudication of the grantor to be an insolvent debtor struck down the deed of trust under section 13 of article 48 of the code of 1860 (now section 14 of article 47 of the code of 1888 as amended by the act of 1896, chapter 446.) "The statute," we said, "by force of its own terms operates upon the deed, and . . . strikes it down from the moment the debtor is adjudi-

cated an insolvent, the illegal preference being the basis of the adjudication; and in such case no defense could be interposed to rescue the deed from the fate declared for it by the statute." And so in *Baker v. Kunkel*, 70 Md. 392, the mortgage executed by the insolvent was made the basis of the proceedings against him, and when he was adjudged to be within the insolvent law because he executed it, it was stricken down by the insolvent court. The mortgagee could have saved the mortgage from condemnation only by appearing to the insolvent proceedings and resisting the adjudication of the debtor to be an insolvent. In *Willison v. First Nat. Bank*, 80 Md. 196, the fraudulent preferences attached were payments, and, upon the adjudication of the debtor to be an insolvent, it was held that the payments were void and the trustee to be afterward ⁴⁶ elected was ordered to recover the money back. In *Dumler v. Bergman*, 79 Md., "unreported cases," 29 Atl. Rep. 826, a bill of sale was attached as a preference. The debtor filed no answer, but the grantee in the bill of sale did. It appeared from the evidence and finding of the jury on the issues submitted to them that part of the expressed consideration was an antecedent debt, and the court, upon adjudicating the grantor to be an insolvent, struck down and annulled the bill of sale as a prohibited preference. The cases just cited were all cases of unlawful preferences and they fell under section 14 of article 47 of the code, which in terms declares all preferences void, "howsoever the same may be made." It is wholly immaterial whether the preferences appear upon the face of a written instrument, or whether they are created by a payment of money, a transfer of property, or otherwise, they all alike are denounced as void; and the adjudication of the debtor to be an insolvent ipso facto strikes them down when they are made the basis of that adjudication.

The tenth and eleventh paragraphs of the petition were framed under section 22 of article 47 of the code, as amended by the act of 1896, chapter 446, and it is assumed that though *Buckner* has been adjudged an insolvent, the transfers complained of must be treated under section 24 of the article, amended by the same act of 1896, as only *prima facie* intended to hinder and delay creditors, and that they cannot be set aside by the insolvent court, but must be assailed in another forum. As thus put the proposition is not tenable. Any deed, conveyance, gift, transfer, or delivery of goods, chattels, moneys, choses in action, lands, tenements, or other property made when the grantor or donor is insolvent or in contemplation of insolvency is declared by section 24 to be *prima facie* intended to

hinder, delay, and defraud the creditors of the person by whom the same is made, and the burden of proof is imposed on both him and the grantee or donee to explain the same and show the bona fides thereof. This section prescribes a new rule of evidence ⁴⁷ which is applicable as well to deeds, conveyances, gifts, and transfers relied on as grounds in coercive insolvency proceedings to have a debtor adjudged an insolvent as to the same instruments and acts when attacked in suit instituted by the insolvent's trustee after adjudication; and in each instance it condemns the transaction as fraudulent on its face, and permits it to be rescued only when the grantor and grantee or donor and donee shall cause its good faith to appear affirmatively. And this rule of evidence under the broad terms of the statute is operative alike in the insolvent court and in a court of law and of equity. As it is obvious that the character of the acts or transactions which are made the basis of involuntary insolvency proceedings must be passed upon, and as those acts and transactions must be determined by the insolvent court to be fraudulent within the meaning of the insolvent law before the court can adjudicate the debtor to be an insolvent, it is no less apparent that when the insolvent court has adjudged the debtor to be insolvent because, under the rule of evidence prescribed by section 24, the very acts or transactions complained of were, in the eye of the law, fraudulent and intended to hinder and delay creditors, it must, of necessity, have passed upon and decided a subject matter expressly within its jurisdiction, and the same question cannot be open for investigation in some other tribunal thereafter, except upon appeal for review by an appellate court. Without possessing the power to decide whether a given transfer of chattels was made with intent to hinder and defraud creditors, or with a view to conceal the property so as to prevent it from being taken under legal process, the insolvent court would be wholly unauthorized to adjudge the debtor an insolvent under this particular involuntary feature of the law; because it is only when the court has itself or by the aid of a jury found the fundamental fact of a fraudulent transfer or concealment that it can, in the case suggested and for that cause, proceed to declare the debtor an insolvent. When that court has found the fact which empowers ⁴⁸ it to adjudicate the debtor an insolvent, the fact thus found cannot be controverted elsewhere, and it becomes unnecessary to go into any other tribunal to procure an adjudication precisely to the same effect.

But where a debtor has been adjudged an insolvent upon one ground, or where he voluntarily applies for the benefit of the

insolvent law, then his trustee must proceed in other forums to have set aside and annulled whatever fraudulent transfers, assignments, liens, or preferences there may be apart from the one forming the basis of his involuntary adjudication; and the insolvent court is without jurisdiction to strike them down. Under the insolvent law existing prior to the act of 1880, there was no involuntary feature, and whenever it became necessary to vacate an assignment or a fraudulent preference or other prohibited transfer, the insolvent's trustee was compelled to seek the aid of a court having jurisdiction over the subject matter as in other controversies. It was with reference to the state of the law existing prior to 1880 that this court used the language quoted from *Purviance v. Glenn*, 8 Md. 206, in *Paul v. Locust Point Co.*, 70 Md. 292, to this effect, viz: "Property belonging to the insolvent may be in different places, or suits in equity may be necessary to vacate assignments; in all which cases it is manifest that the trustee can proceed only in the courts having jurisdiction over the subject matter, as in other controversies."

Now, if Rosenthal and Goldman had not withdrawn their answers, it cannot be doubted that the court of common pleas would have had jurisdiction to try the twelfth, thirteenth, fourteenth, and fifteenth issues framed under the tenth and eleventh paragraphs of the petition; and if that court would have had jurisdiction to try those issues, it would have had authority upon a finding in favor of the creditors to enter up not only an adjudication of insolvency against Buckner, but also an adjudication that the transfers of merchandise to Rosenthal and Goldman were fraudulent, and that they had been made to conceal the property and place it beyond the ⁴⁹ reach of legal process. Such an adjudication would have been effective to vacate the transfers, because it would have stamped them as invalid, and no resort would have been necessary, or could have been had, to any other tribunal for the purpose of annulling what had already been made void. The averments of the petition gave the court of common pleas jurisdiction over the subject matter set forth in the tenth and eleventh paragraphs, and the withdrawal of the answers of Rosenthal and Goldman and of Buckner could not oust or even limit that jurisdiction in any way. Without any answers at all section 24 of article 47 denounced the transfers as *prima facie* fraudulent, and the court would have been justified in proceeding to an adjudication of insolvency and the consequent annulment of the transfers. As, then, that court had incontestably the jurisdiction to hear and decide upon the validity and good

faith of these transfers under the petition, it was clearly the duty of Rosenthal and Goldman to remain in the case and to controvert the averments of the tenth and eleventh paragraphs, if they desired to prevent the transfers from being set aside; but they had the undoubted right to withdraw from the case, just as they had, in the first instance, the right not to become parties to it. But that withdrawal was at their peril, for they could, by withdrawing, neither deprive the court of jurisdiction nor retard or delay the petitioning creditors in having every averment of their petition passed upon by the insolvent court. Having announced their intention to withdraw their answers, which asserted the validity of the transfers, and having actually withdrawn them, the court of common pleas rightly adjudicated Buckner an insolvent, and with that adjudication these transfers fell and were vacated, because there were practically no longer any answers in the case to rescue the transfers from that fate. The learned judge was consequently right in refusing to go on with the trial, because, as he held, there was nothing before him to be tried. The fact that the withdrawal of the answers was without prejudice amounts to nothing. That ⁵⁰ part of the orders was simply inoperative, because the withdrawal of the answers, in whatever form it was made, was, of necessity, in effect unqualified. And it was unqualified because there is no other proceeding to which resort can be had. It is perfectly true this may not result as Rosenthal and Goldman intended; but we are unwilling to put a construction on the insolvent law which will lead to a defeat of its salutary provisions in many instances; or at least will often be conducive to such delay in actual practice as will seriously impair and cripple the efficacy of the whole insolvent system.

Distinct issues were made by the answers of Rosenthal and Goldman. The court of common pleas as a court of insolvency had the undoubted jurisdiction to try those issues, and the announcement that those parties would withdraw their answers, and, therefore, make no further contest as to the truth of the matters averred in the tenth and eleventh paragraphs of the petition, did not and could not deprive the court of its power to proceed in the case to an adjudication, with all the incidents and consequences which that adjudication involved.

We are not unmindful of the general principle that a judgment in one tribunal only operates as an estoppel to a subsequent proceeding when the matter in issue in the second inquiry has been determined between the same parties in the first; and that where the first judgment may have been founded on one or more of many grounds it is generally competent to

show that it was not in fact based on the particular ground relied on in the subsequent action, unless pursuant to settled principles a contrary presumption prevails. But we are not invoking in this case the doctrine of *res adjudicata* or *estoppel*. The adjudication in insolvency is an adjudication in rem, and upon that ground it is held to fix and determine the status of the debtor and the status of the property alleged in the petition to have been unlawfully dealt with by him. For that reason a party who has had an opportunity to maintain in the insolvent court the validity ⁵¹ of a transfer made to him, and which transfer the petition against the debtor impeaches, will not be allowed, after standing by without contest, to litigate the same matter in some other forum; more especially after having voluntarily appeared in the insolvent court, and then having subsequently abandoned the very same issue he had set up there. The law having given him a standing in court, it will not suffer him, when he has deliberately refused to avail of it, to assert the same claim in some other tribunal.

As the adjudication of Buckner to be an insolvent carried with it the transfers mentioned, the court was right in not allowing a trial to be had upon issues already determined; and as the petitioning creditors secured by that adjudication all they could have been entitled to if a trial had taken place and had resulted in a finding on every issue for them, they were not prejudiced by the orders allowing Rosenthal and Goldman to retire from the proceedings.

There being no error in the action of the court as we have interpreted it, the rulings complained of will be affirmed with costs.

Rulings affirmed with costs, and case remanded for further proceedings, striking down these transfers.

JUDGMENTS IN REM—EFFECT AS AGAINST THIRD PERSONS.—A judgment in rem by a court of special and exclusive jurisdiction is an adjudication upon the status of some particular subject matter, and is conclusive upon all persons: *Lord v. Chadbourne*, 42 Me. 429; 66 Am. Dec. 290. See extended note to *Street v. Augusta Ins. etc. Co.*, 75 Am. Dec. 720-724, for a full discussion of judgments in rem; also, *Griffith v. Milwaukee Harvester Co.*, 92 Iowa, 634; 54 Am. St. Rep. 573.

INSOLVENCY—PREFERENCE OF CREDITORS.—A preference may be avoided if made by one who is insolvent, with the intent to give a preference to a creditor who has a reasonable belief that the debtor is insolvent or in contemplation of insolvency: *Denny v. Dana*, 2 Cush. 160; 48 Am. Dec. 655, and note. The burden of proof is on the assignee suing to recover the property to establish the fact that the creditor when he took the transfer had reasonable cause to believe the debtor insolvent: *Butler v. Breck*, 7 Met. 164; 39 Am. Dec. 768. See extended note to *Patapsco Ins. Co. v. Biscoe*, 28 Am. Dec. 218, 219.

IN RE STICKNEY'S WILL.

[85 MARYLAND, 79.]

PERPETUITIES.—BEFORE THE RULE AGAINST PERPETUITIES WILL BE APPLIED, it must be clear that a perpetuity exists. When language is fairly capable of two constructions, one of which will produce a lawful result, and the other one that is bad for remoteness, the former should be adopted rather than the latter.

CONDITIONS PRECEDENT AND SUBSEQUENT, TESTS OF.—If the thing to be done does not necessarily precede the vesting of an estate in the grantee, but may accompany or follow it, and might as well be done after as before the vesting of the estate, the condition is subsequent.

PERPETUITY, WHEN NOT CREATED BY A CONDITION IMPOSED ON THE GRANTEE.—If property is devised to a corporation by a will, in which the testator declares that he expressly requires as a condition of the vesting of the devise that the corporation shall release certain claims against various churches therein specified this condition does not create a perpetuity, though it is possible that the releases might not be executed within lives in being and twenty-one years. The condition is not a condition precedent, and does not prevent the immediate vesting of the estate. Furthermore, the acceptance of the provisions of the will in itself operates as an equitable release of the claims specified therein, and the execution of a formal release would be decreed by a court of equity upon the application of any person interested.

CONDITIONS PRECEDENT AND SUBSEQUENT—CONSTRUCTION.—Courts are adverse to construing conditions to be precedent where they may defeat the vesting of an estate by a will.

WILLS—CORPORATIONS, POWER TO TAKE BY, WHO MAY QUESTION.—The capacity of a corporation to take property by devise or bequest in excess of the amount prescribed by law cannot be questioned by the heirs or next of kin of the testator, but only by a direct proceeding instituted for that purpose.

John Prentiss Poe and George Wilcox, for the appellant.

John C. Everett and William A. Fisher, for the appellees.

98 FOWLER, J. The bill in this case was filed by some of the heirs at law and next of kin of the late Joseph Henry Stickney of Baltimore City, for the construction of certain parts of his will. By the first twenty-four clauses the testator gives "moderate pecuniary legacies" to his nephews, nieces, and cousins. The remaining fifty-two clauses, with the exception of the twenty-fifth and twenty-sixth, with which we are not now concerned, relate to legacies to a large number of religious, charitable, and educational corporations. Many of these were attacked by the original and amended bill, but, by amendments and by dismissing their appeals as to some of these clauses, the plaintiffs have left but two clauses, namely, the seventy-fifth and seventy-sixth, for our consideration.

The distinguished counsel representing the parties on both sides of the three appeals now before us, in addition to exhaus-

tive oral arguments, have filed voluminous briefs. Both in the preparation of these briefs as well as in the arguments at bar, they have shown such fullness of learning, thorough investigation and such skill and zeal as to excite admiration. We cannot, however, give our assent to the view in reference to the seventy-sixth or residuary clause, which has been so ably advocated by the plaintiffs' counsel. The statement of their position, it appears to us, will demonstrate the futility of any successful attempt to maintain it in the face of the language of the testator on which it is founded. ⁹⁹ That position is that the residuary clause is void because it violates the rule against perpetuities. They contend, secondly, that the seventy-fifth clause is void for the same and other reasons; and, thirdly, that, by the laws of the state of New York, under which the corporation which is the residuary legatee was incorporated, it has no corporate capacity in any view to take more of said residuary estate of the testator than will amount to or yield the annual income of ten thousand dollars.

By the decree of the court below it was held that the fourth and fifth subclauses of the seventy-fifth clause, and the whole of the seventy-sixth or residuary clause were void, and that the bequests thereby made should go to the plaintiffs and defendants, next of kin of the testator, in certain proportions not necessary now to mention. All the other parts of the will were sustained. From this decree the plaintiffs have appealed so far as it sustains the seventy-fifth clause. Some of the defendants who are next of kin and have the same interest as the plaintiffs, have taken a similar appeal. The residuary legatee has appealed generally from the decree.

The question is based upon: 1. The supposed fatal objection of a violation of the rule of perpetuity by the seventy-sixth clause; 2. The incapacity of the residuary legatee to take; and, 3. The validity of the seventy-fifth clause, will be considered in the order just named.

The language upon which the first contention rests is as follows:

"Seventy-sixth.—I give, devise and bequeath all the rest of my estate and property of every kind and description whatsoever, real, personal, and mixed, and wheresoever situated or being, which I may own or have any right or title to, at the time of my decease, and that whether the same has been acquired by me heretofore, or shall be acquired by me hereafter, unto the body corporate, formerly existing as a corporation under the name of 'The American Congregational Union,' but which has

laid aside that name, and is now properly designated as the 'Congregational Church ¹⁰⁰ Building Society,' which has its offices in the 'Bible House,' in New York City, and in the 'Congregational House,' in Boston, and of which H. O. Pinneo, Bible House, New York, is (or lately was) treasurer, and I expressly hereby require, as a condition of the vesting of this legacy, that the said residuary legatee, the said 'Congregational Church Building Society,' shall release all claim which it has against the 'First Congregational Church of Baltimore,' for any fund or funds, or money owing by said church to it, and any and all claim and demand that it has to, for or against any and all property in the city of Baltimore now occupied by said church, and shall execute to such church a good and valid legal assignment, transfer, and release thereof; and shall in like manner release the 'Second Congregational Church of Baltimore,' and the 'Canton Congregational Church of Baltimore County,' from any and all claims and demands which it has or shall have against either of said churches, or any property of any kind used by or in possession of said 'Second Congregational Church of Baltimore,' or said 'Canton Congregational Church of Baltimore County.'"

The words in which the condition is set forth "and I expressly hereby require, as a condition of the vesting of this legacy, that the said 'Congregational Church Building Society' shall release," etc., are relied upon as the first and most important step in establishing the existence of a perpetuity, for in them the plaintiffs, and the defendants who agree with them, have found a condition precedent. In short, the contention is, notwithstanding the emphatic terms used by the testator in making the gift, that there was not and was not intended to be made, any immediate bequest; that the condition on which it was given is precedent and not subsequent, and that, therefore, the bequest is subject to the well-known rule against perpetuities and is void in its inception, because the condition is such that it must not necessarily and under all circumstances be performed within the compass of a life or lives in being and twenty-one years and a fraction afterward.

¹⁰¹ But notwithstanding the force and skill with which this view was pressed upon us, we fail to find any substantial support for it in the language of the testator. After making such provision as he deemed proper for his relations, having no immediate family of his own, he proceeded to distribute the residue among a number of corporations of the character we have already mentioned—giving to the residuary legatee nearly one-

half of his large estate. It was undoubtedly his intention that all of these legatees, including, of course, the residuary legatee, should take, hold, and administer the legacies which he bequeathed to them respectively. We should not, therefore, assume that he intended to violate a settled rule of law, and thus by the will itself frustrate his own declared intention; but, if the language which he used, upon its face, shows such an intention, it would, of course, be our duty to apply the rule "remorselessly" (Gray on Perpetuities, 378), without regard to the consequences. But it is obvious that before this rule can be applied, the subject to which it is to be applied must exist. As was said by Sir George Jessel, M. R., in *Cunliffe v. Brancker*, L. R. 3 Ch. Div. 394: "Courts do not regard the consequences of any rule of construction which they may have established as presenting any objection to its application, when clearly called for." In other words, before the rule will be applied it must be clear that a perpetuity exists. It must be conceded that this view, especially in its application to wills, is supported not only by reason but by the settled rules of construction and the great weight of authority. We do not understand there is any difference between counsel as to the rule, nor the circumstances under which it should be applied, but they differ widely as to the propriety and justice of its application to the will now before us, and the single question, therefore, upon this branch of the case is, admitting the rule here invoked by the plaintiffs, but that it is to be applied only when clearly called for, whether this is such a clear case as to demand its application. It is said that when the language "is fairly capable ¹⁰² of two constructions, one of which would produce a legal result, and the other, one that would be bad for remoteness," we should adopt the former rather than the latter and thus promote the accomplishment of the testator's intention: Gray on Perpetuities, sec. 633.

While in the books there may be found much learning and many nice distinctions in the law relating to conditions precedent and subsequent, yet in the construction of wills we should constantly keep in mind the great object in cases like this, which is to ascertain the testator's intention, and, having discovered that, to declare and enforce it if consistent with the rules of law. The question as to whether certain words create a condition precedent or subsequent is generally one of intention, and this is especially so when the condition is annexed to a devise or bequest. It is said in *Creswell v. Lawson*, 7 Gill & J. 240, that there are no "precise technical

words necessary to the creation of a condition precedent or subsequent, either in a will or deed; but the same words may be construed to operate either as the one or the other, according to the evident sense to which they are used, as indicated by the instrument. Upon this principle," continues the court, "all the cases profess to have been decided." It is equally well settled that if the thing to be done does not necessarily precede the vesting of the estate in the grantee, but may accompany or follow it, and may as well be done after as before the vesting of the estate, the condition is subsequent: 1 Jones' Law of Real Estate, 619; *Finley v. King*, 3 Pet. 346. It seems to us that it is evident that the acts here relied on as constituting conditions precedent, namely, the execution of certain releases, are capable of being performed either at the time, before, or after the vesting of the bequest in the residuary legatee—whether performed at one time or the other, the result to all the parties interested would be the same, hence there is no reason to suppose that the testator intended the releases should be executed before the vesting of the bequest as a protection to the churches which were to be ¹⁰³ thereby benefited. Indeed, it would seem, upon the plainest principles of justice and equity, that the acceptance of the bequest would ipso facto work an equitable release. An obvious construction to be placed upon the language is, that when the executors should put the residuary legatee in possession, it was to execute the required releases, and, if it should delay or for any reason refuse beyond a reasonable time to act, a court of equity would, at the instance of the proper parties, decree releases to be executed so as to give absolute protection. The supposed difficulty here disappears when we apply the rule as laid down by C. J. Marshall in *Finley v. King*, 3 Pet. 346. If the act or condition required does not necessarily precede the vesting of the estate, but may accompany or follow it, the condition is subsequent, in which case, of course, no perpetuity arises, for the obvious reason that the bequest vests at once upon the death of the testator, and cannot, therefore, be said to be put and kept extra commercium. But it would seem, also, that the form of the gift, "I give, devise, and bequeath," shows that a present and not a future estate was intended, and that in the contemplation of the testator the residuary legatee was to take at once upon his death, and not at some remote uncertain time in future beyond the period allowed by law: *Eldridge v. Eldridge*, 9 Cush. 519; 2 Washburn on Real Property, 449.

The remaining words, "and I expressly hereby require as a

condition of the vesting of this legacy," must be construed so as to effectuate the general intention unless it is clear that intention is contrary to the rule against perpetuity. But "courts are averse to construing conditions to be precedent where they might defeat the vesting of estates under a will": *Pennington v. Pennington*, 70 Md. 418. And especially is this so "in regard to residuary bequests": *Dulany v. Middleton*, 72 Md. 75. And in conclusion it is only necessary to say that when the executors are prepared in the course of the administration of the testator's estate to transfer the legacy, the residuary legatee will then, or within a reasonable time thereafter to be fixed ¹⁰⁴ by the court in which the estate is being administered, be required to execute the releases mentioned in the residuary clause. Thus we think, the plain intention of the testator would be accomplished, for the residuary legatee would get what it must be conceded it was intended that it and not the plaintiffs should have, and this result would be attained without the violation of the rule against perpetuities.

2. This brings us to the consideration of the second question, whether the residuary legatee has any corporate capacity to take more of the residuary bequest than a sum that will not exceed the annual income of ten thousand dollars.

Whether it has such power depends, say the plaintiffs, upon its charter, which is found in acts of the New York legislature. It was incorporated under the provisions of the New York "Act for the incorporation of benevolent, charitable and missionary societies," passed April 14, 1848. The name of the corporation was afterward changed to the name it now bears, "The Congregational Church Building Society." Section 2 of the act of 1848 is as follows: "And they, and their successors, by their corporate name, shall in law be capable of taking, receiving, purchasing and holding real estate for the purpose of this incorporation to an amount not exceeding the sum of fifty thousand dollars in value, and personal estate for like purposes, to an amount not exceeding the sum of seventy-five thousand dollars in value; but the clear annual income of such real and personal estate shall not exceed the sum of ten thousand dollars."

Section 6 is as follows: "Any corporation formed under this act shall be capable of taking any devise or bequest, contained in any last will or testament of any person whatsoever, the clear annual income of which devise or bequest shall not exceed the sum of ten thousand dollars; provided no person leaving a wife or child or parent shall devise or bequeath to such

institutions or corporations more than one-fourth of his or her estate, after the payment of his or her debts, and such devise or bequest shall be valid to the extent of ¹⁰⁵ such one-fourth, and no such devise shall be valid in any will which shall not have been made and executed at least two months before the death of the testator."

The contention of the plaintiffs is that none of the various acts (Act 1881, c. 641; Act 1885, c. 88; Act 1890, c. 497; Act 1892, c. 687, sec. 12), which either amended the act of 1848 or related to the same class of corporations, made any change whatever in the provisions of section 6 just quoted, except the Act of 1860, chapter 360, which made no change material to the question here being considered, and that, therefore, section 6 remains unaffected, and hence the residuary legatee can only take as is thereby provided. But, in answer to this contention, it is said that however much the power of other charitable corporations in the state of New York may have been restricted by section 6, it has and can have no force as against this legatee, since the act of 1871, chapter 111, which is as follows:

"Chapter 111. An act relative to the American Congregational Union of the city of New York. Passed March 15, 1871.

"The people of the State of New York, represented in senate and assembly, do enact as follows:

"Section 1. It shall be lawful for the American Congregational Union in the city of New York to take and hold, by gift, grant, or devise, or otherwise, subject to all the provisions of law relating to devises and bequests by last will and testament, and to purchase, hold, and convey any estate, real or personal, the annual income received from such real estate not to exceed the sum of seventy-five thousand dollars, for the purpose of aiding feeble churches in the erection of houses of worship, and to render such aid, by gift or grant, or by loan, either with or without security.

Sec. 2. This act shall take effect immediately."

It is conceded, as we understand the position of the plaintiffs, but, whether conceded or not, it is plain that this act increases the power of this legatee "to take and hold by gift, grant, or devise, or otherwise" from all sources an unlimited ¹⁰⁶ amount of personal property and real estate, the annual income from which shall not exceed the sum of seventy-five thousand dollars. Much was said as to the effect of this act, and especially as to whether, conceding its enlarging effect upon the power of this corporation to take in the aggregate, it altered or repealed the

limitations contained in section 6, and whether, also conceding that section 6 is still in force in New York as to this corporation, it has any force outside of that state.

But we will not undertake to pass upon these questions, interesting as they are, for assuming that the section in question limiting the power of this corporation to take, prevails in the state of New York, and that it may be recognized in other states, the plaintiffs and defendants who are here relying upon it to show a want of corporate power clearly have no standing, for that purpose, in the courts of this state, since the decision of the case of *Hanson v. Little Sisters etc.*, 79 Md. 440, for we there held that the legal capacity of a corporation to take property by devise or bequest in excess of the amount prescribed by its charter cannot be taken advantage of by heirs at law or next of kin. We there said: "In regard to the question before us there has been considerable conflict of authority. The court of appeals of New York in *Matter of McGraw*, 111 N. Y. 66, announced the doctrine relied on by the appellants (the heirs at law), but the supreme court of the United States in *Jones v. Habersham*, 107 U. S. 174, adhere to the contrary doctrine, namely, that restrictions imposed by the charter upon the amount of property it may hold cannot be taken advantage of collaterally by private persons, but only by the state in a direct proceeding instituted for that purpose. And it was so held in a case where, as here, the heirs of a decedent filed a bill to have declared void certain devises to charitable corporations, which it was averred would swell the amount of property owned by the corporation to an amount greater than the charter authorized."

¹⁰⁷ The act of 1871, before mentioned, as we have seen, gives to the residuary legatee power to take personal property without limit, and real estate not in excess of the estimated value of the whole of the bequest here in controversy. Therefore this case comes directly within *Hanson v. Little Sisters etc.*, 79 Md. 440, for we there said: "It cannot be denied that this corporation had power to take any estate and property not exceeding the charter limits, and the devise, therefore, was not void on its face, and it must be held valid as to all the world, until it has been determined at the instance of the state that the charter has been violated. . . . The corporation can take property to any amount, but can hold it, as against the state, only to the amount provided by the charter." But it is urged that the doctrine thus laid down should not be applied to this case as against the next of kin. While we are not unmindful of their claims, yet we must not forget, keeping in mind the cardinal rule, that

the testator's intention, as expressed in his will, must be respected and enforced unless contrary to some settled principle of law. Hence there can be no hesitation or doubt as to the proper course to pursue when we discover that by following our own doctrine we gratify his clearly expressed will that this legatee should have his residuary estate, and by following the supposed ruling of the court of appeals of New York we would give that estate to those who were not intended to have it. And especially should we be governed by our own decision in *Hanson v. Little Sisters etc.*, 79 Md. 440, and refuse to follow the New York cases cited by the plaintiffs, when it is, at least, questionable whether the courts of that state would enforce the statute in question as against a bequest found in the will of a Maryland testator: *Cross v. United States Trust Co.*, 131 N. Y. 348; 27 Am. St. Rep. 597; *Hope v. Brewer*, 136 N. Y. 126; *Dammert v. Osborn*, 140 N. Y. 40. In the case last cited, it was held that there was no law that prohibited gifts to charity there by testators in other countries, or that requires New York courts to reject the gift because it might not in all respects be in conformity with the local law of that state. "There ¹⁰⁸ are other statutes," said the court, "that invalidate testamentary gifts to certain corporations unless made within a certain time before death, when the testator has wife, child, or parents. But these restraints applied to members of the political community from which the law emanated, and not to persons in other countries where no such restrictions existed. Bequests by such persons to those corporations, without regarding the statutes referred to, would be good if valid at the domicile of the testator. Our law permits the citizens or subjects of other countries to dispense charities here in such measure as they wish, and according to such methods as their own laws prescribe. The policy which dictated our statutes against perpetuities and accumulations did not anticipate any danger from abroad, and our recent decisions are to the effect that they are local in their general scope and effect." We do not overlook the fact that it was earnestly contended that the language just quoted and similar language used in other cases by the same tribunal does not, and was not intended to, refer to the whole of section 6, and especially not to that part of said section which is here relied on and which it is claimed restricts the power of the legatee. But whatever may have been the intention, the language of the court is, that testators in other states may dispense charities in New York "in such measure as they wish, and according to such methods as their own laws prescribe." It would seem, therefore, that the

law of New York in such a case as this would govern neither the amount of a bequest, nor the method; that is, the time when nor the manner in which it is to be bequeathed. But be this as it may, our rule as applied to this case is clear and distinct, and we follow it because we are bound to do so, and because by so doing we gratify and do not frustrate the testator's expressed wishes.

Having held that the residuary clause stands and that the residuary legatee takes the whole of the residuary estate, it becomes unnecessary to consider the questions presented by the objections raised to the seventy-fifth clause, because ¹⁰⁹ it is provided by the residuary clause that if any of the charitable bequests, legacies, or devises for charitable uses or public or local improvements or benevolent purposes made by the will shall fail to take effect, they shall go to the residuary legatee. Therefore in no event can the heirs or next of kin have any interest in the question of the validity or invalidity of the seventy-fifth clause. The residuary legatee, being alone interested in having this clause set aside, has abandoned and disclaimed all right to any of the bequests therein made, and has expressly insisted upon the validity of the will and every part of it.

It follows, therefore: 1. That the seventy-sixth or residuary clause is free from the objection that it creates a perpetuity; 2. That the residuary legatee will take the whole of the testator's residuary estate, the heirs and next of kin having no right to raise the objection of its want of corporate capacity to take more than the amount limited by section 6 of the said act of 1848; and 3. That the seventy-fifth clause is to be taken and considered as valid.

Decree reversed and cause remanded, costs to be paid out of the estate.

PERPETUITIES—RULE AGAINST.—Every instrument attempting to make a disposition of property will, unless its language forbids, be so construed as not to conflict with the rule against perpetuities, and, therefore, if an instrument is susceptible of two constructions, one of which is obnoxious to the rule, and the other not, the former will not be given: *Monographic note to In re Walkerly*, 49 Am. St. Rep. 126, on the rule against perpetuities.

CONDITIONS—PRECEDENT AND SUBSEQUENT—CONSTRUCTION OF.—A condition will be held to be a condition subsequent if the act does not necessarily precede the vesting of the estate, but may accompany or follow it: *Bell County v. Alexander*, 22 Tex. 350; 73 Am. Dec. 268. Conditions which tend to divest an estate are to be strictly construed: *Note to Jackson v. Schutz*, 9 Am. Dec. 202. And it is an established rule that conditions subsequent are not favored by law and may be created only by express words or clear implication: *Scovill v. McMahon*, 62 Conn. 378; 36 Am. St. Rep. 350,

and note; Kilpatrick v. Baltimore, 81 Md. 179; 48 Am. St. Rep. 509; monographic note to Cross v. Carson, 44 Am. Dec. 744.

CORPORATIONS—POWER TO TAKE UNDER WILL.—As to the capacity of corporations to take title to realty generally, see the monographic note to Page v. Heineberg, 94 Am. Dec. 381-387; by bequest or devise, see McCartee v. Orphan Asylum Soc., 9 Cow. 437; 18 Am. Dec. 516, and note; Downing v. Marshall, 23 N. Y. 366; 80 Am. Dec. 290, and note.

Whether Heirs of a Testator may Assail a Devise or Bequest to a Corporation.

When a devise or bequest of property to a corporation is assailed on the ground that such corporation has no power to receive it, the object of the prohibition is a material subject of inquiry. Has the legislature, through some jealousy of corporate aggression and acquisition, sought to fix the limits thereof, or has it, through some tenderness for heirs, limited the power to disinherit them in so far as a testator has sought to exercise it for the benefit of the corporation in question? To the extent which a state seeks to limit the power of corporations to acquire or hold property of any character whatsoever, the state alone should be permitted to complain when corporations undertake to pass beyond the limits assigned them. A conveyance or other transfer of property to a corporation is not void, but, on the contrary, vests title in the corporation, to be held by it until such time as the state, acting by its properly constituted officers, interposes to complain that the corporation has usurped powers and franchises in excess of those conceded to it by law: Note to Page v. Heineberg, 94 Am. Dec. 381.

Under the English statute of wills, the right to make devises to bodies politic and corporate was denied, and a similar denial has, at times, been incorporated in the statutes of some of the states, and, where such is the case, it seems to be conceded that a devise to a corporation is absolutely void, and that the testator must be regarded as dying intestate with respect to the property so sought to be devised, and this whether the corporation is foreign or domestic, and, if foreign, it is not material that it is competent by the laws of the state of its creation to accept a devise of real property therein situate: McCartee v. Orphan etc. Soc., 9 Cow. 437; 18 Am. Dec. 516; Holmes v. Mead, 52 N. Y. 332; White v. Howard, 46 N. Y. 144; Kuypers v. Ministers etc., 6 Paige, 570; Theological Seminary v. Childs, 4 Paige, 418; 5 Thompson on Corporations, sec. 5783. This is because real property is subject solely to the laws of the state of whose territory it constitutes a part, and therefore it cannot be devised to a corporation, whether of that state or a foreign state or country, if the laws of the state wherein the realty is situated forbid. A different question is presented when a devise is made to a corporation of lands situate in a foreign state whose laws permit of such devise, and the law of the state in which the corporation was created do not confer upon it any power to acquire property by devise. The few authorities existing upon this subject are somewhat evenly divided, those on the one side insisting that the disability of the corporation existing in the state of its creation renders it alike powerless to receive by devise lands situated in another state (Stark-

weather v. American Bible Soc., 72 Ill. 50; 22 Am. Rep. 133), and those on the other side maintaining that the disabilities of the corporation do not follow it into the other state: American Bible Soc. v. Marshall, 15 Ohio St. 537.

We shall not undertake in this note to consider the general question of when corporations, whether foreign or domestic, are competent to acquire property by devise or bequest, but, confining our attention to those cases like the principal case, in which it is conceded that there is some prohibition existing, shall inquire whether that prohibition operates in favor of the heirs of the testator, so that they may claim property notwithstanding his attempt to devise or bequeath it to a corporation. Before the question can arise in any state, its statutes upon the subject of wills must be such as to permit corporations to acquire property thereunder, and must also contain some limitation upon the subject. If the limitation in question appears to be one respecting the powers of the corporation, it is quite clear, we think, by the weight of authority that only the state can inquire whether it has been exceeded. If, on the other hand, the limitation relied upon is upon the powers of the testator, then he cannot exercise a testamentary authority denied him by the statute, and, if he attempts to do so, his heirs may treat it as unavailing. In the principal case, it was apparent that under the statutes of New York certain corporations were capable of receiving real and personal estate of the value designated therein, provided its annual income should not exceed ten thousand dollars, and that such corporations were capable of taking by devise or bequest in any last will or testament of any person property the clear annual income of which should not exceed ten thousand dollars, provided that no person leaving a wife, or child, or parent should devise or bequeath to such a corporation more than one-fourth of his estate after the payment of his debts. The legislature of New York, in prescribing the amount of property which a corporation might hold, may be regarded as prescribing the limits of corporate authority, while in fixing the amount of property which should be devised by any one person to such corporation, it was prescribing the limits of testamentary authority. Therefore, the heirs of a testator should be deemed not entitled to assail a devise or bequest, though it alone, or added to other property, would endow the corporation beyond the limits permitted by the statute, but, on the other hand, they should be permitted to assail such devise or bequest in so far as it attempted to give a greater proportion of his estate than a testator leaving a wife, child, or parent was authorized to give. As to the first proposition, namely, that it is only the state which can present the question that the corporation, if it receives a devise or bequest, will have a greater amount of property than permitted by its charter, the decided weight of authority is in its favor: *Alexander v. Tolleston Club*, 110 Ill. 65; *Hamsher v. Hamsher*, 132 Ill. 273; *Farrington v. Putnam*, 90 Me. 405; *Hanson v. Little Sisters etc.*, 79 Md. 434; *In re Stickney's Will*, 85 Md. 79; ante, p. 308; *Wade v. American etc. Soc.*, 7 Smedes & M. 663; 45 Am. Dec. 324; *De Camp v. Dobbins*, 29 N. J. Eq. 36; *Jones v. Habersham*, 107 U. S. 174. In other states, however, this position

is denied, and it is asserted that even when the limitation is upon the powers of the corporation, it cannot receive any devise or bequest in excess of the amount which it is entitled to hold, and that this rule may be asserted in favor of the heirs of the decedent. Thus, in the case of *Trustees v. Chambers*, 3 Jones Eq. 253, which was a suit commenced in favor of the college to recover the amount of a bequest to it, and it was shown that the charter of the plaintiff provided that the whole amount of its property should not exceed at any time two hundred thousand dollars in value, it was held that the plaintiff could recover so much only of the bequest as was necessary to make its property of the value named, and that the overplus vested in the testator's next of kin. So in the case of *Cromie v. Louisville etc. Soc.*, 3 Bush, 365, it appearing that one of the corporate beneficiaries was prohibited from holding real estate in excess of fifty thousand dollars in value and seventy-five thousand dollars in personal property, and that its real estate at the time of the death of the testator exceeded the amount specified, it was held that the corporation could not take any of the real estate devised to it by him, and that it could take so much only of the bequest as, when added to the personalty owned by it at his death, would make up the sum specified, and therefore that the real estate devised and the remainder of the personal property lapsed as undevised estate to the testator's heirs and distributees. The same rule is maintained in *Rhode Island: Wood v. Hammond*, 16 R. I. 98; *Coggeshall v. Home for Children*, 18 R. I. 696. The same conclusion has also been reached, after great consideration, in New York, where the rule is stated as follows: "A devise to a corporation which is forbidden to take (or forbidden to hold, if the word, under the circumstances of the case, is construed to include a taking also) does not, therefore, give a title subject to the right of some superior to claim a forfeiture of the land; but, if it be a violation of a statute, I think the devise is void, and the land descends to the heir or residuary devisee": *McGraw's Estate*, 111 N. Y. 66, 94.

Possibly, the apparently conflicting decisions upon this subject may be reconciled by considering the statutes construed as consisting of two classes, one authorizing corporations by devise or bequest to acquire property of a specified amount, and the other prohibiting them from acquiring property in excess of such amount; and affirming that their acting in excess of the authorization is a matter of which only the state can complain; while their action in defiance of a statutory injunction is absolutely void, and cannot deprive private persons of property which, if such injunction is respected, must belong to them.

In the case of *Heiskell v. Chickesaw Lodge*, 87 Tenn. 668, where the question was not necessarily involved, it was said that there was a distinction between a case where a corporation had received and is holding property in excess of the limitation of its charter, and a case where its rights have not vested and it is not in possession, and that in the first case no one but the state can raise the question or enforce the forfeiture, and "in the second case, if there be a devise directly to the corporation for its use and benefit, then the heirs or

residuary legatees may raise the question, because the gift would be void the same as if made to an impossible person, and the property would go the same as if the bequest had not been made. Those in whom the right to it would have vested if it had not been disposed of at all have a perfect right to assert their claims against such corporation."

The effect of a devise or bequest to a corporation of a greater proportion of his estate than a testator is permitted by statute to devise to it has been but infrequently considered; but, unless the principal case may be regarded as an exception, we believe it has uniformly been held that a limitation of this character upon the power of the testator prevents his will from having any effect, except upon the proportion of his estate which the statute has permitted him to devise or bequeath. In the case of *Chamberlain v. Chamberlain*, 43 N. Y. 424, the question was presented of whether a testator could give to two or more corporations in the aggregate more than one-half of his estate. The court said: "He cannot, by disposing of his property to different objects, all within the prohibition, effect a disinheritance of his wife or children, when a gift of the same proportion of his estate to a single object would not be sustained. The prohibition operates upon the testator's capacity to give rather than upon the power of the legatee to take": *Chamberlain v. Chamberlain*, 43 N. Y. 424, 440. The provision of the statute of the same state prohibiting a person having a wife, child, or parent from giving by will more than one-half of his estate to charitable or literary corporations was applied in a later decision as against a secret trust impressed upon a testamentary gift, when the trust was in manifest evasion of the statute: *Amherst College v. Rich*, 151 N. Y. 282. In other states, the construction given to this statute by the courts of New York seems to be acquiesced in, but they hold that its object was the protection of wives, children, and parents of testators, and for that reason the statute could not have any extraterritorial effect or be applied to testators domiciled in states other than New York: *White v. Howard*, 38 Conn. 342; *Crum v. Bliss*, 47 Conn. 592. As to personal estate, the application of the rule that, in case of a conflict of laws, it is subject to the law of the domicile of its owner, requires that a bequest to a corporation valid by the law of the state or country wherein the testator has his residence at the time of his decease, be respected and enforced even in a state wherein such corporation could not hold the bequest if made therein by a citizen thereof: *Dammert v. Osborn*, 140 N. Y. 30; *Cross v. United States Trust Co.*, 131 N. Y. 330; 27 Am. St. Rep. 597.

DEMUTH v. OLD TOWN BANK.

[85 MARYLAND, 315.]

MORTGAGE, ASSIGNMENT OF.—BY AN INDORSEMENT OF A PROMISSORY NOTE to a bona fide purchaser he acquires the benefit of the lien of a mortgage to the same extent as though he had been named therein as mortgagee, though the public records afford no evidence of the transfer of the note.

MORTGAGE, RELEASE OF AFTER THE TRANSFER OF NOTE BY THE MORTGAGEE.—If a mortgagee has indorsed the note secured by the mortgage to a bona fide purchaser, such mortgagee is not authorized to afterward release the mortgage, and though he has a conveyance from the mortgagor and produces a note which he represents to be the one secured by the mortgage, and states that it has been fully paid, and is thereby enabled to sell the property subject thereto to an innocent purchaser, the latter acquires title subject to the prior assignment of the mortgage by the indorsement of the note, though such assignment is not of record. The assignee is not prejudiced by the subsequent fraudulent acts of the mortgagee in which he does not participate. This is especially true where a comparison of the note produced with the note described in the mortgage must show that there is substantial difference in their terms, and therefore that the note in the possession of the mortgagee cannot be the one secured by the mortgage.

LACHES, WHAT ARE.—Mere lapse of time alone cannot constitute laches, unless accompanied by the failure to do some act which there was a legal duty to do, and that failure caused prejudice to the adverse party. The failure to place of record the transfer of a mortgage does not constitute laches, where it is operative without any record and is accomplished by an instrument not entitled to record, and the law has not imposed the duty of making any record upon the subject.

LIMITATIONS IN SUITS TO FORECLOSE MORTGAGES.—Though the note to secure which a mortgage was given is barred by the Maryland statute of limitations, the mortgage itself may still be foreclosed.

M. R. Walter, Millard F. Taylor, and Robert F. Leach, Jr., for the appellants.

Thomas Hughes, for the appellee.

319 McSHERRY, C. J. This is a case of exceedingly great hardship, and we have diligently, but in vain, sought for some tenable ground upon which the appellants could be relieved from the loss ³²⁰ that an affirmance of the decree appealed from will necessarily subject them to. But hard cases, it has often been said, almost always make bad law; and hence it is, in the end, far better that the established rules of law should be strictly applied, even though in particular instances serious loss may be thereby inflicted on some individuals, than that by subtle distinctions invented and resorted to solely to escape such consequences, long settled and firmly fixed doctrines should be shaken, questioned, confused, or doubted: *Lovejoy v. Irelan*, 17 Md. 527;

79 Am. Dec. 667. It is often difficult to resist the influence which a palpable hardship is calculated to exert; but a rigid adherence to fundamental principles at all times and a stern insensibility to the results which an unvarying enforcement of those principles may occasionally entail, are the surest, if not the only, means by which stability and certainty in the administration of the law may be secured. It is for the legislature by appropriate enactments, and not for the courts by metaphysical refinements, to provide a remedy against the happening of hardships which may result from the consistent application of established legal principles.

Now, the facts before us are these: Samuel D. Price was in 1888 the owner of some leasehold property in Baltimore City. This on January 28, 1888, he assigned to Henry C. Fowler, an employé of his, for an alleged, but in fact for a simulated, consideration of fifteen hundred dollars. On the same day, and as a part of the same transaction, Fowler executed and delivered to Price a mortgage on the same property to secure the payment of one thousand dollars, stated to be the balance of purchase money due by Fowler to Price; and Fowler also signed and delivered a promissory note of even date, payable to Price in one year, for the principal sum of one thousand dollars, and two other promissory notes, each for the sum of thirty dollars, payable in six and twelve months, for the interest. These three notes are described in the mortgage. The deed and the mortgage were promptly placed on record. ³²¹ Simultaneously with the execution of the deed, the mortgage and the notes, Fowler also executed and delivered to Price a deed reconveying and re-assigning to him the identical leasehold property. This deed was not placed on record until November 12, 1891. The sale by Price to Fowler was not an actual sale at all. It was a mere device to which Price, who was a builder, resorted to raise money without himself executing a mortgage on his property. To all appearances, however, so far as the public records disclosed, it was a perfectly regular and bona fide transaction. On January 31, 1888, Price borrowed from the Old Town Bank of Baltimore, the sum of twelve hundred dollars, and indorsed to the bank as collateral the one thousand dollar mortgage note of Fowler, and another note with which we have no concern. Price's note to the bank was repeatedly renewed, and when each renewal was made Fowler's note to Price was repledged. There can be no doubt about the entire good faith of the bank in this transaction. The bank continued to hold the note which on its face showed that it was secured by a mortgage of even date, and on October

31, 1895, after Price had become insolvent, and shortly before he died, the bank filed in the circuit court of Baltimore City a petition praying for a decree directing a sale of the mortgaged premises, and, under the terms of the mortgage, the usual decree was forthwith signed. Within a month thereafter the appellants came into the case, and by petition asked that the decree be set aside. They base the relief which they seek upon these facts: In November, 1891, the appellants desiring to purchase the property in question had the title examined, and it being then discovered that Price held the mortgage thereon from Fowler, negotiations were opened, not with Fowler—the apparent owner—but with Price, who informed the appellants and their counsel that the mortgage had been paid and that he held a deed from Fowler assigning the property back to him. He thereupon produced the deed of assignment contemporaneous ³²² in date with the mortgage and with the deed from Price to Fowler; and he exhibited three promissory notes purporting to be the three mortgage notes described in the mortgage from Fowler to him—the one note for one thousand dollars, and the other two each for thirty dollars. Without making any inquiry of Fowler, the appellants concluded the purchase with Price; and Price, on November 12, 1891, released on the public records the mortgage of January 28, 1888, and then placed on record the deed of assignment from Fowler to himself dated, as stated, on January 28, 1888, and delivered to the appellants a deed dated November 12, 1891, assigning to them the same property. Thereupon the appellants paid him thirteen hundred dollars—the amount of the purchase money. The appellants had no knowledge of the outstanding note in the hands of the bank, and they believed that the one thousand dollar note exhibited by Price and stated by him to be the identical note secured by the mortgage was in fact the mortgage note. The evidence, however, clearly shows that Fowler signed two one thousand dollar notes on the same day, and the one retained by Price and subsequently exhibited to the appellants as the genuine mortgage note was not in fact the note secured by and described in the mortgage at all; and that the note indorsed to the bank and forming the basis of the decree was in reality the mortgage note. About this the evidence leaves no room for doubt. The appellants claim that they are bona fide purchasers of the property from Price for value, and are, as such, entitled to hold it against the claim of the Old Town Bank. They undoubtedly paid their money for the property to Price, who shamefully deceived and misled them; but whether these facts under the circumstances

are sufficient to defeat the rights acquired by the bank is the question brought before us. The court below dismissed the petition asking for a rescission of the decree, and from the order of dismissal which permits the decree of October 31, 1895, ³²³ directing a sale of the property to stand, this appeal was taken.

Now it cannot be doubted that, prior to the adoption of the act of 1892, chapter 392 (which, however, has no application to this case), the law of Maryland was, and still is, except in so far as modified by the statute just named, that the indorsement or assignment of a promissory note secured by a mortgage gives to a bona fide holder of such note the benefit of the lien of the mortgage as fully as though he had been named as the actual mortgagee; and this, too, though the public records furnish no evidence of the indorsement or transfer and delivery of the note. The transfer or indorsement of the note, which is the principal, carries the mortgage, which is the incident, and effectually clothes the bona fide holder of the note with the lien of the mortgage itself: *Clark v. Levering*, 1 Md. Ch. 178; *Ohio etc. Ins. Co. v. Ross*, 2 Md. Ch. 26; *Byles v. Tome*, 39 Md. 463; *Boyd v. Parker*, 43 Md. 199; *McCracken v. German etc. Ins. Co.*, 43 Md. 477; *Hewell v. Coulbourn*, 54 Md. 63. Clearly, then, the indorsement and delivery by Price of the one thousand dollar mortgage note to the Old Town Bank, on January 31, 1888, for value, operated to carry the mortgage with it and stripped Price of all authority to deal with that mortgage without the consent or sanction of the bank. From the moment of that indorsement and delivery it ceased to be in the power of Price to release the mortgage so as to deprive the bank, by which the note was held, of the benefit of its security under the mortgage. This is precisely what was decided in *Boyd v. Parker*, 43 Md. 199, a case that cannot be distinguished from this. If, then, the bank became the equitable owner of the mortgage, and Price no longer had power to release it so as to affect the rights of the bank, how can the fraud and deception which Price undoubtedly practiced upon the appellants, and for which the bank was in no way responsible or answerable, interfere with the title of the bank or give to the appellants rights superior to those ³²⁴ which Price himself could have asserted? In answer to this it is said the appellants are bona fide purchasers without notice and consequently are entitled to the protection of a court of equity. Bona fide purchasers without notice and for value are a highly favored class in equity, and in a certain sense the appellants bought in good faith; but it is not every bona fide purchaser who can invoke the interposition of a court of equity to defeat the equally meri-

torious claims of others. In the recent case of *Seldner v. McCreery*, 75 Md. 296, we said: "Where a title is perfect on its face and no known circumstances exist to impeach it, or to put a purchaser on inquiry, one who buys bona fide and for value, occupies one of the most highly favored positions in the law. If circumstances afterward come to light which invalidate the title of the seller, there is nothing to prevent redress against him in behalf of the party who may be injured; but the innocent purchaser must be protected at all events." This language was used in replying to an objection that a will, upon which the title then being examined depended, had been proved only in common form and might consequently thereafter be caveated, whereby the purchaser would be involved in a litigation. No facts were shown which rendered it probable that the will was invalid, and the probate in common form being sufficient proof of the will to pass the title to the devisee, the mere possibility that the will might afterward be contested was not a ground upon which the title that it did pass could be impeached. Under the will the seller had a title, and, of course, circumstances coming to light afterward and invalidating that title could not affect a bona fide purchaser for value and without notice. But we have, here and now, no such question before us. Price had no title on the face of the record except as mortgagee when the negotiations were opened with him by the appellants; but even that title he had parted with nearly four years previously by assigning or indorsing the mortgage note to the bank. Consequently, at the very time he executed the deed to the appellants the bank owned ³²⁵ the lien of the mortgage; and because the bank held the note secured by the mortgage Price's attempted release of the mortgage was utterly ineffectual. No circumstance has come to light since the date of the deed to the appellants which invalidates Price's title; for Price had no title at the time he made the deed that was not actually subject to the lien of the mortgage in the hands of the bank.

But, in addition to this, the whole difficulty has arisen out of the deception practiced by Price upon the appellants. The bank had no agency in misleading them, and is clearly not responsible for Price's fraud. The appellants do not seem to have considered it singular that if the mortgage notes had been paid by Fowler, as Price represented, the notes themselves still remained in the possession of Price. Had they been altogether free from fault or less willing to rely on the statements of Price, they would have applied to Fowler, the mortgagor, and would have learned from him the true nature of the transaction, and the important

fact that he had in reality executed two notes each for one thousand dollars on the same day, and a casual comparison of the interest notes with the one thousand dollar note exhibited by Price would have indicated such a marked difference as to suggest, at least, a doubt as to whether the one thousand dollar note shown to them was the genuine mortgage note. The interest notes shown by Price to the appellants contained on their face the words, "collateral with mortgage of even date herewith," and along the margin the words "mortgage note." The one thousand dollar note produced by Price contained none of these words, and in terms drew interest from its date, payable half-yearly—a provision wholly unnecessary and altogether out of place where separate interest notes had been given. But, more than this, a comparison of the note produced by Price with the description in the mortgage of the one secured by the mortgage would have indicated that Price was not then in possession of the genuine mortgage note; because, as just stated, the note produced was drawn to bear interest from ³²⁰ its date, whereas the note described in the mortgage was a note for the principal sum of one thousand dollars payable one year after date, "and, for the interest to accrue thereon," two interest notes were provided. The note produced by Price bore no mark to designate that it was a note secured by a mortgage at all, as each of the interest notes did. These were circumstances calculated to suggest inquiry, if not to excite suspicion, when they are all considered together; and were clearly sufficient to put the purchasers to a further investigation than they actually made. The note produced by the bank corresponds precisely with the interest notes, has the same words upon its face as to being collateral with mortgage, and the same words on its margin, and does not bear interest from its date.

Obviously, the note held by the bank was the genuine mortgage note, and, unless the bank's failure to secure an assignment of the mortgage, or its omission to have placed on record a notice that it owned the note, forfeits its right to the lien created by the mortgage, no act done by Price without the bank's concurrence or sanction can prejudice or affect its lien. If this were not so there would have been no occasion for the adoption of the act of 1892, chapter 392.

But laches and limitations are relied on by the appellants as final defenses. It has been repeatedly said that the application of the doctrine of laches depends on the circumstances of each particular case, and whilst in the abstract this is true, it is apt to be misleading if the constituent and essential elements

which go to make up laches, in the technical sense of the term, are overlooked or disregarded. Strictly speaking, and using the term as it is understood in the law, laches is such neglect or omission to assert a right as, taken in conjunction with lapse of time more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity. Lord Ellenborough said, in discussing the question whether a failure to present a bill of exchange at the specified place of payment was sufficient to discharge the acceptor: ³²⁷ "Laches is a neglect to do something which by law a man is obliged to do. Whether my neglect to call at a house where a man informs me that I may get the money amounts to laches depends on whether I am obliged to call there": Selby v. Abithoe, 4 Maule & S. 462. Obviously, then, there must be a legal duty to do some act, a failure to do that duty and attendant circumstances which cause prejudice to an adverse party before the doctrine can be successfully invoked. Mere lapse of time, without more, unless of sufficient duration to amount to and constitute the bar of the statute of limitations, will not be sufficient. Now, there was clearly no duty which the bank owed anyone to foreclose the mortgage prior to the date of the deed to the appellants. Its omission to do so anterior to the date of the purchase by the appellants was not, therefore, the omission to do something which by law it was required to do; and the subsequent delay—that is, the delay between the date of the purchase by the appellants and the filing of the decree appealed from—placed the appellants in no worse position than they occupied the very moment they paid the purchase money to and took the deed from Price. No act of the Old Town Bank, and no omission on its part to do something that it was legally bound to do, operated to prejudice the appellants, unless the mere naked failure to secure an assignment of the mortgage and to have that assignment recorded was an omission to perform an act which the bank was obliged to perform. But the decided cases we have referred to conclusively establish that no such duty or obligation rested on the bank. The essential elements of laches are, therefore, wanting; and the question comes down to one of mere lapse of time, or the statute of limitations. About this question—the statute of limitations—there is no room to doubt. Whilst it may be conceded that the mortgage note of January, 1888, given by Fowler to Price, and by Price indorsed to the bank, was barred by limitations when the decree was signed, still the right of the bank to have the mortgage foreclosed could not be ³²⁸ barred by the lapse of less than twenty years. This principle has been expressly settled.

by this court, and we need do no more than refer to two of the cases in which it was distinctly applied: *Baltimore etc. R. R. Co. v. Trimble*, 51 Md. 111; *Magruder v. Peter*, 11 Gill & J. 217.

As we find no error in the decree appealed from it will be affirmed with costs.

Decree affirmed with costs above and below.

MORTGAGES—ASSIGNMENT OF.—The indorsement of a note secured by a mortgage operates as an equitable assignment of the mortgage: *Connecticut etc. Ins. Co. v. Talbot*, 113 Ind. 373; 3 Am. St. Rep. 655, and note; *State Bank v. Mathews*, 45 Neb. 659; 50 Am. St. Rep. 565, and note; *Cram v. Cotrell*, 48 Neb. 646; 58 Am. St. Rep. 714.

MORTGAGES—UNRECORDED ASSIGNMENT—RIGHTS OF SUBSEQUENT PURCHASERS.—If the holder of a note and mortgage borrows money thereon, delivering them to his creditor as collateral security, no record of such assignment or pledge is necessary, except as against a subsequent bona fide purchaser of the mortgage, and if the mortgagor subsequently conveys the mortgaged premises to his mortgagee, who sells them to a third person, the latter believing that the interests of the mortgagor and mortgagee have merged, he nevertheless buys subject to such mortgage and such unrecorded assignment thereof: *Curtis v. Moore*, 152 N. Y. 159; 57 Am. St. Rep. 506. In South Dakota it is held that the assignment of a real estate mortgage is a proper instrument for record under the recording act, and, therefore, that bona fide purchasers are protected against a prior unrecorded assignment of such mortgage: *Merrill v. Luce*, 6 S. Dak. 354; 55 Am. St. Rep. 844, and note.

LACHES—WHAT CONSTITUTES.—Mere delay alone, short of the period fixed as a bar by the statute of limitations, will not preclude the assertion of an equitable right. It is only where, by delay and neglect to assert a right, the adverse party is lulled into doing that which he would not have done had the right been properly asserted, that the defense of laches can be considered: Monographic note to *Smith v. Thompson*, 54 Am. Dec. 132. Knowledge, actual or imputable, is necessary: *Bausman v. Kelley*, 38 Minn. 197; 8 Am. St. Rep. 661. See notes to *Neppach v. Jones*, 23 Am. St. Rep. 149-151; *Bell v. Hudson*, 2 Am. St. Rep. 795-808.

McCUBBIN v. STANFORD.

[85 MARYLAND, 378.]

HUSBAND AND WIFE.—A constitutional provision declaring that the property of the wife shall be protected from the debts of the husband, while it does not impair the marital rights of the husband in his wife's property, places it beyond the reach of his creditors. Such interest as he has, therefore, is not subject to his liabilities.

TENANCY BY ENTIRETIES—MORTGAGE EXECUTED BY HUSBAND.—If a husband executes a mortgage on real property which he and his wife hold as tenants by the entirety, she cannot be dispossessed under such mortgage, or any foreclosure thereof to which she was not a party. The constitution of Maryland, by de-

claring that the property of the wife shall be protected from the debts of the husband, renders it impossible that any deed or mortgage made by him alone or any judgment rendered against him shall be enforced so as to deprive her of her right to the possession of the whole of the property of which he and she are tenants by the entireties.

H. R. Preston, Malcolm V. Tyson, and H. L. Bond, Jr., for the appellant.

-Joseph B. Seth and Harry E. Mann, for the appellee.

389 BRYAN, J. McCubbin, having purchased certain real estate in the city of Baltimore at a sale under a decree in equity, filed a petition for a writ of habere facias possessionem against Mrs. Stanford, who was in possession of the property. Her husband was the defendant in equity, but she was not a party to the proceeding. The suit was for the purpose of subjecting the property to the payment of a mortgage executed by the husband. She answered the petition, and the court pro forma dismissed it. Appeal by McCubbin.

390 It was stated in the petition and admitted in the answer that the real estate was conveyed to Stanford and his wife to hold by entireties. By the common law, husband and wife were considered one person. When, therefore, land was conveyed to them and their heirs, each was in contemplation of law seised and possessed of the entire estate in fee simple, and neither could dispose of any part of it without the assent of the other. Each was entitled to the whole by reason of the legal unity of their existence; and consequently an alienation of any part by either one of them would infringe the vested right of the other. The common law on this point has never been changed in this state: *Marburg v. Cole*, 49 Md. 411; 33 Am. Rep. 266. The forty-third section of the third article of the constitution declares that "the property of the wife shall be protected from the debts of the husband." We decided in *Clark v. Wootton*, 63 Md. 113, that this provision of the constitution conferred the protection upon the wife's property without the necessity of an act of an assembly, and that it embraced every portion of the property. The matter which was the subject of consideration in that case was a judgment in favor of husband and wife, which they held by the unity of interest, which is a consequence of the matrimonial relation. By the law, the husband had the right to alien it, but nevertheless, unless he saw fit to do so, the wife's interest existed, and it would have survived to her in case of his death in her lifetime. The constitutional protection is in the words of the act of 1853, chapter 245. This act did not impair or alter

the marital rights of the husband in his wife's property, but it placed it beyond the reach of his creditors: *Schindel v. Schindel*, 12 Md. 313; *Plummer v. Jarman*, 44 Md. 637; *Keller v. Keller*, 45 Md. 276. By the construction given to it the husband might have an interest in his wife's property, but it was not subject to his liabilities. In *Clark v. Wootton*, 63 Md. 113, we decided that the judgment could not be subjected to the husband's debts, because thereby the wife's undivided entirety of interest in it would be destroyed, and ³⁹¹ she would be deprived of the protection which the constitution intended to give her. The reasons for the conclusion to which the court came will be found stated in the report of the case, and they need not to be repeated now. It appears to us that the present case ought to be decided in the same way. Mrs. Stanford's rights are indefeasible by any deed of her husband, and cannot be subjected to any of his debts.

Order affirmed with costs.

HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE—LIABILITY FOR HUSBAND'S DEBTS.—The wife's separate property is not liable for her husband's debts, and therefore no kind of conveyance or disposition of it can have the effect to defraud his creditors: *Evans v. Welborn*, 74 Tex. 530; 15 Am. St. Rep. 858, and note. It cannot be disposed of under execution in satisfaction of his debts: *Howard v. North*, 5 Tex. 290; 51 Am. Dec. 769; *Bridges v. Phillips*, 25 Ala. 136; 60 Am. Dec. 495. But all statutes regarding the rights and powers of married women over their separate estate must be so interpreted as to limit the husband's marital rights only so far as may be required to permit the operation of the statute in the cases specified in it: Monographic note to *In re Ingram*, 12 Am. St. Rep. 84.

HUSBAND AND WIFE—ENTIRETIES—CONVEYANCE OF.—Neither the husband nor the wife, without the consent of the other, can dispose of any part of the estate held by them by the entireties, so as to affect the right of the survivorship of the other: *Hiles v. Fisher*, 144 N. Y. 306; 43 Am. St. Rep. 762, and note. See, also, *Branch v. Polk*, 61 Ark. 388; 54 Am. St. Rep. 266; *Cole Mfg. Co. v. Collier*, 95 Tenn. 115; 49 Am. St. Rep. 921, and note. Both must join in the instrument, and every instrument by which either alone attempts to make such conveyance is void: *Naylor v. Minock*, 96 Mich. 182; 35 Am. St. Rep. 595, and note.

DICKHAUT v. STATE.

[85 MARYLAND, 451.]

GAME LAWS, WHEN INAPPLICABLE TO GAME KILLED IN ANOTHER STATE.—A statute declaring that no person shall shoot or in any manner catch, kill, or have in possession any rabbit between certain dates specified does not prohibit the having in possession between those dates rabbits killed in another state where the killing was lawful.

AN INDICTMENT FOR AN OFFENSE CREATED BY STATUTE is generally sufficient, if it describes the offense in the words of the statute.

William Ponkey White, for the plaintiff in error.

Harry M. Clabaugh, attorney general, for the defendant in error.

459 FOWLER, J. The defendant was indicted in the criminal court of Baltimore City on the charge of having violated section 13 of article 99 of the code, as amended by the act of 1894. The only allegation in the indictment is, that the defendant on the 24th of October, 1896—being a time within the prohibition of the statute—had in his possession ninety-six rabbits, contrary to the form of the act of assembly, etc. To this indictment the defendant demurred, and his demurrer was overruled. He then filed a motion to quash the indictment **400** based upon the ground: 1. That the statute is intended to apply only to persons who shall shoot or in any manner catch or kill any rabbit in the state of Maryland or have in possession any rabbit, so killed, etc., in this state within the prohibited time; and 2. That the indictment is defective because it does not so describe the defendant as to bring him within the class of persons to which the statute applies. This motion having also been overruled, the defendant pleaded non cul, was tried before the court without a jury, convicted, and sentenced. During the course of the trial, the defendant proved that the rabbits found in his possession were shipped here from the state of West Virginia, where there is no law prohibiting the killing or catching of rabbits at any period of the year. But, under the construction of the statute adopted by the learned court below, this proof did not avail the defendant, for no matter when or where the game was killed, under that construction he was guilty, it having been held that proof of possession was conclusive proof of guilt. The record is before us on writ of error in the petition of the defendant.

The question presented under the facts in this case, and especially upon the admitted fact that the rabbits found in the possession of the defendant were lawfully killed in West Vir-

ginia, and were brought here, is whether the defendant is guilty of any offense in having them in his possession at the time and place alleged.

The answer to this question depends upon the construction of the provisions of the code, section 13, article 99. As amended by the act of 1894, chapter 404, it thus reads: "No person shall shoot or in any manner catch, kill, or have in possession any rabbit between the 24th of December and the 1st of November next ensuing." It is such a plain proposition that when the legislature prohibited the catching and killing of rabbits it meant rabbits in this state, that no argument is necessary to establish it. If it was intended that the statute should operate beyond the limits of the state, it was simply void to that extent.⁴⁶¹ It would seem also to be clear that if the prohibition as to catching and killing was necessarily limited to rabbits caught and killed in this state, the prohibition against having any rabbits in possession would relate only to rabbits caught and killed here, for we are not to assume that the legislature intended to do what it had no power to do, that is, to prohibit the killing of game in other states, unless such intention can be clearly gathered from the act itself. But, so far from any such intention having been expressed, the most casual reading will demonstrate that all the prohibitions relate to the same limited class. If, as we have said, the prohibition as to shooting and killing necessarily relates only to rabbits caught and killed in this state, the statute would read, "No person shall shoot or in any manner catch, kill, or have in possession any rabbits between the 24th of December and the 1st of November ensuing, killed in this state between said days." But if the construction of the state be correct, and if we assume, as we must from the collocation of the words and the arrangement of the clauses of the sentence, that the same class of rabbits is referred to in each prohibition, the statute would read thus: "No person shall shoot or kill between the 24th of December and the 1st of November ensuing in this or in any state any rabbit or have in his possession during said time any rabbit killed in this or any other state at any time." But, as we have said, a prohibition as to killing game in other states is clearly inoperative and void, and, therefore, we cannot impute to the legislature an intention to enact such a prohibition. It follows, we think, that the prohibition as to possession relates to the same class that the prohibition as killing embraces, namely, rabbits killed, etc., in this state between the days named.

Statutes similar to ours exist in both Pennsylvania and Massa-

chusetts, and the supreme court of each of those states has held that it is no offense to have in possession within the prohibited time game lawfully killed in and shipped from other states. Thus, in the case of *Commonwealth* ⁴⁰² v. *Wilkinson*, 139 Pa. St. 298, the opinion of the court was delivered by the former Chief Justice Paxson. The statute construed is as follows: "No person shall kill or expose for sale, or have in his possession after the same has been killed, any quail between" certain days.

"The manifest object of this act," says the chief justice, "was the preservation of game within this commonwealth. We cannot assume that it was intended to preserve game elsewhere, and it would be a forced construction to hold that it was intended to exclude from our markets quail and other game killed in other states, where, by the law of those states, the killing of them is lawful. The law was not intended to have any extraterritorial force, and, if so, it would be nugatory. The construction claimed for the act by the commonwealth would render anyone a criminal who lawfully killed quail in another state and brought it here for his own use. It would be *prima facie* evidence of a violation of the act, and if he could not show as a defense that he killed them outside the commonwealth, he would have no defense at all. The matter is too plain to require elaboration." And in the case of the *Commonwealth v. Hall*, 128 Mass. 412, 35 Am. Rep. 387, a similar statute was construed in the same way. In delivering the opinion of the court Chief Justice Gray said that the object of the statute was to protect the birds in Massachusetts. "The mode in which the statute seeks to attain this object is by punishing the taking or killing of such birds in this commonwealth during the time specified, or the buying or selling or having in possession in this commonwealth during such time such birds so taken and killed, and by enacting that the possession in this commonwealth at such times of any birds of the kind specified shall be *prima facie* evidence to convict, leaving it for the defendant to prove, if he can, that the birds found in his possession were not taken or killed in this commonwealth at a prohibited time. So construed, the statute is reasonably adapted to carry out its object, and is free from all constitutional difficulty." It was conceded in ⁴⁰³ the Massachusetts case just cited, as it is in this case, that the game found in the defendant's possession was killed in another state, and for this reason it was held he was wrongly convicted, and the judgment was reversed. And finally the same view has been adopted by the supreme court of Oregon in a clear and well-reasoned opinion by Chief Justice Lord in the case of *State v. McGuire*, 24 Or. 367.

The statute before the court for construction is like ours, and we will quote only that part of it which relates to and prohibits the having in possession: "It shall be unlawful for any person or persons to receive or have in his possession during the close seasons named in this act any of" certain varieties of fish. In the lower court it was held that under this act the fact of possession was conclusive proof of guilt; but the chief justice says, in delivering the opinion of the court: "The effect of this construction is to declare that, in order to protect salmon in this state, it was the intention of the statute to punish . . . the having in possession salmon during the prohibited season, whether caught within or without the state—in a word that it was the intention of the legislature to punish the mere possession of salmon which had been lawfully caught or taken. It ought to require plain, unambiguous, and mandatory language to justify any court in declaring fish and game lawfully caught or taken to be the subject of an offense by the simple possession of it. A construction leading to such injustice ought to be avoided if it can be reasonably done." It was therefore held by the supreme court of Oregon, after citing and reviewing many of the leading cases, those sustaining as well as those opposed to, the views it announced, that, properly construed, the Oregon statute does not relate to or embrace fish or game lawfully taken in another state and found in possession of any person in Oregon during the close season.

There is much conflict of opinion upon this question, and we shall not undertake to review or harmonize the numerous ⁴⁶⁴ cases involving questions of construction and the constitutionality of the game laws of the various states. The cases have been collected by the learned annotator in the notes to the case of *State v. McGuire*, 24 Or. 366, 21 L. R. Ann. 478. See, also, *State v. Geer*, 61 Conn. 144; 13 L. R. Ann. 804; *State v. Swett*, 87 Me. 99; 47 Am. St. Rep. 311; 29 L. R. Ann. 715. In a recent number of the *American Law Register and Review*, October, 1896, volume 35, New Series, 649, will also be found some brief notes and a full collection of recent decisions. But the question of the constitutionality of our statute, because of its alleged conflict with the interstate commerce clause of the United States, article 1, section 8, we need not consider here, for as we have already said, it is clear that, when properly construed, it has no relation whatever to game lawfully killed out of this state, and brought here for use or for sale.

It was contended that the indictment is defective because it did not sufficiently describe the defendant and failed to al-

lege that he had in his possession game shot, etc., in this state during the close season. It is well settled as a general rule that in an indictment for an offense created by statute it is sufficient to describe the offense in the words of the statute: *Parkinson v. State*, 14 Md. 184; 74 Am. Dec. 522; *Cearfoss v. State*, 42 Md. 403; *Mincher v. State*, 66 Md. 227. The pleader has followed this rule in this case, and hence the objection is not a valid one. There was also a motion to quash the indictment upon the same ground, and this was also properly overruled.

But, as has been seen, from what we have already said, we are not able to agree with the learned judge below in the construction of the provision of the code under which the defendant was indicted. As we construe it, possession in this state during the close of the season of game killed in another state is not an offense. And this being so it follows that whenever any person is charged with a violation of the law by having in his possession game during the prohibited time, simple justice demands that when the state has offered proof of the charge, he must have the right and the opportunity to show that the game found in his possession is ⁴⁶⁵ not such game as is contemplated by the statute. As was said in *State v. McGuire*, 24 Or. 366, only the plainest and most mandatory language of the lawmakers would justify any court in holding that the mere possession of game lawfully killed would constitute an offense.

It follows from what we have said that the facts proved by the defendant, if believed by the court sitting as a jury, constituted a good defense, and the defendant should have been acquitted.

Judgment reversed and a new trial awarded.

GAME LAWS—CONSTRUCTION OF.—If a statute declares that every person in the state who shall at any time sell or offer for sale the hide or meat of any deer, elk, antelope, or mountain sheep, shall be guilty of a misdemeanor, its application extends to and includes the selling of the hide or meat of any such animals though lawfully killed beyond the state: *Ex parte Maier*, 103 Cal. 476; 42 Am. St. Rep. 129, and monographic note on game laws. See, also, *Roth v. State*, 51 Ohio St. 209; 46 Am. St. Rep. 566.

INDICTMENT—SUFFICIENCY OF, FOR STATUTORY OFFENSE.—An indictment stating an offense in the terms of the statute creating it should be deemed sufficiently technical: *Meadowcroft v. People*, 163 Ill. 56; 54 Am. St. Rep. 447, and note.

FORD v. STATE.

[85 MARYLAND, 465.]

CONSTITUTIONAL LAW—THE POLICE POWER.—Laws and regulations necessary for the protection of the lives, morals, and safety of society are strictly within the legitimate exercise of the police powers of the state, if reasonable and not prohibited by either the state or the national constitutions.

CONSTITUTIONAL LAW—LOTTERIES.—Laws for the suppression of lotteries are in the interest of the morals and welfare of the people of the state, and therefore are legitimate exercises of its police powers.

CONSTITUTIONAL LAW—LOTTERY TICKETS, STATUTES PROHIBITING POSSESSION OF.—A statute making it criminal for a person to have in his possession any ticket, slip, list, or record of prizes drawn in a lottery, or any record of any lottery ticket, or anything in the nature thereof, unless for the purpose of procuring and furnishing evidence of violations of the law, is constitutional, and the accused cannot escape conviction by proving that he did not know the nature and use of the prohibited articles found in his possession, and that they were given to him by another man, to be delivered to a third, and that he to whom they were so given had no knowledge that they were in any way connected with the lottery business. The absence of guilty knowledge is, under this statute, but a matter for the consideration of the court in imposing sentence for its violation.

R. Chambers Wickes and T. C. Ruddell, for the appellant.

Harry M. Clabaugh, attorney general, and Henry Duffy, state's attorney for the city of Baltimore, for the appellee.

472 **BOYD, J.** The appellant was indicted in the criminal court of Baltimore City for violating the lottery laws of this state. There are five counts in the indictment, to the fourth and fifth of which demurrers were filed which were overruled. The **473** traverser then filed a special plea to the fourth and fifth counts, which was demurred to by the state and the demurrer sustained. The case was then submitted to the court on a plea of not guilty, and the traverser was found guilty on the fourth and fifth counts, and not guilty on the others. During the progress of the trial he offered certain evidence which was ruled out, and an exception was taken to that ruling. Although the rulings of the court on the several demurrers and on the admissibility of the evidence offered are all before us, the principal questions involved in them are the construction and constitutionality of section 178 of chapter 310 of the Laws of 1894.

The portion of that section with which we are particularly concerned on this appeal is the provision that "if any person shall have in his possession in this state any book, list, slip, or record of the numbers drawn in any lottery, whether in this state or elsewhere, or any book, list, slip, or record of any lot-

tery ticket or anything in the nature thereof, mentioned in this section, or of any money received or to be received from or for the sale of any such lottery ticket, or thing in the nature thereof as aforesaid (he) shall be liable to indictment, and upon conviction shall be, in the discretion of the court, fined any sum not exceeding one thousand dollars, or shall be imprisoned for a period not exceeding one year, or shall be both fined and imprisoned; provided, however, that this section shall not apply to any person who may have possession of any of the articles herein mentioned for the purpose of procuring or furnishing evidence of violations of any of the provisions of the laws relating to lotteries."

An examination of our statutes will show numerous efforts on the part of our legislatures to prevent the lottery business from being carried on in this state. Most of the provisions in our present code looking to that end were in the code of 1860, and some of the statutes therein codified had been passed many years before that date. Under that code it was and still is a violation of law to draw any lottery, ⁴⁷⁴ to sell lottery tickets, policies, certificates, or anything by which the vendor or other person promises or guarantees that any particular number, character, ticket, or certificate shall, in any event, or on the happening of any contingency, entitle the purchaser or holder to receive money, property, or evidence of debt. If any person kept a house, office, or other place for the purpose of selling such tickets, policies, certificates, etc., he was subject to a penalty of one thousand dollars, as was the owner of the house or office who permitted it to be used for such purpose. Then section 178 of article 27 of the code imposed a like penalty on any person who brought into this state any such lottery tickets, policies, certificates, etc., and other provisions, with heavy penalties attached, are in the code looking to the suppression of this great evil, but it still existed. The legislature of 1894 went a step further and added to section 178 the provision above quoted, whereby the mere possession of the articles named therein is made a crime, unless it be for the purpose of procuring or furnishing evidence of violations of any of the provisions of law relating to lotteries.

The language of this section is too plain to admit of any discussion as to its meaning. When considered in connection with the previous legislation on this subject, it is evident that the legislature found that the statutes in force were not sufficient to prevent the lottery business in this state, and it was therefore made a crime for anyone to have any of the articles

named in his possession, unless it be for the one purpose provided for by the statute—procuring or furnishing evidence of violations of the law. It will be necessary, then, for us to determine whether such legislation is a valid exercise of the powers vested in the state. It cannot now be denied that laws and regulations necessary for the protection of the health, morals, and safety of society, are strictly within the legitimate exercise of the police powers of the state; provided, of course, that such regulations be reasonable. Such laws are not prohibited, either by the federal constitution or that of this state. ⁴⁷⁵ The cases of *Singer v. State*, 72 Md. 464, *McAllister v. State*, 72 Md. 390, *Long v. State*, 74 Md. 565, 28 Am. St. Rep. 268, *Mugler v. Kansas*, 123 U. S. 623, and *Powell v. Pennsylvania*, 127 U. S. 678, will illustrate the application of the doctrine without encumbering this opinion with the citation of the numerous other decisions on the subject.

If it be necessary to refer to any authority to show that the laws for the suppression of lotteries are regarded by the courts to be in the interest of the morals and welfare of the people, the cases of *Ballock v. State*, 73 Md. 1, 25 Am. St. Rep. 559, and *Stone v. Mississippi*, 101 U. S. 814, will suffice to give the views of the supreme court of the United States and of this court on that subject. There probably never was a time in the history of this state when it was more necessary than the present to use all legitimate means to stamp out this and kindred evils which are demoralizing so many who might otherwise be useful and honest citizens. The man that is always looking for greater returns than his investment or efforts justify is generally a useless, if not a dangerous, member of society, and a lottery is said to be “a game in which small sums are ventured for the chance of obtaining a larger value.” It is not difficult to see why one given up to that sort of business soon becomes worse than useless to his community. The tendency is to make him idle, and idleness easily begets crime. Families are deprived of the comforts, and sometimes necessities, of life which are due them, because those who should provide them either squander their means in pursuit of such gains, or have had their powers of earning paralyzed by the pernicious habit of this form of gambling.

In view of the disastrous effect on those dealing with lottery tickets, and upon the community where such business is conducted, there can be no doubt about the right of the legislature to prohibit anyone from having them in his possession, if that be reasonably necessary for the suppression of the evil. As

the statute made it a crime to have them in possession, the purpose for which the traverser had ⁴⁷⁶ them is wholly immaterial, and inasmuch as the legislature did not make the crime dependent upon the knowledge of the party as to what the articles were, it was unnecessary to allege in the indictment that the traverser had them in his possession knowingly, willfully, or in any other words that would impute knowledge of the fact that they were some of the articles prohibited by the law. The allegations in the indictment were clearly sufficient.

But it is contended that if that be conceded, the effect of the statute was simply to shift the burden to the traverser, and he could still prove that he did not have knowledge of what the articles were, and hence was not guilty of a violation of law, and that if the statute must be so construed as to deprive him of that right, then it is in conflict with the constitutions of the United States and of this state. This question was intended to be raised by the special plea filed and the offer of testimony stated in the bill of exceptions. The plea alleges that the defendant "was in possession of policy books and slips, as stated in said indictment, but also says that he is in no way engaged in the policy business, and that he was not aware that the papers, books, and other articles which were found in his possession were policy or lottery slips; that the said articles were given to him to carry to a certain place, and that he was then taking them to that place without knowing what said articles were." The proffer of evidence, as stated in the bill of exceptions, was "that said articles were given to him by a man who asked him to deliver them to another man; and that he did not know what said articles were, and had no knowledge that they were policy books or anything connected with said business."

It would, of course, be no excuse if the traverser did not know that the law prohibited the possession of these articles. He is, on the contrary, presumed to know that it did. Would, then, his ignorance of the fact that what he had in his possession were policy books and slips excuse him? It is argued that to hold it would not, might result in the conviction ⁴⁷⁷ and punishment of innocent people—that some one might find on the street a book or list of lottery tickets and not know what it was, but be convicted simply because he had it in his possession. We are not informed by the record how the books, lists, slips, and records named in the indictment are made and what they embrace, but in the supplemental brief the learned counsel for the traverser have undertaken to explain them, and we cannot imagine how anyone finding either of them on the street would

be induced to take it into his possession unless he knew what it was, for it seems to be merely a collection of figures and letters so arranged as to be utterly unintelligible to anyone not learned in the business, and to an innocent person would certainly not be suggestive of any value. If anyone be so unfortunate as to find one, and whilst satisfying his curiosity as to what it is a police officer overtakes him, it will be time enough to determine whether he had it in his possession within the meaning of the statute. But if, after a person has undoubtedly gotten into his possession one of the prohibited articles, he is to be permitted, notwithstanding the language of the statute, to prove that he found it, or did not know what it was, it will make the statute practically useless, for if he swears that such was the case it will generally be impossible for the state to prove the contrary, and will be a great temptation to perjury, not only to the accused, but to others who might come to his assistance. If a reputable person satisfies the prosecuting officer that he came into possession of it in an innocent way, it is not likely the prosecution would be continued, or if the court be informed of such facts it could take it into consideration in imposing the penalty, and could fine him fifteen cents or less, which would relieve him of the costs. Courts can and frequently do consider facts in imposing penalties that would not bar a prosecution. If, for example, the court is satisfied that the accused was ignorant of the statute under which he was arrested, and if, prior to the passage of the statute, what is therein prohibited was not unlawful, the ⁴⁷⁸ court might take the fact that he was ignorant of it into consideration in passing sentence, but still he could be lawfully convicted. So far as the justice of the case is concerned, it would not be more inequitable to punish one for having in his possession what is prohibited when he did not know that he had it than to punish him when he did not know it was prohibited, although he knew he had it. But he is presumed to know the law, and is therefore punished for its violation, although only unlawful because the statute says so, and why should he not be presumed to know that he had what the law prohibited from being in his possession?

In *State v. Baltimore etc. Steam Co.*, 13 Md. 181, the statute under consideration provided "that it shall not be lawful for any slave to be transported on any railroad, or on any steamboat, etc., without a permission in writing from the owner of such slave." The defense was that the company, or its agents, had no knowledge that the negro was on board and had no in-

tention to violate the law, but the court held that the liability could be enforced without reference to such circumstances. Tuck, J., in delivering the opinion of the court, said: "If the legislature deemed it expedient, in view of the grievance complained of, to hold persons responsible for transporting negroes, whether they were instigated by a criminal intent or not, they had the power to do so. Such acts may produce mischief in individual cases, but the inconvenience and injury would be much more general if in every case of this kind the party charged could defend himself by offering evidence that he did not know the negro was on board of the boat and that reasonable diligence had been used to prevent such persons from coming on board. The law would scarcely afford any protection to slave owners." In *Carroll v. State*, 63 Md. 551, this court said: "As ignorance of the existence of such law will not excuse, so also ignorance of a fact necessary to be known to avoid a violation of law will not excuse." In that case there are quotations from 3 Greenleaf on Evidence, ⁴⁷⁹ section 21, that "where a statute commands that an act be done or omitted, which, in the absence of such statute, might have been done or omitted, without culpability, ignorance of the fact or state of things contemplated by the statute, it seems, will not excuse its violation." Again, "such is the case in regard to fiscal and police regulations, for the violation of which, irrespective of the motives or knowledge of the party, certain penalties are enacted; for the law, in those cases seems to bind the party to know the facts and to obey the law at his peril." The court refers to a note in Greenleaf, where the rule "is said to apply to the sale of any articles, the sale of which is prohibited, and it has been held to be no excuse that the vendor did not know it was a prohibited article." Some of the cases cited in that opinion are very applicable to this case.

Laws of this character have been sustained in numerous decisions, some of which were much more likely to work hardship in individual cases than this statute. In *Ex parte Holcomb*, 2 Dill. 392, the defendant was held liable for having in his possession miniature photographs of United States treasury notes. Laws prohibiting persons from having game in their possession during specified periods have generally been upheld, although the decisions have differed as to whether the statutes applied to game received from beyond the state prohibiting the possession: *Dickhaut v. State*, 85 Md. 451, ante, p. 332; *Phelps v. Racey*, 60 N. Y. 12; 19 Am. Rep. 140; *State v. Randolph*, 1

Mo. App. 15; Roth v. State, 51 Ohio St. 209; 46 Am. St. Rep. 566; *Magner v. People*, 97 Ill. 320; and other cases cited in *Dickhaut v. State*, 85 Md. 451; ante, p. 332.

Some of the cases construing statutes against carrying concealed weapons regulating the sale of intoxicating liquors, oleo-margarine, milk, etc., might be cited as tending to sustain the position taken by the state in this case, but it is unnecessary, as many of them can be found in the note to section 21 of 3 Greenleaf on Evidence, fifteenth edition. ⁴⁸⁰ It is proper to say, however, that such statutes are dealing with articles that may, under certain circumstances and conditions, be lawfully used, yet the supreme court of the United States and other courts in numerous cases have held that the articles could be seized and destroyed by the proper authorities, on the principle that the constitutional right of the individual to hold property is subject to those reasonable regulations which are necessary for the common good and general welfare—especially such as affect the health and morals of the people. The policy books and slips found in the possession of the traverser could only be put to one legitimate use in this state—procuring or furnishing evidence of the violations of the lottery law, and it is not contended he had them for this purpose.

But it is contended that the statute deprives the accused of the right of trial by jury and of his constitutional guarantee that he be not deprived of his liberty without due process of law. But the fallacy of the argument is in assuming that it does interfere with those rights. He had the perfect right to prove either that the articles charged in the indictment were not found in his possession, or that those found were not such as the law prohibited him from having. That is the issue made by the statute. It does not deprive him of the presumption of innocence to which he is entitled, but it does make it a crime for him to have in his possession that which is of no lawful use in this state and which injuriously affects the morals and interferes with the welfare of the people. And it is evident that the statute has made the mere possession of the articles a crime because that is the most effectual way to break up the lottery business. The importance of placing the construction we do on the law could not be better illustrated than by what we find in this case and that of *Edward McNeal v. State*, which were argued together. The pleas and the evidence offered in the two cases are identical. It may be possible, even if not very probable that both received the forbidden articles under exactly similar circumstances, but, if that be so it looks ⁴⁸¹ as if those

engaged in the business have, for the purpose of shielding themselves and avoiding detection in the delivery of them, resorted to this method of doing so. If the police authorities ascertain who the agent for selling the tickets is, he might be detected in delivering them, so he would call some one to his assistance, and, according to the contention of the appellant, if the latter does not know what they are, but they are simply "given to him by a man who asked him to deliver them to another man," then he cannot be convicted, although he have his pockets full of some of the articles prohibited by law from being in the possession of any one. Such a construction of the law would render its enforcement very difficult, if not impossible. It is safer to give the language of the legislature its ordinary meaning and construe it to mean what it says. We do not fear that the innocent will thereby suffer, but if there be any such danger, it is for the legislature and not for the judicial branch of the government to correct any defects that may be found, from experience, to exist in the statute, and we find no such objection to it as would give the court the right to declare it invalid. The judgment must be affirmed.

Judgment affirmed with costs.

POLICE POWER—WHAT IS—EXTENDS TO WHAT.—The police power is that inherent and plenary power which enables the state to restrain or prohibit all things hurtful to the comfort, safety, or welfare of society: *Meadowcroft v. People*, 163 Ill. 56; 54 Am. St. Rep. 447, and note; *Chicago etc. R. R. Co. v. State*, 47 Neb. 549; 53 Am. St. Rep. 557, and note. This power of a state extends to almost everything within its borders, to the prohibition of lotteries, gambling, horseracing, or anything else that the legislature may deem opposed to the public welfare: *Monographic note to People v. Wemple*, 27 Am. St. Rep. 565. See also, the monographic note to *State v. Goodwill*, 25 Am. St. Rep. 882-890.

DROVERS AND MECHANICS' NATIONAL BANK v. ROLLER.

[85 MARYLAND, 495.]

BROKERS AND COMMISSION MERCHANTS, RIGHT TO FOLLOW MONEYS IN THE HANDS OF.—Where goods are consigned to a broker or commission merchant for sale, the title does not vest in him, but remains in the consignor, and the money arising from the sale is his, and not the money of the agent. Wherever that money can be traced, it may be claimed by its owner. If the broker makes an assignment for the benefit of his creditors, his assignee is not entitled to such money, but must pay it over to the consignor from the sale of whose property it resulted.

TRUST MONEYS, RIGHT TO FOLLOW AFTER THEIR IDENTITY HAS BEEN LOST.—If money held by a person in a fiduciary capacity has been paid by him to his account at his bankers' and mixed with his own money, and he afterward draws checks in the ordinary manner, he is presumed to have drawn out his own, rather than the trust money.

TRUST MONEYS, LIEN CREATED BY MISAPPROPRIATION OF.—If a person holding moneys as a fiduciary mingles them with his own and applies them to the satisfaction of his own obligations, so that they can no longer be traced, no lien is thereby created against his general assets, and the beneficiary cannot, on the insolvency of the trustee, maintain a claim to be paid out of the general assets in preference to other creditors.

PARTNER, WHO IS NOT.—An employè is not a partner because his compensation is measured by the amount of the profits earned by one branch of the business.

James McColgan, for the appellant.

S. S. Field, for the appellees.

⁴⁹⁶ McSHERRY, C. J. There are two questions to be disposed of on this appeal, and they both arise upon exceptions to an auditor's report. One involves quite an interesting question of law, the other chiefly a question of fact. The circumstances out of which the first question grows are these: The firm or copartnership of Sheeler and Ripple had for a number of years been engaged in the livestock commission business in Baltimore. On the seventeenth day of January, 1895, D. & W. Roller, of Tennessee, consigned to Sheeler and Ripple for sale a quantity of live hogs which, when received by the consignees on January 21st, were sold in several lots for the consignors; and on January 24th ⁴⁹⁷ an account of sales, together with a check for the net amount of the proceeds after deducting commissions and freight charges, was mailed to the consignors. On the 31st of January, Sheeler and Ripple, being then, and apparently having been for some months anterior thereto, hopelessly insolvent, executed a deed of trust for the benefit of their creditors, and when the check given to D. & W. Roller reached in due course on the 2d of February, the Drovers and Mechanics' National Bank upon which it had been drawn, there were no funds in bank to the credit of the drawers—they having previously overchecked their account—and the check was dishonored. The funds actually received by Sheeler and Ripple for the hogs sold had been paid out on other checks given for other demands. Most of the hogs were sold for cash, and the proceeds, without earmark or identification, were placed to the credit of Sheeler and Ripple, intermingled with funds of their own in the Drovers and Mechanics' National Bank where the partnership bank account was kept; but a por-

tion of the hogs had not been paid for by the purchasers of them when the deed of trust was made, and afterward the trustees collected and now have in their hands these particular proceeds of sales. D. & W. Roller filed their claim in the trust estate for the whole net proceeds of sale, and insist that they are entitled to a priority over other creditors to the extent of the whole net proceeds of the sales of their hogs. The assets in the hands of the trustees consist of collections made by them, but, except as just stated, do not represent the proceeds of the sales of Roller's consigned hogs, or the proceeds of the sale of any other property in which the proceeds of the sales of those hogs had been invested. The first question is: Are D. & W. Roller entitled, under these circumstances, to a preferential lien upon the general assets of Sheeler and Ripple in the hands of the trustees, for the full amount of the claim they have against the insolvent firm for the proceeds of the sales of the consigned hogs?

⁴⁹⁸ With respect to the proceeds of sale which actually went into the hands of the trustees after their appointment there can be and there is no difficulty whatever. When goods or chattels are consigned to a commission merchant or broker for sale, the title does not vest in the latter, but remains in the consignor, and the money arising from a sale of them is the money not of the agent, but of the owner of the consigned property. Hence, whenever the money can be traced, it may be claimed by its owner, and upon an assignment being made for the benefit of creditors, the trustee can have no greater right to the money than his grantor, the consignee, possessed. The proceeds of the sales of Rollers' hogs that have actually gone into the possession of the trustees, and which are capable of identification, belong to the Rollers and must be paid over to them; but quite another and a different condition exists in regard to the proceeds received by the insolvent firm and spent or dissipated by them before the trustees were appointed.

The general doctrine in relation to the right of the owner of property or the cestui que trust to follow and reclaim his property is, we think, thoroughly settled. The early English cases only went to the extent of holding that the owner of property intrusted to an agent, factor, or trustee could follow and retake his property from the possession of such agent, factor, or trustees or others in privity with him, whether such property remained in its original, or had been changed into some different or substituted, form, so long as it could be ascertained to be the same property or the product or proceeds thereof, unless the

superior rights of bona fide purchasers for value and without notice had intervened; but that such right or reclamation ceased when the means of ascertainment failed, as when the subject of the trust was money or had been converted into money and then mixed and confounded in a general mass of the same description, so as to be no longer divisible or distinguishable. The more recent rule, however, in England as to following trust moneys is broader, and goes to the extent of holding that if ⁴⁹⁹ money held by a person in a fiduciary character has been paid by him to his account at his bankers', the person for whom he held the money can follow it, and has a charge on the balance in the bankers' hands; and that if a person who holds money in a fiduciary character pays it to his account at his bankers', and mixes it with his own money, and afterward draws out sums by checks in the ordinary manner, the drawer must be taken to have drawn out his own money in preference to the trust money: *Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696. This court in *Englar v. Offutt*, 70 Md. 78, 14 Am. St. Rep. 332, following closely the supreme court of the United States in *Central Nat. Bank v. Commercial Ins. Co.*, 104 U. S. 54, has announced the same principles. But it is now insisted that the doctrine has been expanded and amplified, and that though the funds cannot be traced or identified, a lien still exists upon the debtor's general assets in the hands of his trustee, in favor of the owner or cestui que trust whose property or money has been mingled with that of the fiduciary, and has been used by him in liquidating other claims against himself; and that this lien is a preferential one over other creditors of the debtor. The theory upon which this supposed enlarged doctrine rests is, that inasmuch as the wrongful application of the trust funds reduces the general indebtedness of the fiduciary, his assets, swelled to the extent of that reduction, ought to be impressed with a trust or lien in favor of the person whose money or property has been improperly employed and used to discharge the individual indebtedness. There are some cases which support this view: *People v. City Bank*, 96 N. Y. 32; *McLeod v. Evans*, 66 Wis. 401; 57 Am. Rep. 287; *Francis v. Evans*, 69 Wis. 115; *Bowers v. Evans*, 71 Wis. 133; *Harrison v. Smith*, 83 Mo. 210; 53 Am. Rep. 571, and some others. But it is obvious, even if these cases were not opposed to the general principles already alluded to, and even if they had not been questioned and some of them flatly overruled, that they proceed upon a wholly fallacious and untenable theory. They are founded upon the assumption that the misapplication of the

trust funds by the ⁵⁰⁰ fiduciary to the payment of his own debts actually swells the volume of his assets. This is the introduction of a new and unsound principle into an old and well-known doctrine of equity. But instead of such a misappropriation swelling the volume of the debtor's assets, it would merely diminish the amount of his indebtedness, and this would benefit the estate only to the extent that it increased the percentage that the other creditors would receive provided the amount of the misappropriation were not deducted as a preferred demand. The case of *People v. City Bank*, 96 N. Y. 32, which was followed in *McLeod v. Evans*, 66 Wis. 401, 57 Am. Rep. 287, if it can be held to support this new doctrine (for it is a brief opinion resting on no well-defined principle), is in conflict with the more recent case of *Cavin v. Gleason*, 105 N. Y. 256, wherein it was expressly decided, in disposing of this very contention, that it was "quite too vague an equity for judicial cognizance"; and that there was "no case justifying relief upon such a circumstance." *McLeod v. Evans*, 66 Wis. 401, 57 Am. Rep. 287, *Francis v. Evans*, 69 Wis. 115, and *Bowers v. Evans*, 71 Wis. 133, determined by a bare majority of the court, were subsequently overruled in *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237—the opinion of the court being delivered by one of the judges who dissented in *McLeod v. Evans*, 66 Wis. 401, 57 Am. Rep. 287—and those cases are consequently no longer authority even in the state of Wisconsin. In *Slater v. Oriental Mills*, 18 N. H. 352, *Shields v. Thomas*, 71 Miss. 260, 42 Am. St. Rep. 458, *Ferchen v. Arndt*, 26 Or. 121, 46 Am. St. Rep. 603, *Philadelphia Nat. Bank v. Dowd*, 38 Fed. Rep. 172, and *Little v. Chadwick*, 151 Mass. 109, the doctrine of the Wisconsin, Iowa, Kansas, Missouri, and Texas cases is criticised and repudiated. The distinction between the two conditions that are presented when, first, trust funds remain in the insolvent estate and go to swell it, and when, secondly, trust funds have been dissipated or spent and used in the payment of debts due by the fiduciary, and, therefore, no longer constitute a part of his estate, is a perfectly manifest one; and the fundamental error underlying the cases we have been ⁵⁰¹ reviewing consists in confusing or confounding these essentially dissimilar conditions, and a consequent failure to distinguish between property which may be either specifically identified as belonging to the claimant, or money traced to and remaining in the hands of the factor or trustee, on the one hand; and, on the other hand, money arising from the sale of property confessedly never owned by the claimant or cestui que trust, or confessedly not purchased with money belonging to

him. Creditors have no right to share in that which is shown not to belong to the debtor, and, conversely, a claimant has no right to take from creditors that which he cannot show to be equitably his own. But just here comes the argument that it is equitably his own, because the debtor has taken the claimant's money and mingled it with his estate, whereby the estate is swelled precisely that much. But obviously, as applicable to all cases, the argument is unsound. Where the property or its equivalent remains, there can be no contention that the claim is just and enforceable; but where it has been dissipated and is gone, the appropriation of some other property in its stead simply takes from creditors that which clearly belongs to them. In one of the cases the illustration was used by Knight Bruce of a debtor mingling trust funds with his own in a chest; and in another Sir George Jessel likened the situation to that of a debtor who had mingled trust funds with his own in a bag. Though the particular money cannot be identified, the amount is swelled just so much and the amount added belongs to the cestui que trust. But where all the money has been spent—where Knight Bruce's chest and Jessel's bag is empty—there is no swelling of the estate at all; and in such a contingency it comes to this, that a court of equity is asked to order a like amount to be taken out of some other chest or bag, or out of the debtor's general estate, not because the creditors who are entitled to be paid out of that general estate have done any wrong, but because the debtor has been guilty of misconduct as a trustee. It comes down to the ordinary ⁵⁰² case of misfortune on the part of the claimant or cestui que trust whose confidence in a trustee or fiduciary has been abused: *Slater v. Oriental Mills*, 18 R. I. 352.

But the case of *Englar v. Offutt*, 70 Md. 78, 14 Am. St. Rep. 332, affords, in our judgment, a complete answer to the contention of D. & W. Roller as respects that portion of their claim now under consideration. In that case, it appeared that John P. Shriner had been engaged in business as a merchant and manufacturer under the name and style of J. P. Shriner and Company. In May, 1883, he was appointed guardian of two infants and received something over ten thousand dollars belonging to them. On the day he received this money he deposited nearly all of it in the Howard Bank to his own credit in an account kept in the name of John P. Shriner and Company. Against this and all other credits, aggregating considerably more than double the guardianship fund, he checked and drew out, as he needed the money, the whole amount of his deposits,

except the trifling sum of forty-eight dollars and forty-nine cents. In December, 1885, Edward C. Shriner became a partner of his brother, John P. Shriner. In November, 1886, the firm made a deed of assignment for the benefit of creditors, and the trustees sold all the assets of the firm and these realized about nine thousand five hundred dollars. Thereupon the infants whose money had gone into the business of John P. Shriner filed a petition in the trust estate claiming a priority over the other creditors of the firm in the distribution of the net proceeds of the sales of the firm's assets. After stating the general rule as we have heretofore announced it, we said: "The sole question, therefore, in every case where trust property is attempted to be traced is, whether it can or cannot be identified either in its original or altered form." Then, after discussing the evidence and showing that the whole trust fund had been drawn out, and that there was nothing in the testimony tending to show that the stock which went into the hands of the trustees had been purchased with the trust funds, the opinion proceeds: "And such being the case, the claim of the ⁵⁰³ appellants upon the fund for distribution is altogether too indefinite. At most, it is but matter of conjecture, for it is impossible to say, as this case is presented, and after the great lapse of time that has occurred, whether any, or, if any, what portion of the stock of goods that passed into the hands of the assignee, under the general assignment for the benefit of creditors, was the product of the trust fund belonging to the appellants. . . . It is clear, therefore, that the fund now in court for distribution cannot be identified as the product of any investment of the original trust fund belonging to the appellants," who were the infants. And because this could not be done, the relief sought was denied, though, had the doctrine of the Wisconsin and other cases heretofore cited been considered the law, the fund, notwithstanding the trust money had not been traced into the purchase of the firm's assets, could have been impressed with a preferential trust, and the ward's claim would have prevailed over the debts due to the general creditors of the firm.

In our opinion, then, so much of the claim of D. & W. Roller as the firm of Sheeler and Ripple actually collected before the appointment of the trustees is not entitled to a priority because the funds had been spent or dissipated, and did not in any form go into the hands of the trustees, and, therefore, as to that portion of their claim they are simply general creditors standing on the same footing with other general creditors of Sheeler and Ripple; though as to so much of the proceeds of the sales

of the consigned hogs as the trustees have collected, and which, consequently, is capable of identification, the Rollers are entitled to a priority.

The remaining question, chiefly one of fact, arises on the claim of William Lynn. It has been objected that he is not entitled to prove his claim because he was a member of the insolvent firm. Of course, if he had been a member of the firm, he would not be allowed to compete with the firm's creditors; and the question as to whether he was or was ⁵⁰⁴ not a partner is really the only question involved. After a careful examination of the evidence in the record, we are convinced that he was an employé and not a partner. His compensation was measured by the amount of the profits earned in one branch of the business, but he was not on that account a copartner. The firm of Sheeler and Ripple was composed of John N. Ripple and T. Brandon Silcott, and the petition filed in this case by the trustees asking the circuit court to assume jurisdiction in administering the trust makes no averment that Lynn was a partner; nor was the deed of trust itself signed by him. It would serve no useful purpose to go into an analysis of the somewhat lengthy evidence bearing on this question of fact, and we consequently content ourselves with stating the result of our examination of it. The circuit court decided that Lynn was not a partner, and in this conclusion we concur.

Inasmuch as the learned judge below held that D. & W. Roller were entitled to have their whole claim treated as a preference to be paid in full, and as we do not agree with him in this, so much of the order appealed from as allows this claim in full will be reversed, and the cause will be remanded, that a new order may be passed allowing as a preference the amount of the proceeds of Rollers' hogs collected by the trustees after their appointment, and placing the balance of the claim on an equal footing with other general creditors. In so far as respects the claim of Lynn, the order appealed from will be affirmed. The costs incurred in the Rollers claim must be paid by Rollers and those incurred on the Lynn claim must be paid by the appellant.

Order reversed in part and affirmed in part and cause remanded. Costs to be divided as above indicated.

AGENCY—RIGHT OF PRINCIPAL TO FOLLOW HIS PROPERTY.—A principal is entitled in all cases when he can trace his property, whether it be in the hands of his agent, or of his representative, or of a third person, to reclaim it, and it is immaterial that it has been converted into money if it is in condition to be distin-

gulsbed from other property or assets of the agent: *Roca v. Byrne*, 145 N. Y. 182; 45 Am. St. Rep. 599, and note; *Stevenson v. Kyle*, 42 W. Va. 229; 57 Am. St. Rep. 854, and note.

TRUSTS—RIGHT TO FOLLOW TRUST FUNDS.—No right is more fully recognized, both at law and in equity, than the right of a cestui que trust to pursue and recover trust funds wrongfully diverted, provided their identity has not been lost, and they have not passed into the hands of a bona fide purchaser without notice: Monographic note to *Union Nat. Bank v. Goetz*, 32 Am. St. Rep. 125. Where the trustee deposits trust funds to his own credit in his bank, the cestui que trust may follow such funds though they may have lost their identity. If the trustee draws checks upon his account, he will be presumed to have drawn out his own funds, and to have left the moneys held in trust: Monographic note to *Union Nat. Bank v. Goetz*, 32 Am. St. Rep. 129. But see *Weatherell v. O'Brien*, 140 Ill. 146; 33 Am. St. Rep. 221, and note. See, also, note to *Stevenson v. Kyle*, 57 Am. St. Rep. 858; *Mutual Acc. Assn. v. Jacobs*, 141 Ill. 261; 33 Am. St. Rep. 302, and note.

PARTNERSHIP—WHO IS A PARTNER—EMPLOYÉ WHOSE SALARY IS DEPENDENT UPON PROFITS.—Sharing in the profits is the test of a partnership, but the party must share in such profits as a principal; for a stipulation to receive a sum of money in proportion to a quantum of the profits as a reward for one's services will not make him a partner: *Loomis v. Marshall*, 12 Conn. 69; 30 Am. Dec. 596, and note; *Macy v. Combs*, 15 Ind. 469; 77 Am. Dec. 163. See *St. Victor v. Dauhert*, 9 La. 314; 29 Am. Dec. 447; note to *Morgan v. Farrel*, 18 Am. St. Rep. 290.

MILLER v. GITTINGS.

[85 MARYLAND, 601.]

AN INJUNCTION AGAINST RESORTING TO THE COURTS OF ANOTHER STATE may be granted when both parties are residents of this state, and the object of the prosecution of the action in the other state is to evade the laws of this and to subject the defendant to some penalty or remedy of an oppressive character to which he is not subject in the state of his residence and wherein the alleged cause of action accrued.

INJUNCTION TO PREVENT ARREST IN AN ACTION IN ANOTHER STATE.—If a cause of action accrues, or is alleged to have accrued, in favor of one party and against another in a state of which both are residents and upon which cause of action no arrest or imprisonment is lawful in the state wherein it arose, an injunction will issue to prevent the prosecution of an action thereon in another state where the remedy of arrest and imprisonment is sought, and may be, or has been, awarded.

AN INJUNCTION MAY ISSUE TO PREVENT THE PROSECUTION OF AN ACTION IN ANOTHER STATE, though one of the defendants is a resident thereof, if the alleged cause of action arose in this state, of which the plaintiffs in the action were residents, and they went to such other state for the purpose of evading the laws of this and of having the defendants arrested suddenly, and thereby coerced into paying plaintiff's claim, when, had the action been begun in the state wherein the cause accrued, no arrest could have been made under its laws.

AN INJUNCTION MAY ISSUE AGAINST THE PROSECUTING IN ANOTHER STATE by citizens of this state of any action, when the substantial ends of justice require that the action should not be prosecuted elsewhere than in this state.

John Prentiss Poe and Benjamin Rosenheim, for the appellant.

Frank Gosnell, William S. Bryan, and Edward N. Rich, for the appellee.

613 BRYAN, J. Ernest Gittings filed a bill in equity against Emanuel H. Miller and Arthur E. Wilson.

It was alleged that Gittings was a citizen and resident of the state of Maryland and of the city of Baltimore; that Miller and Wilson were also citizens and residents of the same city and state; that in the month of September, 1895, Gittings and Charles C. Allen who is a resident and citizen of the state of New York, formed a partnership for the conduct of the stock brokerage business in the city of Baltimore under the name of Gittings & Co., and that in said business Gittings was the active member who alone saw the customers, and conducted the operations with them; that in the summer and early fall of 1896, Miller and Wilson had a large number of transactions with Gittings & Co. **614** in relation to stocks; that said transactions were in the form of purchases and sales of stock made by Gittings & Co., for the account and risk of Miller and Wilson, but were in reality gambling transactions, and that there was no intention or belief by any of the parties to the transactions that the stocks should ever be actually delivered, but that the sole purpose was that there should be an accounting and settling as the stocks rose or fell in price; that all these gambling transactions were entered into in the city of Baltimore; and all settlements were also to be made in the city of Baltimore; that for the purpose of indemnifying Gittings & Co. against loss in executing their orders, Miller and Wilson placed in the hands of Gittings as margins ten bonds of the par value of a thousand dollars, and two hundred shares of the preferred stock of the Southern Railway Company; that these bonds and shares of stock were delivered to Gittings with the express intention and expectation on the part of Miller and Wilson that he would hypothecate them for the purpose of obtaining money to enable him to aid Miller and Wilson in their gambling transactions; that the amount of money which would have been necessary to purchase the stocks and carry them until Miller and Wilson should elect to order the sale of them to make their settlements with Gittings & Co. would have been over two hundred thousand dollars, and Miller and Wilson both knew that neither Gittings nor Gittings & Co. had any such sum; and Miller and Wilson had no such sum with which to make payment for the

stocks, as it would be necessary for them to do, if it had been intended that there should be an actual delivery of them; that Gittings hypothecated the ten bonds in the First National Bank of Baltimore for the sum of eight thousand dollars, for which sum the account of Miller and Wilson was duly credited by him on the books of Gittings & Co.; that this hypothecation was made with the full knowledge at the time it was made of Wilson and of William H. Miller, the father of Emanuel Miller; that at that time Emanuel Miller was absent from Baltimore, and that on his ⁶¹⁵ return a day or two afterward he was informed of it by Gittings; that the Southern Railway stock was also hypothecated in accordance with the understanding and expectation of the parties when it was delivered to Gittings; that it was hypothecated with Cuthbert & Co., stock brokers in the city of New York, through whom Gittings acted in carrying on the greater part of the speculative transactions for Miller and Wilson.

The bill of complaint further alleges that on the tenth day of September, 1896, Gittings & Co. were unable to settle with Miller and Wilson for the winnings to which they would have been entitled if their dealings had not been illegal gambling transactions; and that Gittings would not have felt justified in making such a defense but for the perjuries and fraud, and the oppressive and dishonest conduct of said Miller and Wilson hereinafter set forth. It also alleges that on the said tenth day of September Gittings gave to Miller a check on the Continental National Bank for eight thousand dollars in part payment of said winnings, and that at the time the check was given Miller knew that there were no funds to meet it, and that it would not and could not be good, unless Allen, the partner of Gittings, should provide for its payment, which he did not do; that Miller and Wilson brought two actions in the city of New York against Gittings and the said Allen, claiming in one of them about eight thousand dollars for nonpayment of the check, and in the other seventeen thousand dollars for the alleged conversion of the bonds and stock deposited as margin, and for the alleged conversion of the different stocks on whose fluctuations in price Miller and Wilson had been gambling; that Gittings was summoned to appear to these actions when he was in New York (this was at the time hereinafter mentioned when he was arrested and held to bail); that Gittings has filed his answers to these actions, and copies of the answers are filed with the bill of complaint; that the complainant believes that Allen has also filed answers, but that complainant is not possessed of ⁶¹⁶ copies of

them, and cannot, therefore, file them; that he believes, and therefore avers, that by the law and practice of the state of New York, the complaints and answers in actions are kept in the offices of the attorneys of the several parties until the cause is ready for trial; and that the complainant believes, and therefore avers, that Allen's answer is not filed in any public office from which a duly certified copy could be obtained. The bill of complaint further alleges that the right of Miller and Wilson to recover in these actions depends on the question whether the aforesaid transactions are wagering or gambling transactions, and that their validity depends on the law of Maryland; that the complainant has a right to have their legality decided by the law of Maryland; that if these causes are tried in New York it will be necessary to aver and prove the Maryland law as a fact, while if they are tried in Maryland the law of the state will be judicially recognized, and more equal and complete justice can be done; that the complainant submits his rights to the jurisdiction of the court, and is willing that such decree may be passed as is just between himself and Miller and Wilson; that the said Miller and Wilson went out of the jurisdiction in which both they and the complainant resided, for the purpose of evading and escaping the Maryland law and of obtaining a judgment in New York, to which they are not entitled by the law of the place where the transactions arose and where the parties are domiciled. The bill of complaint further alleges that they obtained an order for the arrest of the complainant from a justice of the supreme court of New York in the second of the above-mentioned suits upon certain affidavits made by them and others, which state, among other things, that the complainant wrongfully, and without the knowledge and consent of Miller and Wilson, hypothecated the before-mentioned bonds; that the said statement was false, and was known to be false by Miller and Wilson, and was made for the deliberate, malicious, and unlawful purpose of enabling them to have the complainant arrested suddenly when away ⁶¹⁷ from home, and dishonestly and oppressively coercing him and his friends to pay their unlawful and fraudulent claims in order to secure complainant's liberty; that the complainant was arrested when in the city of New York, and held to bail in the city of New York in the sum of fifteen thousand dollars; that the complainant moved by his attorney to vacate the order of arrest, but the court overruled the motion without filing an opinion; that the said Allen has stated through his attorneys that he will voluntarily appear in this suit, if made a party defendant. The prayer of the bill of complaint was for

an injunction prohibiting the further prosecution of the suits in New York, and from any further proceedings looking to the arrest or imprisonment of the complainant in said suits; and that the court would assume jurisdiction, and for general relief. Process was prayed against Miller and Wilson and against Allen. The court granted the injunction. Miller and Wilson, having filed an answer, appealed. It is stated in the appellee's brief that Allen has appeared as a defendant and submitted himself to the jurisdiction of the court. He was represented by counsel at the argument in this court.

It appears by the exhibits filed with the bill of complaint that the suits were brought in the city of New York about the 16th of September, 1896, and that the order for the arrest of Gittings was issued on the twenty-seventh day of October. He was arrested on the same day and gave bail, by which he and his surety became bound that he should at all times render himself amenable to any mandate which might be issued to enforce a final judgment against him in the action. After his release on bail, that is, on the 4th of December, he filed his answers to the two suits against him and his partner Allen. The plaintiffs in the suits, in anticipation of Gittings' visit to New York, prepared their own affidavits in the city of Baltimore on the 17th of October, and obtained about the same time the affidavits of other persons in the same city. The plaintiff Wilson made an additional affidavit in ⁶¹⁸ New York City on the 27th of October. The bail given by Gittings required him to obey any mandate which might be made to enforce a final judgment in the action, and made it, therefore, necessary for the protection of his rights that he should answer and resist the complaint filed in the suit. It is not a question in this case whether it was lawful for the plaintiffs in the New York suits to cause Gittings to be arrested. The declaration of the constitution is unconditional and absolute: "No person shall be imprisoned for debt." The payment of debts is to be obtained from the property of the debtor; his body cannot be taken in satisfaction of it. Neither can it be seized and held in restraint as a means of coercing or inducing him to make payment. An attempt made in this state by a creditor to do so would subject him to serious consequences. It is presumed that no one would contend that the citizens and residents of the state are not bound to yield obedience to the supreme law of the land.

The important inquiry concerns the powers of a court of equity to interfere and protect the citizens of the state in their constitutional rights, when the processes of legal tribunals are

inadequate to the purpose. An examination of authorities of high character will assist us in the decision of this question. In *Keyser v. Rice*, 47 Md. 203, 28 Am. Rep. 448, it appeared that Keyser and Rice were both residents and citizens of the state of Maryland, and that Keyser was an employé of the Baltimore and Ohio Railroad Company at Cumberland, and that the railroad company was indebted to him for wages in an amount less than a hundred dollars, and that Rice had caused an attachment to be issued in the state of West Virginia, and laid in the hands of the railroad company for the purpose of condemning the debt due to Keyser in payment of a debt due by him to Rice. The debt to Rice accrued subsequently to the passage of the act of 1874, chapter 45. This act exempted from attachment the wages or hire due to any laborer or employé by any employer or corporation to the amount of ~~619~~ a hundred dollars. This court decided that Rice should be prohibited by injunction from prosecuting his suit for the condemnation of the wages due to Keyser. In its opinion it stated very explicitly certain principles applicable to cases of the kind. We will quote some of them: "As long as a citizen belongs to a state, he owes it obedience, and, as between states, that state in which he is domiciled has jurisdiction over his person and his personal relations to other citizens of the state." "The power of the state to compel its citizens to respect its laws, even beyond its own territorial limits, is supported, we think, by a great preponderance of precedent and authority." It also said that the jurisdiction to prevent by injunction suits in other states was not founded "upon any right to interfere with or control the proceedings of other tribunals in other states, but on the clear authority vested in courts of equity over persons within their jurisdiction and amenable to process to restrain them from doing acts which will work wrong and injury to others, and are contrary to equity and good conscience." It also strongly condemned the effort by a creditor to evade the laws of his own country by a resort to a tribunal of another state for the purpose of obtaining a preference to the injury of other creditors, and said that it was against equity to do so. And it also said at the conclusion of the opinion: "We think the intention to evade is necessarily presumed, when the act is persisted in after knowledge, and still inchoate, against the protestation of the complainant and the process of the court." Many high authorities were cited by the court in support of their opinion. We may say that the decision in *Keyser v. Rice*, 47 Md. 203, 28 Am. Rep. 448, has been quoted with approval in courts of the highest repute.

In *Cole v. Cunningham*, 133 U. S. 107, this question was considered very fully and elaborately. *Keyser v. Rice*, 47 Md. 203, 28 Am. Rep. 448, was quoted and many of the cases which this court had cited in its opinion. The learned court also quoted with approval *Dinsmore v. Neresheimer*, 32 Hun, 204, "where the supreme court of New York held that an express company could maintain an action in New York to restrain the defendant, ⁶²⁰ a resident of the state of New York, from prosecuting actions against the company in the District of Columbia, brought to avoid a decision of the court of appeals of New York, differing from the rule upon the same subject in the District of Columbia." And it also said, adopting the words of another court, "that in the courts of a state any citizen of that state may be enjoined from resorting to the courts of any other state for the purpose of evading the exemption laws of his own state." The facts in *Cole v. Cunningham*, 133 U. S. 107, were as follows: Two citizens of Massachusetts, who were partners, becoming aware of the insolvent condition of another citizen of the same state, assigned their claim against him without consideration to one Fayerweather, a resident of New York, and caused funds of their debtor in New York to be attached in Fayerweather's name but for their own benefit; while these attachments were pending the debtor in Massachusetts was adjudicated an insolvent. The supreme court of Massachusetts, at the suit of the assignee in insolvency, decided that the Massachusetts creditors should be restrained by injunction from prosecuting the attachment in New York in the name of Fayerweather, saying: "As residents of this state, they cannot be allowed to this extent to defeat the operation of the assignment, and thus to obtain a preference over other creditors resident here. They are within the limits of the jurisdiction of this court, and amenable to its process and should be enjoined from prosecuting a suit the effect of which, if successful, will be to work a wrong and injury to other residents of the state." This decision was affirmed by the supreme court of the United States. The principle involved is sustained by a vast weight of authority, as may be readily seen by an examination of the opinion of the learned court.

There are other cases which we think it proper to mention. In *Talleyrand v. Boulanger*, 3 Ves. 447, two complainants filed a bill in equity against the defendant for an injunction. It appeared that all the parties were Frenchmen sojourning in England, and that one of the complainants ⁶²¹ while in France had become indebted to the defendant, and that by the law of

France there could not be an arrest of the person in a suit on the obligation which had been given for the debt. The complainants and defendant fled from France and came to England during the Revolution. The debtor was arrested in England at the suit of his creditor, and, to procure his release, he paid some cash, and gave bills of exchange, and a bond, to all of which the other complainant in the equity suit became a surety. After the first bill of exchange had been paid, the complainants refused to make any more payments, whereupon they were arrested in four actions and held to bail at the suit of the defendant in the equity suit. An injunction was granted against proceeding with the suits and it was continued by the lord chancellor. He said that the proceeding on the part of the defendant had been extremely oppressive and immoral; and that if the case stood on the original contract "it would be contrary to all the principles which guide the courts of one country in deciding on contracts made in another to give a greater effect to the contract than it would have by the laws of the country where it took place." He also said: "I cannot suffer these bills of exchange so obtained to have effect." "I cannot suffer these actions to proceed." This case is remarkable from the circumstance that the court extended to domiciled aliens, in respect to the contracts made in their own country, the protection due to its own fellow subjects under similar circumstances. It has been made the subject of adverse criticism and disapproval in *Liverpool Marine Credit Co. v. Hunter*, 1 L. R. 3 Ch. App. 486. Nevertheless, it was pointedly approved by the house of lords in *Don v. Lippmann*, 5 Clark & F. 18, Lord Brougham delivering the opinion. In the same opinion, *Melan v. Fitzjames*, 1 Bos. & P. 138, was approved on the same point. It is unnecessary in this case to determine the question in respect to aliens, as we have before us only citizens and residents of our own state claiming the protection of its laws. ⁶²² The *Liverpool Company* case is thus stated: "A British ship, mortgaged in England by a British subject to British subjects, was arrested at New Orleans by creditors of the mortgagor, also British subjects resident in England, and as the courts of New Orleans do not recognize such mortgages of ships, the mortgagees, in order to protect the ship from sale, gave bonds for the amounts claimed by the creditors. The mortgagees afterward filed a bill to restrain the creditors from suing on these bonds. Held, that though the decisions of the courts of New Orleans might be open to the reproach of injustice, yet as the creditors owed no duty to the mortgagees, and had a right to proceed against the property of

their debtor wherever they found it, the bill could not be maintained." Whatever credit may be due to this decision, it is proper to say that it is in direct conflict with *Simpson v. Fogo*, 1 Hem. & M. 195, in the high court of chancery. The principle, however, on which it is decided can have no bearing on the questions in the present case. It is stated that the creditors who proceeded against the ship owed no duty to the mortgagees.

In *Bushby v. Munday*, 5 Madd. 297, and in *Portarlington v. Soulby*, 3 Mylne & K. 104, gambling debts were contracted in England, and the defendants were enjoined from prosecuting suits on them in Scotland and Ireland respectively. In *Bushby's* case, the court said that the English court was a more convenient jurisdiction than the Scotch court for determining the question between the parties, which depended on the law of England. And also said: "The substantial ends of justice would require that this court should pursue its own better means of determining both the law and the fact of the case, and it must necessarily follow that it must bind the interests of the parties by its own conclusions." In *Claffin v. Hamlin*, 62 How. Pr. 284, it was alleged that a suit in Illinois brought by a citizen of New York against other citizens of the same state was instituted for blackmailing purposes, and upon causes of action obtained by fraud. It was held ⁶²³ that it should be enjoined, the court saying that it was not brought in good faith, but for the purpose of vexing, annoying, and harassing the parties sued.

The authorities show that equity will enjoin suits in other states where there is fraud, oppression, vexation, injustice, or unconscientious advantage; and most especially where there is an attempt to evade or defeat the operation of the laws of the state where both parties to the suit reside. The transactions in this case all occurred in the city of Baltimore; the parties to this controversy are all citizens and residents of that city; the evidence would naturally be there and readily obtainable; and courts are established there with jurisdiction competent to determine the rights of the parties, according to the law of Maryland of which they have judicial knowledge. The complainant is subjected to prosecution before a tribunal in another state which must ascertain the law through imperfect methods of proof, where there must be much difficulty and expense in obtaining the evidence of the witnesses, and where the legal processes have features of severity and harshness from which citizens of Maryland are protected by the constitu-

tion of the state. Ever since the adoption of the constitution of 1851, arrest of the person has been forbidden in the prosecution of civil actions. The *capias* both as *mesne* and *final* process has been unknown. Collection of a debt cannot be coerced either by imprisonment or threat of imprisonment. In the present case, the complainant was arrested, and presented with the alternative of going to prison, or giving bail, which bound him at all times to "render himself amenable to any mandate which may be issued to enforce a final judgment against him in the action. It is believed that no one would seriously contend that such a proceeding would be lawful in Maryland. When this cause of action arose, Miller and Wilson well knew that by the constitution Gittings was protected from any such invasion of his liberty as a mode of enforcing the payment of what was alleged to be due from him. And yet they deliberately ⁶²⁴ violated his constitutionally guaranteed right of personal liberty. A court of law has not adequate power to relieve him from this imposition. If redress is to be afforded, it must come from a court of equity. This court has solemnly decided that a statute for the protection of the property of a citizen of the state shall not be violated by another citizen through the instrumentality of a suit in another state. When the statute says that the citizen's property shall be unmolested, no other citizen shall disobey the laws even beyond the bounds of the state. But here the sacred right of personal liberty is violated in contempt and defiance of the constitution. The person of a citizen is seized as a portion of the proceeding for litigating a civil liability. The complainant below has every title to relief which has been established in the adjudicated cases. All the transactions arise from and are parts of gambling contracts made between citizens of this state. In *Bushby v. Munday*, 5 Madd. 297, a contract of this kind was made in England, and the court of chancery prohibited the prosecution of a suit on it in Scotland, although the complainant was a resident of Scotland, and had real estate there. A gambling contract was void in Scotland as well as in England; but as the court had better means of determining both the law and the facts of the case than the Scotch court, it thought that justice required that it ought to try the case and enjoin the suit in Scotland. In *Portarlington v. Soulby*, 3 Mylne & K. 104, Lord Brougham enjoined a suit in Ireland on a gambling contract in England. It is not questioned that by the law of New York Miller and Wilson could sue Gittings in the state of New York. The question in the cases where equity has inter-

vened has not been whether the plaintiffs at law had a right to sue at law; but whether there were not equitable circumstances which ought to prevent the exercise of such a legal right. If they had no right to sue according to the course of the local law, there would have been no necessity for equitable relief. The suit here is not only brought on a contract ⁶²⁵ made in a gambling transaction, but, although the bonds and stock were delivered to Gittings with the express intention and expectation that he should hypothecate them, it is alleged that he had wrongfully hypothecated them without the knowledge and consent of Miller and Wilson, and on this allegation an order has been obtained for Gittings' arrest.

In the long line of cases on this subject, beginning at Lord Hardwicke's decision in *McIntosh v. Ogilvie*, 4 Term. Rep. 193, and coming down to the present time, it has been uniformly held that a suitor shall not, by impleading a fellow citizen or fellow subject in the court of a foreign country, deprive him of a right or benefit given to him by the laws of their own country. When they owe a duty to each other, this duty must be observed both abroad and at home. And on this footing courts of equity exert their jurisdiction to give the relief which cannot be obtained in a court of law. The further prosecution of the suits in New York ought to be enjoined and the controversy ought to be determined by the court granting the injunction, which has power to do full and complete justice between the parties. If the suits should be continued against Allen alone, and result in a judgment against him, it could be enforced against the partnership property, and would thus affect the interest of Gittings in the partnership effects as fully as if the judgment had been rendered against him: *Johnston v. Matthews*, 32 Md. 368; *Folsom v. Detrick Fertilizer Co.*, 85 Md. 52.

The fact that Allen is a resident of New York might distinguish this case from those relied on to sustain the right of a court of equity to interfere under ordinary circumstances, but the appeal admits for the purpose of this case the allegation in the bill, "that the said Miller and Wilson went out of the jurisdiction in which both they and this plaintiff resided and still reside, for the purpose of evading and escaping the Maryland law and of obtaining a judgment against the plaintiff in New York," and that the ⁶²⁶ statement upon which the plaintiff was arrested "was known to be false when sworn to by said Miller and Wilson, and was made for the deliberate, malicious, and unlawful purpose of enabling the said Miller and Wilson to

have the plaintiff arrested suddenly when away from home, and of thus enabling said Miller and Wilson to dishonestly and oppressively coerce him and his friends, in order to secure the liberty of the plaintiff into paying the said Miller and Wilson's unlawful and invalid claims against this plaintiff." If it be true, as the appeal admits, that the proceedings were instituted in New York for those purposes, and not because Allen resided there, his residence is immaterial. On this appeal we are obliged to assume that all the allegations of the bill of complaint are true.

We have considered the questions before us exclusively upon the allegations of the bill of complaint, as it was our duty to do. We have given considerable prominence to the arrest of the complainant, but we think that we have mentioned other circumstances, which show that the bringing of the suits in New York was oppressive and unreasonable; that it tended to embarrass and defeat justice in the settlement of the controversy between the parties; that it was an unconscientious and inequitable attempt to obtain an advantage over the parties who were sued.

Order affirmed with costs and cause remanded.

Fowler, J., dissents.

INJUNCTION TO RESTRAIN SUITS IN FOREIGN STATES—WHEN WILL ISSUE.—A citizen of a state may be enjoined from commencing or prosecuting suits against his fellow citizen thereof in the courts of another state for the purpose of obtaining an advantage which he is not entitled to in the state of their common domicile: *Sandage v. Studabaker Bros. Mfg. Co.*, 142 Ind. 148; 51 Am. St. Rep. 165, and note. Such injunction may issue whenever the facts of the case make such restraint necessary to enable the court to do justice and prevent one citizen from obtaining an inequitable advantage over other citizens: *Hawkins v. Ireland*, 64 Minn. 339; 58 Am. St. Rep. 534, and note. See extended note to *Cunningham v. Butler*, 56 Am. Rep. 663-666; *Griggs v. Docter*, 89 Wis. 161; 46 Am. St. Rep. 824.

CASES
IN THE
SUPREME COURT
OF
MASSACHUSETTS.

HOLBROOK *v.* ALDRICH.

[163 MASSACHUSETTS, 15.]

MACHINERY, SHOPKEEPER'S LIABILITY FOR DANGEROUS.—A child of tender years who enters a shop, though for the purpose of buying candy which is there for sale, has no implied invitation to go into another part thereof where a coffee grinder is in operation, and the owner is under no obligation to look out for the child and to see that it does not injure itself by placing its hand or fingers in a part of the grinder, from which it suffers personal harm. Temptation is not always invitation.

Tort for personal injuries. At the trial the judge directed the jury to return a verdict in favor of the defendants, and the plaintiff excepted.

J. R. Thayer and C. G. Chick, for the plaintiff.

C. T. Russell and G. C. Dickson, for the defendants.

HOLMES, J. This is an action for loss of the plaintiff's fingers, which were cut off by a coffee grinder in the defendants' shop. The plaintiff, a minor less than seven years old, entered the shop with her father, who was going to make a purchase. She intended to buy some candy, but in the first place accompanied her father to a part of the shop at some distance from the candy counter and near to the coffee grinder. He let go her hand to get his money, and she went over to the coffee grinder, put her hand up the spout out of which the ground coffee came, hoping to get some whole kernels, and lost her fingers. The judge directed a verdict for the defendants, and the plaintiff excepted.

We are of opinion that the direction was right. If the de-

cision were to be put on the narrowest possible ground, it might be said that at the moment of the accident the plaintiff was not within the scope of the defendants' implied invitation, and therefore was entitled to no protection against such possibilities of harm to herself. But, even if she had been buying coffee, we should regard the rule as the same. The defendants' invitation in that case would have bound them to due care for the safety of those walking in the neighborhood while simply moving about. But it would not have bound them to look out for or to prevent wrongful acts, on the ground that the acts if done might hurt the actor. Temptation is not always invitation. As the common law is understood by the most competent authorities, it does not excuse a trespass because there is a temptation to commit it, or hold property owners bound to contemplate the infraction of property rights because the temptation to untrained minds to infringe them might have been foreseen: *McFarchen* ¹⁷ v. Boston etc. R. R. Co., 150 Mass. 515; *Daniels v. New York etc. R. R. Co.*, 154 Mass. 349; 26 Am. St. Rep. 253; *Gay v. Essex Electric Street Ry. Co.*, 159 Mass. 238; 38 Am. St. Rep. 415. The case is similar in principle to *McGuinness v. Butler*, 159 Mass. 233, 38 Am. St. Rep. 412, and to *Mangan v. Atterton*, L. R. 1 Ex. 239, which, notwithstanding the observations in *Clark v. Chambers*, L. R. 3 Q. B. Div. 327, has been cited in this commonwealth repeatedly as unquestioned law. See, also, *Hughes v. Macfie*, 2 Hurl. & C. 744. In *Moynihah v. Whidden*, 143 Mass. 287, which would have to yield to *McGuinness v. Butler*, 159 Mass. 233, 38 Am. St. Rep. 412, if there were a conflict, it seems to have been assumed that the plaintiff's touching the rope was not tortious.

Exceptions overruled.

REAL PROPERTY—INJURY TO PERSONS COMING THEREON—INFANTS—LIABILITY OF OWNER.—The principal case opens up a question which is too large for discussion here, and upon which the authorities are not in accord. The law imposes upon the owners of private houses the duty of only ordinary care to avoid injury to persons who are invited thereon upon lawful business: *Baddeley v. Shea*, 114 Cal. 1; 55 Am. St. Rep. 56, and note; but as to licensees and trespassers the rule is different: *Beehler v. Daniels*, 18 R. I. 563; 49 Am. St. Rep. 790, and note; *Faris v. Hoberg*, 134 Ind. 269; 39 Am. St. Rep. 261, and note. The law recognizes a substantial difference between a property owner's duty to adult and infant trespassers, licensees, or invitees: *Barrett v. Southern Pac. Co.*, 91 Cal. 296; 25 Am. St. Rep. 186, and note. See *Foley v. California Horseshoe Co.*, 115 Cal. 184; 56 Am. St. Rep. 87, and note. For a discussion of injuries to children caused by dangerous machinery upon another's land, see monographic note to *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep. 419-423; note to *Plummer v. Dill*, 32 Am. St. Rep. 470-472; monographic note to *Westbrook v. Mobile etc. R. R. Co.*, 14 Am. St. Rep. 590-596.

FOSS v. HARTWELL.

[168 MASSACHUSETTS, 66.]

PARENT AND CHILD.—A father is not liable for the board of his minor son who voluntarily elects to leave him and to go and live with his mother, who has been divorced from the father; and her second husband cannot maintain an action for such board, where he has not communicated with the father and indicated that he expected to be compensated by him.

Action to recover for board and clothing furnished to the defendant's minor son. The trial judge, after hearing the evidence, ruled that the action could not be maintained, and reported the case for the determination of the supreme court.

J. C. Sanborn, for the plaintiff.

W. L. Thompson, for the defendant.

66 LATHROP, J. The facts appear to be as follows: The defendant obtained a divorce from his wife in 1889, on the ground of her desertion. The custody of the son was awarded to neither of the parties, and neither asked for it. Both parties married again, the woman becoming the wife of the plaintiff. The boy, at the time of the divorce, was staying with his grandmother. Subsequently, in 1889, he went to live with his father, and was with him about two years, and attended school. On his way home from school, in 1891, he was met by his mother, who took him to the home of the plaintiff. The plaintiff's wife wrote to the defendant's wife a letter, stating that she had taken the boy home with her, and requested that his trunk be sent to him. Some days afterward the defendant, who had been away from home, returned, and it was arranged that an interview should take place between him and his son. The defendant, at this interview, asked his son what he intended to do. The boy **67** answered, "I come to see you about going away to school." The defendant said "Well, the schools of Lawrence were good enough for me, and must be good enough for you." The boy said "All right." The defendant then asked him with whom he preferred to live, his mother or himself, and the boy said that, if he was not going to be sent away to school he preferred to live with his mother. The defendant replied, "Very well. I will send your things to-morrow." On the following day the trunk and personal effects of the boy were sent to him at the plaintiff's house. The boy at this time was thirteen years old. From that time until this action was brought, neither the plaintiff nor his wife made any demand upon the defendant for the support of the boy, or had any communication with him upon the subject.

There was no express contract on the part of the defendant to pay the plaintiff for the support of his child; and we are of opinion that the jury would not have been warranted in finding that there was any implied contract. While the boy was living with his father, and was supported by him, his mother saw fit surreptitiously to take him to her home, and there he continued to live down to the time this action was brought. The boy was given the choice with whom he would live, and he selected his mother. The most that can be said in favor of the plaintiff is that the father did not dissent from this arrangement. Under some circumstances, where a man and his wife are living apart, it may be that the man may be liable for the wife's support and for his child's support. This is undoubtedly true where the wife leaves for a justifiable cause, and takes her infant child with her: *Reynolds v. Sweetser*, 15 Gray, 78; *Bazeley v. Forder*, L. R. 3 Q. B. 559. But he is not so liable where she leaves without justifiable cause: *Baldwin v. Foster*, 138 Mass. 449. Nor is he liable when the custody of the child is given to the wife by a decree of court: *Brow v. Brighman*, 136 Mass. 187.

We have no occasion to consider whether or not, at common law, a father is bound to support his minor child, or whether the obligation is merely a moral one. If there is a legal obligation, it must rest upon the ground that he is entitled to the custody, the society, and the services of the child. He must also have the right to determine where his child shall live. If a son ⁶⁸ chooses to leave voluntarily his father's house and live elsewhere, his father is not responsible for his support: *Angel v. McLellan*, 16 Mass. 28; 8 Am. Dec. 118. So, if a child is induced by another to leave his father, without any necessity for so doing, the person thus influencing him to leave would, in case he should furnish supplies, have no cause of action against the father: *Dodge v. Adams*, 19 Pick. 429, 432.

There is nothing in the case before us to show any abandonment of the child by the father. It is simply the case of a child taken away from his father, without right, by the mother, and then voluntarily electing, when the choice was given him, to stay with his mother in her new home. If the plaintiff chose to receive him, he had no right, without communicating with the defendant, to look to the father for the boy's support.

Verdict to stand.

PARENT AND CHILD—NECESSARIES FURNISHED CHILD BY STEPFATHER—LIABILITY OF FATHER.—It is undoubtedly the law that nothing can be recovered by or allowed to a stepfather

for the maintenance and education of his stepchild in the absence of a special agreement if the parental relation has been assumed: Extended note to Bartley v. Richtmyer, 53 Am. Dec. 346. See note to Bennett v. Gillette, 74 Am. Dec. 779, and monographic note to Guion v. Guion, 57 Am. Dec. 226-229, on the liability of a parent for necessities furnished his child.

SWASEY v. EMERSON.

[168 MASSACHUSETTS, 118.]

MORTGAGE.—A RELEASE BY A MORTGAGEE AFTER ASSIGNING THE NOTE to secure which the mortgage was given is valid as in favor of one who had no notice of such assignment, though both the note and the mortgage were in the hands of the assignee. He, by failing to place his title on record, made it possible for the mortgagee to execute a release which apparently freed the property from the mortgage, and an innocent purchaser relying upon the release must be protected.

AN ASSIGNMENT OF A MORTGAGE IS A CONVEYANCE within the meaning of the statutes of Massachusetts, and must, therefore, be recorded, to charge subsequent purchasers with notice thereof.

CORPORATIONS.—THE AUTHORITY OF THE PRESIDENT of a corporation to execute a release of a mortgage made to him is sufficiently established by evidence that he did most of its business at a place where the mortgage was given and recorded, and had made many deeds in its behalf, each of which, as well as the release in question, had attached thereto a certificate of the secretary of the corporation of what purported to be a vote of the directors authorizing it.

Suit in equity by Swasey as receiver of the Debenture Investment Company to have discharges executed by it of certain mortgages declared void and the mortgagees entitled to priority. At the hearing the bill was dismissed, and the case reported for the consideration of the full court.

G. R. Swasey and J. Nelson, for the plaintiff.

F. Ranney, for Emerson.

S. Lincoln and F. P. Sears, for the Boston Safe Deposit and Trust Company.

119 HOLMES, J. Early in 1893 one Rice executed three mortgages to the Debenture Investment Company, of which the plaintiff has been appointed receiver. In January, 1894, the company assigned and delivered these mortgages and notes to the Boston Safe Deposit and Trust Company, upon certain trusts for its creditors. The last-named company delivered them to the American Loan and Trust Company, its successor in the trusts, and a new assignment was executed by the debenture company to the latter. None of the assignments were ever recorded. In November, 1894, after the assignment, the De-

benture Investment Company executed discharges of the mortgages to one Roett, which were dated November 1st, but acknowledged and recorded on November 12th. The report states that Roett received conveyances of the equities on or about November 1, 1894. The date in the bill is November 7th, and this is said by the defendants to be the true date, which it will be seen is later than the date of the discharges. But whatever the dates, we must assume, in accordance with the clear meaning of the report, that the discharges were made after Roett had become owner of the equities in the mortgaged land. At the same time that ¹²⁰ he received the discharges, Roett made a new mortgage of the land to Emerson, who took it in good faith and for value, relying upon the discharges and the title as it appeared in the registry. Emerson did not demand production of the discharged mortgages or the mortgage notes, which then were outstanding in the hands of the American Loan and Trust Company. This bill is brought to establish the priority of the earlier mortgages and the invalidity of the discharges. The justice who heard the case dismissed the bill, and reported the substance of the evidence.

The main argument for the plaintiff, in a few words, is, of course, that Emerson had notice of the mortgages and of the possibility that the notes might have been assigned by the mortgagee, as they had been in fact, in which case the right of the mortgagee to make the discharges was at an end, and that therefore he was bound to call for the notes before relying on the discharges, just as a mortgage debtor is bound to do before he can pay the debt to the mortgagee with safety, or as in the case of a would be purchaser of the mortgage debt: *Biggerstaff v. Marston*, 161 Mass. 101.

The argument for Emerson is equally obvious, and in our opinion, must prevail. When the title to land is dealt with, the intent of the registry laws is that purchasers should not be required to look beyond the registry of deeds further than is absolutely necessary. The assignment of the mortgages was a conveyance within the Public Statutes, chapter 120, section 4, which the assignees might have had recorded and in that way have protected themselves. Not having been recorded, it is invalid as against Emerson by the express terms of the statute. To give the American Loan and Trust Company a better claim against the land as holders of the notes than it got by the conveyance of the land is to defeat the statute by indirection. It does not claim by way of trust, as when the note is transferred without assignment of the mortgages, and if it did, to say that

Emerson had notice of the trust, although not recorded under the Public Statutes, chapter 141, section 2, really is to beg the question. He only had notice that there might be one. Every grantee of land has notice that there may be a trust outstanding, but he is not called on to inquire about it unless he has notice that there is one: See *Norman v. Towne*, 130 Mass. 52, 54. The principle on which we go is established by *Wolcott v. Winchester*, 15 Gray, 461. There the defendant's ¹²¹ grantor bought of a mortgagee of land his interest in the mortgaged land. He owned the equity in a part of the land, and in a part he did not. It was held that his title as to the former portion was good as against a prior unrecorded assignment of the mortgage, although it followed the note as to the residue: See, also, *Morris v. Bacon*, 123 Mass. 58, 59; 25 Am. Rep. 17. Our opinion is supported by many decisions elsewhere: *Ladd v. Campbell*, 56 Vt. 529; *Williams v. Jackson*, 107 U. S. 478, 483, 484; *Bacon v. Van Schoonhoven*, 87 N. Y. 446, 451, 452; *Connecticut Ins. Co. v. Talbot*, 113 Ind. 373; 3 Am. St. Rep. 655; *Daws v. Craig*, 62 Iowa, 515; *Ferguson v. Glassford*, 68 Mich. 36, 47; *Swartz v. Leist*, 13 Ohio St. 419; *Girardin v. Lampe*, 58 Wis. 267; *Henderson v. Pilgrim*, 22 Tex. 464.

The question is raised by the plaintiff as to the authority of the president of the debenture company to execute the discharges. The president did most of the company's business in Boston, and before executing these discharges made many deeds on its behalf, each of which had attached to it a certificate signed by the secretary of what purported to be a vote of the directors authorizing the deed. A similar certificate was appended to each of these deeds. There was also what purported to be a copy of a vote giving the president a general authority to discharge mortgages. The records were out of the state and could not be produced. The evidence of authority was ample: *Commonwealth v. Reading Sav. Bank*, 137 Mass. 431, 440. See *England v. Dearborn*, 141 Mass. 590, 592.

Bill dismissed.

MORTGAGE—ASSIGNMENT OF—NONRECORD OF—RIGHTS OF BONA FIDE PURCHASERS.—The assignment of a real estate mortgage is a proper instrument for record under the recording act of South Dakota, and an unrecorded assignment of a real estate mortgage is, under that act, void as to subsequent purchasers or encumbrancers of the mortgaged premises, in good faith, and for a valuable consideration, whose conveyances are first recorded: *Merrill v. Luce*, 6 S. Dak. 354; 55 Am. St. Rep. 844, and note; *Merrill v. Hurley*, 6 S. Dak. 592; 55 Am. St. Rep. 859, and note. See extended note to *James v. Morey*, 14 Am. Dec. 513, 514. If a note secured by mortgage has been assigned, a purchaser of the mortgaged premises, in good faith, without notice of the assignment, will be protect-

ed by a release of the mortgage executed by the original mortgagee: *Cram v. Cotrell*, 48 Neb. 646; 58 Am. St. Rep. 714. See, also, *Curtis v. Moore*, 152 N. Y. 159; 57 Am. St. Rep. 506, and note.

CORPORATIONS—AUTHORITY OF PRESIDENT.—The president of a corporation may, without express authority, perform all acts which are incident to the execution of the trust reposed in him and which custom or necessity impose upon the office: *Note to Ford v. Hill*, 53 Am. St. Rep. 908. His authority to transfer its negotiable securities may be inferred from evidence that he was in the habit of exercising such power: *Note to Merrill v. Hurley*, 55 Am. St. Rep. 869. His authority is incident to the management of the business: *Ceeder v. Loud etc.*, 86 Mich. 541; 24 Am. St. Rep. 134, and note.

MESSER v. THE FADETTES.

[168 MASSACHUSETTS, 140.]

TRADE NAME, USE OF, WHEN WILL NOT BE ENJOINED.—If a person organizes and manages an orchestra, giving it a name by which it becomes well and favorably known, and subsequently sells all of his interest in the organization with the right to use such name, the assignee will not be protected in the use of the name, when the other members of the orchestra no longer remain part of it.

TRADE NAMES.—A PERSON WILL NOT BE PROTECTED by a court of equity in the use of a trade name, when such use would only be to mislead and defraud the public by falsely implying that the persons who originally used such name and gained a good reputation therein were the persons now using it.

Suit to restrain the use of a trade name. Ethel Atwood in 1888 organized an orchestra composed exclusively of women and gave it the name of "Fadette Ladies' Orchestra." This orchestra was afterward well advertised and became favorably known to the public, its success being chiefly due to the skill, ability, and personal supervision of Ethel Atwood. She, for a valuable consideration, sold and conveyed to the plaintiff "all my right, title, and interest in and to the organization known as the 'Fadette Ladies' Orchestra,' together with all the rights acquired in and to the establishment, name, and trademark in the name of 'Fadette Ladies' Orchestra.'" She thereafter had no further connection with the orchestra. The remaining members, other than the plaintiff, abandoned the organization and formed and incorporated another, giving it the name of "The Fadettes." The suit of the plaintiff was to enjoin the use of the name.

R. W. Light and C. F. Light, for the plaintiff.

T. J. Barry, for the defendants.

¹⁴² **KNOWLTON, J.** Ethel Atwood organized and employed a band of musicians called the "Fadette Ladies' Orchestra," and hired and paid the members of it. She sold to the plaintiff

all her "right, title, and interest in and to the organization known as the 'Fadette Ladies' Orchestra,' . . . together with all rights acquired in and to the establishment, name, and trademark in the words of 'Fadette Ladies' Orchestra,'" and then ceased to have any connection with the company. The other members of the orchestra were not parties to the contract, and did not agree to continue to play under the direction or management of the plaintiff. At the time when the plaintiff brought this suit no member of the original organization remained with her. The question is, whether the plaintiff acquired a right in the trademark or trade name which she can enforce by way of injunction against the defendant corporation, some of the members of which were members of the original organization.

It is very clear that this question must be answered in the negative. So far as Ethel Atwood had any right or ownership in the trade name which designated the organization under her management, it was personal to herself, depending upon her personal reputation and skill, and it was not assignable. The other musicians employed by her could not, by her contract of sale, be put in the control of any other person, and there was nothing in her relation to them that she could convey. The case is not like those in which there is a sale of fixed property, and a local business to which the name belongs, and whose principal features remain unchanged after the sale. If the use by the plaintiff of the name "Fadette Ladies' Orchestra" would have any influence beneficial to herself upon the public who wished to procure the services of such an organization, it would be only to mislead and defraud them by implying that she and such musicians as she employed were the same persons who had formerly gained a good reputation under this name. It is well settled that the courts will not enforce a claim of this kind which contains a misrepresentation to the public: *Hoxie v. Chaney*, 143 ¹⁴³ Mass. 592; 58 Am. Rep. 149; *Connell v. Reed*, 128 Mass. 477; 35 Am. Rep. 397; *Chadwick v. Covell*, 151 Mass. 190, 194; 21 Am. St. Rep. 442; *Weener v. Brayton*, 152 Mass. 101; *Covell v. Chadwick*, 153 Mass. 263, 267; 25 Am. St. Rep. 625; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218. Decree affirmed.

JUDGE LATHROP expressed his inability to agree to the opinion of the majority of the court, and insisted that if such opinion is maintainable, then, whenever a business is conducted under a trade name, "the more the ability, skill, and personal supervision of the owner conduces to its success, the less is the trade name assignable with the business." He thought this conclusion not in accordance

with sound principle, nor with the authorities. He cited the case of *Booth v. Jarrett*, 52 How. Pr. 169, refusing an injunction to Edwin Booth against the styling of a theater leased from him as "Booth's Theater," and also the decisions holding that the names of hotels are assignable: *Woods v. Sands*, Cox's Manual, 467; and he declared that he saw no reason why the plaintiff should not be entitled to the trade name of the orchestra.

TRADE NAMES AND TRADEMARKS—ASSIGNMENT OF—RIGHTS OF ASSIGNEE—INJUNCTION.—The distinction between a trademark and a trade name is, that the former owes its existence to the fact that it is actually affixed to a vendible commodity, whereas the latter is a mere property allied to the goodwill of the business: *Vonderbank v. Schmidt*, 44 La. Ann. 264; 32 Am. St. Rep. 336. If the court to which an assignee of a trademark of which the name of another individual is a part appeals for protection against the use of the same name by the assignor, or by any other person, is of the opinion that the use of the trademark by the assignee is to deceive or defraud the public, by inducing them to purchase goods in the mistaken belief that they are manufactured or sold by him whose name appears on the trademark, such court, proceeding on the principle that he who comes into equity must come with clean hands, will deny relief: *Extended note to Symonds v. Jones*, 17 Am. St. Rep. 498. See *extended note to Hennessy v. Wheeler*, 25 Am. Rep. 191-195.

ATTLEBOROUGH SAVINGS BANK v. SECURITY INSURANCE COMPANY.

[168 MASSACHUSETTS, 147.]

INSURANCE IN FAVOR OF MORTGAGEE.—A policy of insurance made payable to a designated mortgagee, as his interest may appear, covers only such interest as he has at the issuing of the policy, and cannot entitle him to indemnity for loss suffered because of further loans made by him and secured by mortgages on the insured property.

INSURANCE, FORFEITURE OF MORTGAGEE'S RIGHTS. If an insurer has lost his right to indemnity because of a breach of a policy of insurance made payable to a mortgagee as his interest may appear, and the latter cannot or will not assign his mortgage to the insurer so that he can be subrogated to his rights, such mortgagee cannot recover anything on the policy, if it stipulates that the insurer, if he elects to pay the amount secured by the mortgage, shall be entitled to an assignment thereof, if no liability exists as to the mortgagor.

Action upon a policy insuring against loss by fire certain property in South Wrentham. The trial court, sitting without a jury, found for the defendant, but reported the case for the determination of this court.

J. M. Lesser, for the plaintiff.

C. W. Clifford and O. Prescott, Jr., for the defendant.

147 LATHROP, J. This is an action on a policy of insurance against loss by fire, in the Massachusetts standard form,

issued to Emma A. Briggs, and "payable in case of loss to Attleborough Savings Bank, mortgagee, as its interest shall appear." Among other things, the policy provides that it shall be void if, without the assent of the company, the property shall be sold; and further, that "if this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person, other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate; provided, that the mortgagee shall, on demand, pay according to the established scale of rates ¹⁴⁸ for any increase of risks not paid for by the insured; and whenever this company shall be liable to a mortgagee for any sum for loss under this policy, for which no liability exists as to the mortgagor, or owner, and this company shall elect by itself or with others to pay the mortgagee the full amount secured by such mortgage, then the mortgagee shall assign and transfer to the company interested, upon such payment, the said mortgage, together with the note and debt thereby secured."

When the policy was issued the plaintiff held a mortgage on the property insured for fifteen hundred dollars. At the date of the loss there was due on the mortgage fifteen hundred dollars, the interest having been paid. After the policy was issued the plaintiff took a second and a third mortgage on the property from the same owner, for one thousand dollars and five hundred dollars respectively. The defendant had no notice of these subsequent mortgages until after the loss. At the time of the loss there was due on all three mortgages an amount exceeding two thousand dollars. Before the loss the owner of the property sold it without notice to the defendant, the deed reciting that the premises conveyed were subject to three mortgages to the Attleborough Savings Bank. On December 28, 1894, the plaintiff, without notice to the defendant, released from all three mortgages a part of the mortgaged property. On January 8, 1895, the defendant tendered to the plaintiff the sum of fifteen hundred dollars, and demanded an assignment of the first mortgage and the note for fifteen hundred dollars which it secured. The plaintiff rejected the tender.

The mortgagor having forfeited her insurance by a conveyance without notice to or the consent of the defendant, the question is as to the plaintiff's rights under the policy. The plaintiff contends that as at the time of the loss it held three mortgages on the property greater in amount than the sum insured, it is entitled to recover two thousand dollars which is

the amount of the policy. The defendant contends that the interest of the plaintiff was insured only to the amount due at the time of the loss under the first mortgage, and that the plaintiff, having refused to assign said mortgage and mortgage note, and having put it out of its power to subrogate the defendant to its rights under the first mortgage, can recover nothing.

We are of opinion that the defendant's contention is correct. The chief reliance of the plaintiff in its argument is on the language ¹⁴⁹ of the clause by which the policy is made payable to the plaintiff. But the words "as its interest shall appear" have reference to the amount which may be due the mortgagee on the mortgage debt, which is originally brought to the attention of the insurer. It was not intended to include additional claims, but was intended to provide for a diminution of the interest of the mortgagee by the reduction, by payment or otherwise, of the amount of the debt.

In *Palmer Sav. Bank v. Insurance Co. of North America*, 166 Mass. 189, 55 Am. St. Rep. 387, while the question now before the court was not determined, the law in relation to policies insuring the interest of a mortgagee was much considered. It is there said that at first the policy was usually issued to the mortgagor in the common form, and was then assigned to the mortgagee to the extent of his interest, the insurance company assenting to the assignment; that afterward the provisions for the benefit of the mortgagee were inserted in the body of the policy, but that such policies, unless there were stipulations to the contrary, were avoided as against the mortgagee by any act of the mortgagor which avoided the policy as to him, and that the present form was adopted in order to give the mortgagee a better security, but that the effect was the same as if the mortgagor had taken out the insurance in his own name and then assigned it to the mortgagee to the extent of his interest, and the insurance company had assented to the assignment and had promised the mortgagee that no act of the mortgagor should defeat the right of the mortgagee to recover to the extent of his interest. But whether the clause is to be considered as an assignment by the mortgagor of an insurance upon his interest, or as a contract made with the insured by which, in a certain contingency, it promises to pay to the mortgagee an amount to be determined, it seems to us clear that the nature of the interest and the extent of the risk must be made known at the time when the contract is made, in order that the premium may be measured thereby. While the insurance com-

pany cannot be compelled to pay more than the face of the policy, yet to obtain the advantages of subrogation, if the plaintiff's contention is correct, it may be compelled to pay several times that amount. The clause in regard to subrogation is inserted as of value to the company, and must be taken into consideration ¹⁵⁰ in measuring the risk assumed and the consideration paid therefor; but if this amount cannot be determined when the contract is made, and may be so great as to make the subrogation clause worthless, it ceases to be one of the elements of the contract.

We are, therefore, of opinion that the plaintiff's interest under the subsequent mortgages was not covered by the insurance; and that as it was not willing to assign its first mortgage and note, and in fact could not do so, the justice who tried the case in the court below rightly found for the defendant.

According to the terms of the report, the order must be judgment for the defendant.

INSURANCE IN FAVOR OF MORTGAGEE—SUBSEQUENT INCREASE OF MORTGAGE.—If the owner of real property obtains insurance thereon, payable, in case of a loss, to a designated mortgagee as his interest may appear, and such owner afterward conveys the property to another person who conveys to the former owner's wife, who then procures another loan and executes another mortgage to the same mortgagee, the husband joining to release any rights he may have as husband, such second mortgage is not included within the terms of the original insurance, and the mortgagee's recovery may be limited to his interest existing when the policy issued: *Palmer Sav. Bank v. Insurance Co. of North America*, 166 Mass. 189; 55 Am. St. Rep. 387. See, also, monographic note to *King v. State etc. Ins. Co.*, 54 Am. Dec. 695.

INSURANCE IN FAVOR OF MORTGAGEE—SUBROGATION OF INSURER.—If a mortgagee insures his interest, and the policy contains a provision that, in case of loss, the assured shall assign to the insurer an interest in the mortgage equal to the amount of loss paid, the insurer is entitled to the subrogation provided for: Monographic note to *Mobile Ins. Co. v. Columbia etc. R. R. Co.*, 44 Am. St. Rep. 733, on the right of an insurer to subrogation. See, also, *Gibb v. Philadelphia Fire Ins. Co.*, 59 Minn. 267; 50 Am. St. Rep. 405, and note.

NEW ENGLAND AWL AND NEEDLE COMPANY v. MARLBOROUGH AWL AND NEEDLE COMPANY.

[168 MASSACHUSETTS, 154.]

TRADE PACKAGES—ENJOINING USE OF.—One who has been a manufacturer of awls for several years and has put them up in a distinctive package, consisting of a bronze colored box having a brown label on the top and one side, with printed inscriptions, and tied with an orange string, is entitled to an injunction against the use by a rival of a package indistinguishable in every particular except the use of the rival's name at the bottom of the package in place of the complainant's. Nor is his right to relief negatived by a finding that the defendant did not intend to deceive the public by passing off his goods as the complainant's, where it is admitted that the goods in such packages were put up for dealers who would or might try to deceive the public.

J. E. Maynadier and O. R. Mitchell, for the plaintiff.

W. H. Coolidge and H. N. Rice, for the defendant.

155 HOLMES, J. This is a bill to restrain the infringement of an alleged exclusive right of the plaintiff to put up awls in a distinctive package consisting of a bronze colored box having a brown label on the top and one side with printed inscriptions, and tied with an orange string. The box used by the defendant is indistinguishable in every particular, including the words of the inscription and the size and shape of the type, except that at the bottom, instead of "Manufactured and Warranted by the New England Awl & Needle Co., West Medway, Mass.," the defendant's label reads, "Manufactured for the United States Awl & Needle Co., New York," in letters and arrangement as nearly like the plaintiff's as possible. It is admitted by the answer that the plaintiff is a manufacturer of awls, and that it has used packages of the kind described since 1885. At first this use was comparatively small, but in 1893 it increased, and in 1896 extended to three-quarters of the plaintiff's manufacture. In September, 1895, the defendant began the use complained of. An inspection of the boxes makes it plain that the public would not distinguish them. The judge before whom the case was tried found the facts, and ruled that the bill could not be maintained.

It is found that the defendant did not intend to deceive the public by passing off their goods for the plaintiff's, but this must be taken pretty strictly. They knew that they were putting the power to do so into the retail dealers' hands. It hardly can be doubted that they contemplated that the wholesale dealer at whose request they put up their awls in this form, with full knowledge of the plaintiff's prior use, would or might

try to deceive the public, and whether they did or not is immaterial. They knew it after they were warned by the plaintiff, and stood upon their rights. The principles upon which the rights of the parties are to be determined are similar to those which are well known to govern trademarks, although the combination of elements is more complex than in devices which commonly go by that name: *Hildreth v. McDonald*, 164 Mass. 16; 49 Am. St. Rep. 440; *Chadwick v. Covell*, 151 Mass. 190, 194; 21 Am. St. Rep. 442; *Goodyear's etc. Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 604; *McLean v. Fleming*, 96 U. S. 245, 253, 254; *Taendsticksfabriks Aktiebolaget Vulcan v. Myers*, 139 N. Y. 364; *Hall v. Barrows*, ¹⁵⁶ 4 De Gex, J. & S. 150, 159; *Singer Machine Mfrs. v. Wilson*, L. R. 3 App. Cas. 376, 389; *Turton v. Turton*, L. R. 42 Ch. Div. 128, 141; *Kerly on Trademarks*, 13-15.

The report states that it did not appear whether or not any purchaser of awls had learned to recognize the plaintiff's awls by the appearance of the packages. This cannot mean more than that there was no direct testimony to that effect. But the fact that the plaintiff had used the combination since 1885, and largely since 1893, is enough to raise a presumption in its favor: *McAndrew v. Bassett*, 4 De Gex. J. & S. 380, 384, 385.

The ground of the ruling probably was that the plaintiff did not claim a trademark in boxes or labels, and that its objection to the defendant's boxes was solely because the label was of the same color as the plaintiff's. Of course, a person cannot claim the monopoly of a color in connection with a particular line of trade, and very likely not in connection with the labels of a certain kind of goods generally. But the most universal element may be appropriated as the specific mark of a plaintiff's goods if it is used and claimed only in connection with a sufficiently complex combination of other things. The plaintiff did not claim the exclusive right to brown labels for awls, but it claimed the exclusive use of the brown color in the combination which we have described. If the only other element besides the color had been a box of a certain size and a label of a certain shape, the case might be different: *Morgan's Sons Co. v. Troxell*, 89 N. Y. 292; 42 Am. Rep. 294; but when there is added an inscription, which both in its pictorial aspect of black marks and in its meaning was calculated to confuse, if not to deceive, the plaintiff's claim seems to us moderate: *Frese v. Bachof*, 14 Blatchf. 432; *Sawyer v. Horn*, 4 Hughes, 239, 253; 1 Fed. Rep. 24; *Carbolic Soap Co. v. Thompson*, 25 Fed. Rep. 625; *Jennings v. Johnson*, 37 Fed. Rep. 364; *Wellman etc.*

Tobacco Co. v. Ware Tobacco Works, 46 Fed. Rep. 289; N. K. Fairbanks Co. v. R. W. Bell Mfg. Co., 77 Fed. Rep. 869.

We are of opinion that the plaintiff is entitled to an injunction. To what further relief it is entitled can be determined better by the superior court.

Injunction to issue.

TRADEMARKS—FORM AND STYLE OF PACKAGE—INJUNCTION.—If a manufacturer of candy puts it up in packages of a particular size and shape, with a word in red script letters upon the middle and ends of the wrappers, another person may be restrained from putting up packages in the same form and size with another word printed upon the middle of the wrappers in Roman letters, if it is found that the public is thereby deceived into believing that the defendant's goods are the plaintiff's goods and that the resemblance is not accidental: *Hildreth v. McDonald*, 164 Mass. 16; 49 Am. St. Rep. 440, and note. See, also, *Hoyt v. Hoyt*, 143 Pa. St. 623; 24 Am. St. Rep. 575, and note; monographic note to *Partridge v. Menck*, 47 Am. Dec. 287-295, on what may become a trademark.

TELLEFSEN v. FEE.

[168 MASSACHUSETTS, 188.]

TRANSITORY ACTIONS, TREATIES TAKING AWAY JURISDICTION OF STATE COURTS OVER.—A provision in a treaty between the United States and a foreign nation to the effect that the consuls, vice-consuls, and other designated officers of the nation named therein shall have the right to sit as judges and arbitrators in such differences as may arise between the captains and crews of vessels belonging to such nation deprives the courts of the state of jurisdiction of an action brought against the captain of a vessel of such nation by a member of his crew for wages alleged to be due. It is not material whether the plaintiff remained a member of the crew or had been discharged therefrom. In either event the question of his wages remains, and no tribunals other than those specified in the treaty have jurisdiction of it.

PROCESS, WHEN A JUSTIFICATION OF AN OFFICER.—Where process is in due form and comes from a court of general jurisdiction of the subject matter, an officer is justified in acting according to its tenor, even if irregularities making the process voidable have occurred. Where, however, the process is void on its face, the officer is not protected.

AN OFFICER HAVING PROCESS IN HIS HANDS IS BOUND TO KNOW THE LAW, and, if he is informed of facts from which the inference is irresistible that the court issuing the process did not have jurisdiction of the action or of the defendant, he is not justified in executing it.

PROCESS, JUSTIFICATION UNDER.—If an officer is informed of extrinsic facts showing that the court issuing process did not have jurisdiction, he is not justified in proceeding to execute it. Hence, if it is against a captain of a vessel and in favor of a member of his crew claiming wages, and the officer is informed that the vessel belongs to a foreign nation, and that the matter will be adjusted at the consulate of such nation, he must take notice of the

treaty giving exclusive jurisdiction of the matter to such consulate, and is liable if he proceeds to make an arrest under such process.

THE PROTECTION OF PROCESS CANNOT EXTEND so far as to shield an officer who, from all the circumstances of the case, does not appear to have acted in good faith, and whose conduct shows that his eyes were willfully closed to enable him not to see and know that he was a too ready instrument in the perpetration of a grievous wrong.

Tort for assault and false imprisonment. One Johnson commenced an action against Tellefsen as master of the steamship Albert to recover for work upon such steamship. A writ issued purporting to authorize the arrest of the defendant in that action, and the defendant herein, who was a constable of the city of Boston to whom such writ was given for execution, proceeded to the vessel, and being about to make an arrest, was informed that the vessel was a Norwegian one and the defendant in the writ was the captain thereof, and that the claim of the plaintiff in the writ would be adjusted at the consulate of the kingdom of Sweden and Norway in Boston. The constable, nevertheless, arrested and handcuffed the captain and kept him under arrest in the cabin of the vessel until he paid, under protest, the amount claimed to be due to Johnson. Thereafter this action was commenced. At the trial the plaintiff requested the court to rule that, by virtue of the treaty between the United States and the kingdom of Sweden and Norway, the captain was exempt from the arrest at the time it was made, and that the process under which the constable acted was not sufficient to justify the arrest under the circumstances. The judge refused to so rule, and, on the contrary, ruled that the constable was, under his writ, justified in making the arrest, unless he used excessive force. To this ruling the plaintiff excepted. The jury afterward returned a verdict for the defendant.

J. Lowell and E. S. Dodge, for the plaintiff.

B. Hall and A. F. Coulter, for the defendant.

190 LATHROP, J. The municipal court of the city of Boston had no jurisdiction of the action brought against the plaintiff in this case for wages alleged to be due one Johnson, and the writ upon which the plaintiff was arrested on mesne process was of no effect.

By article 13 of the treaty between the United States and Sweden and Norway of 1827 (8 U. S. Stats. 346, 352), it is provided that "the consuls, vice-consuls, or commercial agents, or the persons duly authorized to supply their places, shall have the right, as such, to sit as judges and arbitrators in such dif-

ferences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities, unless the conduct of the crews or of the captain should disturb the order or tranquillity of the country, or the said consuls, vice-consuls, or commercial agents should require their assistance to cause their decisions to be carried into effect or supported. It is, however, understood that this species of judgment, or arbitration, shall not ¹⁹¹ deprive the contending parties of the right they have to resort, on their return, to the judicial authority of their country."

There are similar treaties with other countries, including one with Prussia in 1828: 8 U. S. Stats. 378, 382. Many of these treaties are referred to in 7 Am. Law Rev. 417. Later treaties have been made with the Netherlands, in 1855 (10 U. S. Stats. 1150, 1155); with Denmark, in 1861 (13 U. S. Stats. 605); with Germany, 1871 (17 U. S. Stats. 921, 928); and with Italy, in 1878 (20 U. S. Stats. 725, 729).

By article 6 of the constitution of the United States, it is declared that "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Such a treaty as that with Sweden and Norway has almost uniformly been held to take away all right of action for wages in the courts of this country, by a seaman coming within the scope of the treaty, whether the action be in rem or in personam: *Norberg v. Hillgren*, 5 N. Y. Leg. Obs. 177; *The Elwine Krepelin*, 9 Blatchf. 438, where the question is considered at length; *The Salomoni*, 29 Fed. Rep. 534; *The Burchard*, 42 Fed. Rep. 608; *The Marie*, 49 Fed. Rep. 286; *The Welhaven*, 55 Fed. Rep. 80.

In *The Amalia*, 3 Fed. Rep. 652, jurisdiction was entertained by Judge Fox of the United States district court in Maine of a libel against a Swedish vessel, on the ground that there was no consular representative of Sweden in the district of Maine. But this case has no bearing upon the one before us.

An examination of the treaty and authorities above cited makes it plain that the court has no discretion in the matter, and that the local authorities have no right to interfere. Where jurisdiction is given by a treaty to a consul, vice-consul, or a commercial agent, he alone has authority to act in determining in the first instance whether wages are due, and the amount.

It is to be remembered that the United States government has the same right by the treaty in regard to its vessels in Norway; and this right is insisted upon by our government. In the United States Consular Regulations of 1888, page 25, paragraph 66, under the ¹⁹² title "Jurisdiction over Disputes between Masters, Officers, and Crews," appears the following: "Exclusive jurisdiction over such disputes in the vessels of the United States, including questions of wages, is conferred by treaties or conventions with" several governments named, and, among them, Sweden and Norway. And on page 92, paragraph 273, is also the following: "In many instances, by treaty and consular convention, the United States have secured to their consular officers jurisdiction over questions of wages, shipment, and discharge of seamen."

The bill of exceptions is not so full as it should be as to what occurred on the arrival of the ship in Boston. It is merely said that "Johnson left the ship at Boston because his term of service had expired." It does not appear whether he had been discharged, or had left without permission of the master, though perhaps the more reasonable interpretation of the exceptions is that the statement of the cause of his leaving precludes our assuming other reasons to exist. However this may be, whether he was discharged or not, there was still the question of wages to be determined, and the defendant had been informed before he made the arrest that the claim of Johnson would be adjusted at the consulate of the Kingdom of Sweden and Norway. It seems to us impossible to say that there was not such a difference between the master and Johnson that the consul had not exclusive jurisdiction in the premises.

The facts in the case of *The Elwine Kreplin* are not fully set forth in the report in 9 Blatchf. 438. But they are found at length in the report of the case in the district court, 4 Ben. 413. It was there considered by Judge Benedict that the connection of the men with the ship was severed by mutual consent, and that they were entitled to their wages. While this view of the facts was not fully assented to by Judge Woodruff, his opinion was, that although the men were entitled to their discharge and to be paid off, and the master was in the wrong, yet this matter of difference "was left by the treaty in the hands of the consul"; and the libel of the seamen was dismissed.

In *The Burchard*, 42 Fed. Rep. 608, Judge Toulmin dismissed a libel for wages against a German vessel brought by an American seaman who had shipped on board and who claimed to be entitled to a discharge. He stated, however, that he was

inclined ¹⁹³ to take jurisdiction, if the fact had been proved that a discharge had been granted.

In the later case of *The Welhaven*, 55 Fed. Rep. 80, a libel was brought against a Norwegian steamship by a citizen of the United States, for damages and for wages, alleging that he shipped on the vessel at Mobile, for a round voyage to Tampico, and that, on his arrival in Mobile Bay, on the return trip, he was put ashore, manacled, and finally discharged at Mobile, without full pay. On the intervention of the Norwegian consul, claiming jurisdiction, Judge Toulmin sustained the consul's position, and dismissed the libel. The case appears to have been heard on exceptions to the libel, as the judge concludes the opinion thus: "I am, therefore, constrained to sustain the exceptions to the libel, and to order that the libel be dismissed."

It appears, therefore, that the consul of Sweden and Norway had exclusive jurisdiction of the controversy or difference between Johnson and Tellefsen, and that the municipal court of the city of Boston had no jurisdiction either of the subject matter or of the persons of the parties in the action which the seaman saw fit to bring against the master. The officer who arrested the master was therefore acting illegally and without justification, and is liable in this action, unless he is protected by virtue of his writ. This presents a question of some difficulty and one which is not wholly free from doubt.

Before proceeding to consider the principal question, it may be well to state briefly certain principles laid down by the courts in regard to which there is little or no dispute.

Where the process is in due form and comes from a court of general jurisdiction over the subject matter, the officer is justified in acting according to its tenor, even if irregularities making the process voidable have previously occurred: *Savacool v. Boughton*, 5 Wend. 170; 21 Am. Dec. 181; *Earl v. Camp*, 16 Wend. 562; *Ela v. Shepard*, 32 N. H. 277; *Howard v. Proctor*, 7 Gray, 128; *Dwinnels v. Boynton*, 3 Allen, 310; *Chase v. Ingalls*, 97 Mass. 524; *Hubbard v. Garfield*, 102 Mass. 72; *Bergin v. Hayward*, 102 Mass. 414; *Rawson v. Spencer*, 113 Mass. 40; *Chesebro v. Barme*, 163 Mass. 79, 82; *Hines v. Chambers*, 29 Minn. 7; *Hann v. Lloyd*, 50 N. J. L. 1.

Where, however, the process is void on its face, the officer is ¹⁹⁴ not protected: *Clark v. Woods*, 2 Ex. 395; *Pearce v. Atwood*, 13 Mass. 324; *Eames v. Johnson*, 4 Allen, 382; *Thurston v. Adams*, 41 Me. 419; *Harwood v. Siphers*, 70 Me. 464; *Brown v. Howard*, 86 Me. 342; *Rosen v. Fischel*, 44 Conn. 371; *Frazier v.*

Turner, 76 Wis. 562; Sheldon v. Hill, 33 Mich. 171; Poulk v. Slocum, 3 Blackf. 421.

An officer is bound to know the law, and to know the jurisdiction of the court whose officer he is; if, therefore, he does an act in obedience to a precept of the court, and the court has no jurisdiction in the matter, either because the statute under which the court acted is unconstitutional, or there is a want of jurisdiction for any other reason, it would seem that the officer is not protected. There are many authorities to this effect: Fisher v. McGirr, 1 Gray, 1, 45; 61 Am. Dec. 381; Warren v. Kelley, 80 Me. 512; Batchelder v. Currier, 45 N. H. 460; Thurston v. Martin, 5 Mason, 497; Campbell v. Sherman, 35 Wis. 103; Sumner v. Beeler, 50 Ind. 341; 19 Am. Rep. 718; The Marshalsea, 10 Rep. 68 b; Crepps v. Durden, Cowp. 640; Brown v. Compton, 8 Term Rep. 424; Watson v. Bodell, 14 Mees. & W. 57.

Whether this doctrine applies to a case like the present where the court had general jurisdiction over the subject matter, but no jurisdiction over the particular controversy between the parties, and no jurisdiction over their persons, we need not decide, because on the facts in this case we are of opinion that the officer may be held liable.

He was informed before making the arrest that the vessel was a Norwegian vessel, and the captain of the vessel a Norwegian, and that the claim of Johnson would be adjusted at the consulate of the Kingdom of Sweden and Norway. Being informed of the facts, he was bound to know the law, that the court had no jurisdiction over the person of the captain or the subject matter of the action: Sprague v. Birchard, 1 Wis. 457, 464, 469; 60 Am. Dec. 393; Grace v. Mitchell, 31 Wis. 533, 539, 545; 11 Am. Rep. 613; Leachman v. Dougherty, 81 Ill. 324, 327, 328.

There are, without doubt, cases which lay down a more stringent rule, and say that the officer need not look beyond his precept, and is not bound to take notice of extrinsic facts; but all of these are cases which are distinguishable from the case at bar. The leading case on this subject is People v. Warren, 5 195 Hill, 440. The defendant was indicted for assaulting an officer. The inspectors of an election issued a warrant to a constable for the arrest of the defendant, for interrupting the proceedings at the election by disorderly conduct in the presence of the inspectors. The defendant offered to show that he had not been in the presence of the inspectors at any time during the election and that the constable knew it. This was held to be rightly excluded. The opinion is per curiam, and is very

brief. While it says that the inspectors had no jurisdiction of the subject matter, yet the clear meaning is, that if the defendant was not in their presence, they acted in excess of their jurisdiction. Knowledge by an officer that a man was innocent would, of course, be no excuse for assaulting the officer, if he arrested the man upon a warrant from a court of competent jurisdiction. An officer in a criminal case is obliged to obey his warrant, whatever his knowledge may be. This disposes also of the case of *State v. Weed*, 21 N. H. 262; 53 Am. Dec. 188.

Several cases have been called to our attention in which there are dicta to the effect that an officer is not bound to look beyond his precept, even if he has knowledge that the court has no jurisdiction; but an examination of these cases shows that the facts known to the officer did not affect the jurisdiction of the court, but related to irregularities in the prior proceedings, or to matters merely of defense to the action: See cases above cited.

Of course, where the court has jurisdiction of the subject matter and of the parties to an action, knowledge on the part of the officer, or information to him that there is some irregularity in the proceeding, can make no difference: *Underwood v. Robinson*, 106 Mass. 296. Nor can it make any difference that the officer is informed that there is a defense to the action, such as that the defendant has a receipt: *Twitchell v. Shaw*, 10 Cush. 46; 57 Am. Dec. 80; or a discharge in insolvency: *Wilmarth v. Burt*, 7 Met. 257; or that the defendant is an infant: *Cassier v. Fales*, 139 Mass. 461.

But the question of jurisdiction is a more serious matter, and if facts are brought to the attention of the officer about which he can have no reasonable doubt, and he knows, or is bound to know, that on these facts the court has no jurisdiction of the controversy, he may well be held to proceed at his peril.

We can see no hardship upon the officer in holding him responsible ¹⁹⁶ in this case for an illegal arrest and for a false imprisonment. If an officer has reasonable cause to doubt the lawfulness of an arrest, he may demand from the plaintiff a bond of indemnity, and so save himself harmless: *Marsh v. Gold*, 2 Pick. 285, 290. We are not aware that this case has ever been doubted; and in practice, bonds of indemnity have often been required.

In the case at bar, after receiving full information, he chose to proceed, and, in defiance of the treaty, to subject the subject of a foreign nation to a gross indignity, for the purpose of extorting money from him, under the guise of a precept which the

court had no jurisdiction to issue, and which it would not have issued had the facts been before it.

We approve of the language of Mr. Freeman in 21 Am. Dec. 204, where, after a discussion of the cases bearing upon the question of the liability of an officer, he says: "We apprehend, at all events, that the protection of process cannot so far extend as to protect an officer who, from all the circumstances of the case, does not appear to have acted in good faith, and whose conduct shows that his eyes were willfully closed to enable him not to see and know that he was a too ready instrument in the perpetration of a grievous wrong."

In the opinion of a majority of the court, the instruction requested should have been given.

Exceptions sustained.

JUDGE KNOWLTON dissented, claiming that the majority of the members of the court erred "in holding that the defendant was bound to receive statements made by the plaintiff or others for the purpose of determining whether he could lawfully serve a writ which was regular in form, and which on its face showed a case within the jurisdiction of the court." The judge admitted that the officer was bound to know the law, even to the extent of determining whether a statute on which process was founded was constitutional, but insisted that for the facts the officer was "not called upon to take the testimony of anybody in regard to anything outside of the statements contained in the process, nor even to act upon what he believes to be his own knowledge. The jurisdiction which the court must have in order to justify him is jurisdiction of the case stated in the writ. It may turn out that there was no real case upon which to issue a writ, and that the prosecution is grossly malicious, or that there is a real case materially different from that stated, and which does not come within the jurisdiction of the court, but the officer is not bound to inquire into matters of this kind. This has been held in a great many cases in Massachusetts and elsewhere, and the reasons for the rule have been elaborately stated in different jurisdictions. These reasons seem to me fully to cover the present case: *Twitchell v. Shaw*, 10 Cush. 46; 57 Am. Dec. 80; *Wilmarth v. Bert*, 7 Met. 257; *Donahoe v. Shed*, 8 Met. 326; *Fisher v. McGirr*, 1 Gay, 1, 45; 61 Am. Dec. 381; *Clarke v. May*, 2 Gray, 410; 61 Am. Dec. 470; *Chase v. Ingalls*, 97 Mass. 524; *Underwood v. Robinson*, 106 Mass. 296, 297; *Rawson v. Spencer*, 113 Mass. 40, 46; *Cassier v. Fales*, 139 Mass. 461; *State v. Weed*, 21 N. H. 262; 53 Am. Dec. 188; *Batchelder v. Currier*, 45 N. H. 460; *Watson v. Watson*, 9 Conn. 140; 23 Am. Dec. 324; *Warren v. Kelly*, 80 Me. 512, 531; *Earl v. Camp*, 16 Wend. 562; *Webber v. Gray*, 24 Wend. 485; *People v. Warren*, 5 Hill, 440; *Hann v. Lloyd*, 50 N. J. L. 1; *Taylor v. Alexander*, 6 Ohio, 144, 147; *Henline v. Reese*, 54 Ohio St. 599; 56 Am. St. Rep. 736; *Wall v. Trumbull*, 16 Mich. 228, 234."

TREATIES.—A treaty is the supreme law of the land, binding all courts, state and federal: Succession of Rabasse, 47 La. Ann. 1452; 49 Am. St. Rep. 433, and note; and is obligatory on all departments of the government and on all parties litigating in the courts: Howell v. Fountain, 3 Ga. 176; 46 Am. Dec. 415. See monographic note to Yeaker v. Yeaker, 81 Am. Dec. 536-540.

PROCESS—WHEN A PROTECTION TO OFFICER.—An officer is justified for every action within the scope of the command of a process appearing on its face to have issued to him from competent authority, and with legal regularity: Watson v. Watson, 9 Conn. 140; 23 Am. Dec. 324; Keniston v. Little, 30 N. H. 318; 64 Am. Dec. 297; Clay v. Caperton, 1 T. B. Mon. 10; 15 Am. Dec. 77. There is some conflict in the decisions as to whether or not an officer will be protected by process regular on its face, if he has personal knowledge of a defect in the previous process which renders such process void or voidable: Monographic note to Savacool v. Boughton, 21 Am. Dec. 201, on justification of officers by their process. A note on the prosecution of transitory actions in the courts of another state or nation follows Eingartner v. Illinois Steel Co., 59 Am. St. Rep. 859.

BRAUER v. SHAW.

[168 MASSACHUSETTS, 198.]

OFFER, ACCEPTANCE BY TELEGRAMS, WHEN THE MINUTES POWER TO WITHDRAW OFFER.—If an offer made by one telegram is accepted by another, it cannot afterward be withdrawn by a third telegram forwarded before the second was actually received, but which did not reach its addressee until after the second telegram had come to the hands of the person making, and afterward seeking to withdraw, from the offer.

R. M. Rogers, for the plaintiffs.

B. L. M. Tower and F. A. North, for the defendants.

198 HOLMES, J. These are two actions of contract, on alleged contracts letting all the cattle carrying space on the Warren line of steamships for the May sailings from Boston to Liverpool, the first contract at the rate of fifty shillings a head, the second and alternative one at fifty-two shillings and sixpence. As we are all of opinion that, for one reason or another, the **199** right to recover upon the first contract is not made out, it may be stated shortly. On April 15, 1892, after earlier correspondence, the defendants wrote stating terms, saying that they had telegraphed that they "would probably accept 50-s. if reply promptly," referring to an answer asking to have the space kept until noon the next day, and to their reply that they would "try to keep space for you," and adding that there were several customers, and that they should feel "duty bound to let it to the first man making the best bid." The plaintiffs' agents telegraphed at fifty-three minutes past eight the next morning,

making a modified offer. Whether they had received the above letter does not appear. The defendants answered, "referring our letter yesterday first offer for number named has preference three parties considering. Wire quick if you want it." This was received in the New York telegraph office at fifteen minutes past ten. At twenty minutes past ten the plaintiffs' agents telegraphed, "Have closed all your May spaces as per letter," etc. This is relied on as making the contract. It does not appear whether the telegram which arrived only five minutes before had been received. If not, and if the last telegram was in answer to the letter only, the plaintiffs would encounter the question whether the letter contained an absolute offer or only invited one, and if the former, whether the offer had not been rejected by the modified offer in the first telegram mentioned. However this may be, the parties did not stop at the point which we have reached, but went on telegraphing as we shall state, so that if there was any moment when a contract had been made the parties assumed the contrary and continued their bargaining. Either no contract had been made thus far, or it was discharged by the conduct of the parties. It was treated as discharged in a letter of the plaintiffs' agents written later on the same day.

We come then to the later telegrams of the same day, which are relied on as making the second contract. At half past eleven the defendants telegraphed, "Subject prompt reply will let you May space fifty-two six." This was received in New York at sixteen minutes past twelve, and at twenty-eight minutes past twelve a reply was sent accepting the offer. For some reason this was not received by the defendants until twenty ²⁰⁰ minutes past one. At one the defendants telegraphed revoking their offer, the message being received in New York at forty-three minutes past one. The plaintiffs held the defendants to their bargain, and both parties stand upon their rights.

There is no doubt that the reply was handed to the telegraph company promptly, and at least it would have been open to a jury to find that the plaintiffs had done all that was necessary on their part to complete the contract. If, then, the offer was outstanding when it was accepted, the contract was made. But the offer was outstanding. At the time when the acceptance was received, even, the revocation of the offer had not been received. It seems to us a reasonable requirement that, to disable the plaintiffs from accepting their offer, the defendants should bring home to them actual notice that it had been revoked. By their choice and act they brought about a relation between themselves and the plaintiffs which the plaintiffs could turn into a contract

by an act on their part and authorized the plaintiffs to understand and to assume that that relation existed. When the plaintiffs acted in good faith on the assumption, the defendants could not complain. Knowingly to lead a person reasonably to suppose that you offer and to offer are the same thing: *O'Donnell v. Clinton*, 145 Mass. 461, 463; *Cornish v. Abington*, 4 Hurl. & N. 549. The offer must be made before the acceptance, and it does not matter whether it is made a longer or a shorter time before, if, by its express or implied terms, it is outstanding at the time of the acceptance. Whether much or little time has intervened, it reaches forward to the moment of the acceptance, and speaks then. It would be monstrous to allow an inconsistent act of the offerer, not known or brought to the notice of the offeree, to affect the making of the contract; for instance, a sale by an agent elsewhere one minute after the principal personally has offered goods which are accepted within five minutes by the person to whom he is speaking. The principle is the same when the time is longer and the act relied on a step looking to but not yet giving notice. The contrary suggestion by Wilde, J., in *M'Culloch v. Eagle Ins. Co.*, 1 Pick. 278, 279, is not adopted as a ground of decision, and the view which we take is that taken by the supreme court of the United States, and is now the settled law of England: *Tayloe v. Merchants' Ins. Co.*, 9 How. 390, 400; *Patrick v. Bowman*, 149 U. S. 411, 424; *Byrne v. Van Tienhoven*, 5 C. P. Div. 344; *Stevenson v. McLean*, 5 Q. B. Div. 346; *Henthorn v. Fraser* (1892), 2 Ch. 27; *Thomson v. James*, 18 Ct. of Sess. Cas., 2d series, 1; *Langdell on Contracts*, sec. 180; *Drew v. Nunn*, 4 Q. B. Div. 661, 667; *Wheat v. Cross*, 31 Md. 99, 103; *Kempner v. Cohn*, 47 Ark. 519, 527; 58 Am. Rep. 775.

It is unnecessary to consider other reasons which were urged for our decision.

Exceptions sustained.

CONTRACTS BY TELEGRAPH—WHEN COMPLETE.—A contract becomes complete the moment the message containing an unqualified acceptance is delivered to the telegraph company for transmission. And such acceptance is, in this country, at the risk of the party whose proposition is accepted whether it arrives in due course of the telegraph, correctly or incorrectly, or not at all: *Extended note to Trevor v. Wood*, 93 Am. Dec. 515, on contracts by telegraph. See, also, *Perry v. Mount Hope Iron Co.*, 15 R. I. 380; 2 Am. St. Rep. 902, and note; *Calhoun v. Atchison*, 4 Bush, 261; 96 Am. Dec. 299.

ANDREWS v. JACKSON.

[168 MASSACHUSETTS, 266.]

FALSE REPRESENTATIONS, WHEN ACTIONABLE.—One who, to induce a sale of notes, represents them to be good as gold, and who intends, and is understood to intend, not an expression of an opinion, but a statement of a fact of his own knowledge, is, if such representations were known by him to be false, answerable to the person to whom they were made and who has been damaged by acting thereon.

FALSE REPRESENTATIONS, EVIDENCE TO SUPPORT FINDING OF.—Evidence showing that a person seeking to sell promissory notes professed to know all about the solvency of the maker, that she to whom they were offered knew nothing of the maker, but lived in another town and was obliged to accept the seller's representations or decline to deal with him, and that he said he had loaned money to the maker, and asked, "Do you suppose I would lend my money to him when he was not good," is sufficient to support a finding that such seller was understood, and intended to be understood, as making a representation of facts within his own knowledge.

A RESCISSION OF A CONTRACT IS NOT NECESSARY to support an action for damages for false representations whereby plaintiff was induced to make it.

Action of tort for deceit. The complaint alleged that the defendant sought to purchase of the plaintiff certain real property situate in the town of Medford and to have the plaintiff accept as part payment thereof certain notes executed by H. Joseph, and to induce the plaintiff to accept such notes, represented to her that the maker was a man of property and that the notes were good as gold. The plaintiff, believing these representations, was induced to convey the real property. Judgment for the plaintiff; the defendant alleged exceptions.

H. R. Bailey and J. H. Appleton, for the defendant.

W. P. Martin, for the plaintiff.

207 KNOWLTON, J. The principal question in this case is, whether there was any evidence to warrant a finding that the false representations made by the defendant in regard to the notes were actionable. This finding is in these words: "I find that the defendant represented these notes to be as good as gold, and that that representation was intended by him and understood by the plaintiff, not to be an expression of opinion, but a statement of a fact of his own knowledge. I find that the notes were worthless." It is contended by the defendant that such a representation is necessarily, and as matter of law, a mere expression of opinion, for which, however willfully false, and however damaging in the reliance placed upon it, no action can be maintained.

It is true that such a representation may be, and often is, a

mere expression of opinion. But we think that it may be made under such circumstances and in such a way as properly to be understood as a statement of fact upon which one may well rely.

In *Stubbs v. Johnson*, 127 Mass. 219, one of the representations in regard to a note was that it was "as good as gold," and the jury were instructed that, if this was intended as a representation of the financial ability of the maker of the note, it was a statement of a material fact, for which the defendant was liable. This instruction was held erroneous "because a representation as to a man's financial ability to pay a debt may be made either as a matter of opinion, or as a matter of fact; the subject of the statement does not necessarily determine which it is. . . . It is often impossible," says Mr. Justice Colt further in the opinion, "to determine, as matter of law, whether a statement is a representation of a fact, which the defendant intended should be understood as true of his own knowledge, or an expression of opinion. That will depend upon the nature of the representation, the meaning of the language used, as applied to the subject matter, and as interpreted by the surrounding circumstances, in ²⁶⁸ each case. The question is generally to be submitted to the jury." The opinion plainly implies that, if the jury had been left to determine whether there was a representation of the maker's financial ability to pay made as matter of fact and not as mere matter of opinion, they might have found against the defendant on his false representation that the note was "as good as gold." In *Belcher v. Costello*, 122 Mass. 189, there is also a strong intimation that the rule is as above stated. In *Safford v. Grout*, 120 Mass. 20, the representation set out in the declaration was that the maker of the note "was a person of ample means and ability to pay said note, and that the note was good." The plaintiff was allowed to recover. The court says of the representations, "We must presume that they were legally sufficient to support the action; that is to say, that they were statements of facts susceptible of knowledge, as distinguished from matters of mere opinion or belief": See, also, *Morse v. Shaw*, 124 Mass. 59; *Teague v. Irwin*, 127 Mass. 217.

In two recent cases, *Way v. Ryther*, 165 Mass. 226, and *Kilgore v. Burce*, 166 Mass. 136, 138, this court has expressed a disinclination to extend the rule which permits dealers to indulge with impunity in false representations of opinion.

In the case now before us, the notes were turned over to the plaintiff in part payment of the agreed price for land sold to the defendant. He professed to know, and probably did know,

all about the financial standing of the maker of them, who lived in Boston. The plaintiff lived in a suburban town and knew nothing of the maker. She was obliged to take the defendant's representations or to decline to deal with him until she could go to Boston and make an investigation for herself. He told her that he had lent money to the maker, and said, "Do you suppose I would lend my money to anyone that was not good?"

A representation that a note is as good as gold may be founded on absolute personal knowledge of the validity of the note, and upon an equally certain knowledge of the maker's financial ability. The known facts upon which financial ability depends may be so clear and cogent as to make the consequent conclusion, which ordinarily would be a mere matter of opinion, a matter of moral certainty which can properly be called knowledge. We cannot say, as matter of law, that this representation was not ²⁶⁹ intended to be, and properly understood to be, a representation of facts within the defendant's knowledge.

The case of *Deming v. Darling*, 148 Mass. 504, differs materially from this at bar. The property to which the representation related was one of many mortgage bonds issued by a railroad company, of which, in the language of the opinion, the "market prices at least were easily accessible to the plaintiff." The representations which were held to be insufficient on which to found an action were "in relation to the value of the bond in question, or of the railroad, its terminals, and other property which were mortgaged to secure it." The value of articles sold in market, and especially of railroad property and of railroad bonds payable in the distant future, is ordinarily only a matter of opinion. A statement of the value of such property is very different from a statement that a promissory note which is almost due is known to be valid, and that the maker of it is a person of such known integrity and financial ability that his promise to pay is as good as that of the state or nation. A statement that a note is as good as gold may be intended to represent facts of this kind.

The request to rule "that the tender of the four notes at the time of the trial was made too late to effect a rescission of the contract, or that part of it relating to the notes," was rightly refused. The action does not rest upon a rescission of the contract, but upon an affirmation of it, and upon a claim for damages for false representations in regard to the property delivered to the plaintiff under it.

Exceptions overruled.

FRAUD—FALSE REPRESENTATIONS—MATTERS OF OPINION.—In general, statements of mere matters of opinion, though false, cannot be made the basis of an action for deceit: *Crocker v. Manley*, 164 Ill. 282, 56 Am. St. Rep. 196, and note. But a false statement of opinion as to a subject on which one party has special knowledge, while the other party is ignorant and relies thereon to his damage, if made fraudulently, renders the person giving the opinion liable in such an action: *Hedlin v. Minneapolis etc. Inst.*, 62 Minn. 146; 54 Am. St. Rep. 628, and note. As to what misrepresentations will support an action for deceit, see *Crocker v. Manley*, 164 Ill. 282; 56 Am. St. Rep. 196, and note; *Kountze v. Kennedy*, 147 N. Y. 124; 49 Am. St. Rep. 651, and note.

FRAUD IN PROCURING CONTRACT—ACTION FOR DAMAGES—RESCISSION NOT NECESSARY.—Where one person knowingly and fraudulently takes advantage of another's intoxication by inducing him to enter upon a contract against his best interests, the latter may maintain an action to recover the damages sustained by him without first rescinding the contract and offering to return the consideration received for it: *Baird v. Howard*, 51 Ohio St. 57; 46 Am. St. Rep. 550, and note. See monographic note to *Cottrill v. Krum*, 18 Am. St. Rep. 555-563, on action to recover for false representations.

SPADE v. LYNN AND BOSTON RAILROAD COMPANY.

[168 MASSACHUSETTS, 285.]

DAMAGES FOR FRIGHT OR MENTAL DISTURBANCE.—In an action to recover damages for an injury sustained through the negligence of another, there can be no recovery for a bodily injury caused by mere fright or mental disturbance. Persons who are merely negligent are not bound to anticipate and guard against fright and the consequences thereof. The rule is probably otherwise where there is an intention to cause mental disturbance, or where acts are done with gross carelessness or recklessness, showing an utter indifference to consequences.

Tort for personal injuries. The evidence showed that the plaintiff was riding as a passenger in a car of the defendant, at which time an altercation took place between the conductor of the car and an intoxicated passenger respecting the payment of fare; that the conductor informed the passenger that he would be thrown off the car if he did not keep quiet, even if it broke his head; that the plaintiff saw the conductor grab the man by the collar, that another man from the other end of the car interfered in the proceedings in some way not very clear from the plaintiff's testimony, lurching him over her, the consequences of which she described as follows: "It seemed as though I turned to solid ice. My breath was cut right off. I could not have spoken; I tried to speak, but I chilled so I kept growing stiffer and stiffer, until I did not know, I do not know when they got me off the car." The plaintiff was not injured in any other way, and did not suffer any pain other than the chilliness re-

ferred to. The jury returned a verdict in her favor, and the defendant alleged exceptions.

C. K. Cobb, for the defendant.

S. L. Whipple and W. R. Sears, for the plaintiff.

²⁸⁷ ALLEN, J. This case presents a question which has not heretofore been determined in this commonwealth, and in respect to which the decisions elsewhere have not been uniform. It is this: whether, in an action to recover damages for an injury sustained through the negligence of another, there can be a recovery for a bodily injury caused by mere fright and mental disturbance. The jury were instructed that a person cannot recover for mere fright, fear, or mental distress occasioned by the negligence of another, which does not result in bodily injury; but that when the fright or fear or nervous shock produces a bodily injury, there may be a recovery for that bodily injury, and for all the pain, mental or otherwise, which may arise out of that bodily injury.

In *Canning v. Williamstown*, 1 Cush. 451, it was held, in an action against a town to recover damages for an injury sustained by the plaintiff in consequence of a defective bridge, that he could not recover if he sustained no injury to his person, but merely incurred risk and peril which caused fright and mental suffering. In *Warren v. Boston etc. R. R. Co.*, 163 Mass. 484, the evidence tended to show that the defendant's train struck the carriage of the plaintiff, thereby throwing him out upon the ground, and it was held to be a physical injury to the person to be thrown out of a wagon, or to be compelled to jump out, even although the harm consists mainly of nervous shock. It was not, therefore, a case of mere fright, and resulting nervous shock.

The case calls for a consideration of the real ground upon which the liability or nonliability of a defendant guilty of negligence ²⁸⁸ in a case like the present depends. The exemption from liability for mere fright, terror, alarm, or anxiety does not rest on the assumption that these do not constitute an actual injury. They do in fact deprive one of enjoyment and of comfort, cause real suffering, and to a greater or less extent disqualify one for the time being from doing the duties of life. If these results flow from a wrongful or negligent act, a recovery therefor cannot be denied on the ground that the injury is fanciful and not real. Nor can it be maintained that these results may not be the direct and immediate consequence of the negligence. Danger excites alarm. Few people are wholly insensible

to the emotions caused by imminent danger, though some are less affected than others.

It must also be admitted that a timid or sensitive person may suffer not only in mind, but also in body, from such a cause. Great emotion may, and sometimes does, produce physical effects. The action of the heart, the circulation of the blood, the temperature of the body, as well as the nerves and the appetite, may all be affected. A physical injury may be directly traceable to fright, and so may be caused by it. We cannot say, therefore, that such consequences may not flow proximately from unintentional negligence, and, if compensation in damages may be recovered for a physical injury so caused, it is hard on principle to say why there should not also be a recovery for the mere mental suffering when not accompanied by any perceptible physical effects.

It would seem, therefore, that the real reason for refusing damages sustained from mere fright must be something different; and it probably rests on the ground that in practice it is impossible satisfactorily to administer any other rule. The law must be administered in the courts according to general rules. Courts will aim to make these rules as just as possible, bearing in mind that they are to be of general application. But as the law is a practical science, having to do with the affairs of life, any rule is unwise if, in its general application, it will not as a usual result serve the purposes of justice. A new rule cannot be made for each case, and there must, therefore, be a certain generality in rules of law, which in particular cases may fail to meet what would be desirable if the single case were alone to be considered.

Rules of law respecting the recovery of damages are framed ²⁸⁹ with reference to the just rights of both parties; not merely what it might be right for an injured person to receive, to afford just compensation for his injury, but also what it is just to compel the other party to pay. One cannot always look to others to make compensation for injuries received. Many accidents occur, the consequences of which the sufferer must bear alone. And in determining the rules of law by which the right to recover compensation for unintended injury from others is to be governed, regard must chiefly be paid to such conditions as are usually found to exist. Not only the transportation of passengers and the running of trains, but the general conduct of business and of the ordinary affairs of life, must be done on the assumption that persons who are liable to be affected thereby are not peculiarly sensitive, and are of ordinary physical and

mental strength. If, for example, a traveler is sick or infirm, delicate in health, specially nervous or emotional, liable to be upset by slight causes, and therefore requiring precautions which are not usual or practicable for travelers in general, notice should be given, so that, if reasonably practicable, arrangements may be made accordingly, and extra care be observed. But, as a general rule, a carrier of passengers is not bound to anticipate or to guard against an injurious result which would only happen to a person of peculiar sensitiveness. This limitation of liability for injury of another description is intimated in *Allsop v. Allsop*, 5 Hurl. & N. 534, 538, 539. One may be held bound to anticipate and guard against the probable consequences to ordinary people, but to carry the rule of damages further imposes an undue measure of responsibility upon those who are guilty only of unintentional negligence. The general rule limiting damages in such a case to the natural and probable consequences of the acts done is of wide application, and has often been expressed and applied: *Lombard v. Lennox*, 155 Mass. 70; 31 Am. St. Rep. 528; *White v. Dresser*, 135 Mass. 150; 46 Am. Rep. 454; *Fillebrown v. Hoar*, 124 Mass. 580; *Derry v. Flitner*, 118 Mass. 131; *Milwaukee etc. Ry. Co. v. Kellogg*, 94 U. S. 469, 475; *Wyman v. Leavitt*, 71 Me. 227; 36 Am. Rep. 308; *Ellis v. Cleveland*, 55 Vt. 358; *Phillips v. Dickerson*, 85 Ill. 11; 28 Am. Rep. 607; *Hampton v. Jones*, 58 Iowa, 317; *Renner v. Canfield*, 36 Minn. 90; 1 Am. St. Rep. 654; *Lynch v. Knight*, 9 H. L. Cas. 577, 591, 595, 598; *The Notting Hill*, L. R. 9 P. D. 105; *Hobbs v. London etc. Ry.*, L. R. 10 Q. B. 111, 122.

²⁰⁰ The law of negligence in its special application to cases of accidents has received great development in recent years. The number of actions brought is very great. This should lead courts well to consider the grounds on which claims for compensation properly rest, and the necessary limitations of the right to recover. We remain satisfied with the rule that there can be no recovery for fright, terror, alarm, anxiety, or distress of mind, if these are unaccompanied by some physical injury; and, if this rule is to stand, we think it should also be held that there can be no recovery for such physical injuries as may be caused solely by such mental disturbance, where there is no injury to the person from without. The logical vindication of this rule is, that it is unreasonable to hold persons who are merely negligent bound to anticipate and guard against fright and the consequences of fright; and that this would open a wide door for unjust claims, which could not successfully be met. These views are supported by the following decisions: *Victorian Ry.*

Commrs. v. Coultas, L. R. 13 App. Cas. 222; Mitchell v. Rochester Ry. Co., 151 N. Y. 107; 56 Am. St. Rep. 604; Ewing v. Pittsburg etc. Ry. Co., 147 Pa. St. 40; 30 Am. St. Rep. 709; Haile v. Texas etc. Ry. Co., 60 Fed. Rep. 557.

In the following cases, a different view was taken: Bell v. Great Northern Ry. Co., 26 L. R. Ir. 428; Purcell v. St. Paul City Ry. Co., 48 Minn. 134; Fitzpatrick v. Great Western Ry. Co., 12 U. C. Q. B. 645. See, also, Beven on Negligence, 77, et seq.

It is hardly necessary to add that this decision does not reach those classes of actions where an intention to cause mental distress or to hurt the feelings is shown, or is reasonably to be inferred, as, for example, in cases of seduction, slander, malicious prosecution, or arrest, and some others. Nor do we include cases of acts done with gross carelessness or recklessness, showing utter indifference to such consequences, when they must have been in the actor's mind: Lombard v. Lennox, 155 Mass. 70; 31 Am. St. Rep. 528; Fillebrown v. Hoar, 124 Mass. 580; Meagher v. Driscoll, 99 Mass. 281; 96 Am. Dec. 759.

In the present case, no such considerations entered into the rulings or were presented by the facts. The entry therefore must be, exceptions sustained.

DAMAGES—MENTAL DISTURBANCE—FRIGHT.—Damages for fright cannot be recovered where there is no injury to property and no physical injury, though such fright and mental suffering resulted from the negligence of the defendant: Gulf etc. Ry. Co. v. Trott, 86 Tex. 412; 40 Am. St. Rep. 866, and note. See, also, Mitchell v. Rochester Ry. Co., 151 N. Y. 107; 56 Am. St. Rep. 604, and note.

KELLY v. NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

[168 MASSACHUSETTS, 308.]

HUSBAND AND WIFE.—FOR HIS LOSS OF CONSORTIUM with his wife a husband may maintain an action, notwithstanding the enactment of statutes enlarging the rights of married women. While these abridge his right to compel her to work for him, he still has a right to her society and assistance which is different in character and degree from that which other people have or which she is at liberty to give them. Hence, if a wife suffers personal injuries from the negligence of another, her husband may recover compensation for his consequential injuries therefrom, including his loss of consortium.

Tort to recover consequential damages resulting from personal injuries to plaintiff's wife from the defendant's negligence. She was injured through the negligence of defendant's agents

while a passenger on one of its trains. Before this injury she had been in good health, doing the housework, cooking, and washing in plaintiff's household, and taking care of two children. From the accident she had suffered a fractured shoulderblade and other injuries, causing her severe pain and rendering her unable for a considerable length of time to perform any work, and her capacity for work had been permanently impaired, and her disposition rendered irritable. The plaintiff had incurred expenses for medical attendance, nursing, and medicines to the amount of one thousand dollars and upward. The defendant requested the judge to instruct that the plaintiff could not recover. This he refused, but did instruct the jury that while the plaintiff and his wife could not together recover more damages than she would be entitled to recover if unmarried, yet that this was subject to the qualification that he was entitled to recover for loss of consortium, and that this word "consortium" could best be defined as meaning fellowship, society, and communion. Verdict for the plaintiff for six hundred and sixteen dollars, and the defendant alleged exceptions.

J. H. Benton, Jr., and C. F. Choate, Jr., for the defendant.

J. E. Cotter, for the plaintiff.

310 ALIEN, J. In *Bigaouette v. Paulet*, 134 Mass. 123, 45 Am. Rep. 307, a husband's action for loss of consortium with his wife was held to be maintainable, although there was no loss of service or payment of expenses in consequence thereof. And in *Bennett v. Bennett*, 116 N. Y. 584, it is said that the basis of the husband's action for loss of consortium is his right to the conjugal society of his wife, and that it is not necessary that there should be proof of any pecuniary loss or loss of service.

The present case was tried with an action brought by the plaintiff's wife, and the same jury fixed the damages in both cases. The defendant took exceptions in this case, but none in the action brought by her. The jury were instructed that the division of the rights to recover, which by law are made between the husband and the wife, does not in any sense increase the aggregate right of recovery, and that the damages which are to be divided between the husband and the wife should not in the aggregate exceed the damages which the wife, if unmarried, would be entitled to recover; with the qualification, however, that one additional element should be considered, namely, the loss of consortium by the husband. The defendant contends that now an action will not lie for loss of consortium, or at

least that it will not in case of an injury to her through negligence, and that the incurring of expenses will not alone give a ground of action.

It might be sufficient to dispose of this case to say that the plaintiff was bound to support his wife, and that the expenses incurred by him appear to have exceeded the amount of the verdict, ³¹¹ and that therefore the defendant's exceptions should be overruled; but in view of the ruling at the trial allowing the jury to take into account the plaintiff's loss of consortium, and of the defendant's request that the correctness of this ruling should be determined, we proceed to consider it.

By the common law, it is quite clear that a husband might maintain an action in his own name alone for an injury to his wife which resulted in his loss of consortium with her; as, for example, for an injury caused by an assault and battery upon her, by medical or surgical malpractice, or by other negligence: *Hyde v. Scysson*, Cro. Jac. 538; *Guy v. Lusy*, 2 Rolle, 51; *Russell v. Corne*, 2 Ld. Rayn. 1031; *Dix v. Brookes*, 1 Strange, 61; *Smith v. Hixon*, 2 Strange, 977; 2 Rolle's Abridgment, Tresspass (Y), 16, p. 556; *Hale's Analysis of Law*, 96; 3 *Blackstone's Commentaries*, 140; 1 *Chitty on Pleading*, 7th ed., 83; *Yelv.*, Met. ed., 89; *Baker v. Bolton*, 1 Camp. 493; *Carey v. Berkshire R. R. Co.*, 1 Cush. 475, 478; 48 Am. Dec. 616; *Barnes v. Hurd*, 11 Mass. 59; *Laughlin v. Eaton*, 54 Me. 156; *Hopkins v. Atlantic etc. R. R. Co.*, 36 N. H. 9, 14; 72 Am. Dec. 287; *Lewis v. Babcock*, 18 Johns. 443; *Matteson v. New York Cent. R. R. Co.*, 35 N. Y. 487; 91 Am. Dec. 67; *Jones v. Utica etc. R. R. Co.*, 40 Hun, 349 (a case much like the present); *Berger v. Jacobs*, 21 Mich. 215; *Hyatt v. Adams*, 16 Mich. 180; *Long v. Morrison*, 14 Ind. 595; 77 Am. Dec. 72; *Nixon v. Ludlam*, 50 Ill. App. 273; *Mewhirter v. Hatten*, 42 Iowa, 288; 20 Am. Rep. 618; *Mowry v. Chaney*, 43 Iowa, 609; *Smith v. St. Joseph*, 55 Mo. 456; 17 Am. Rep. 660.

The contention of the defendant, therefore, must rest entirely on the ground that the husband has lost this right of consortium by reason of the legislation of this commonwealth increasing the rights of married women: *Harmon v. Old Colony R. R. Co.*, 165 Mass. 100; 52 Am. St. Rep. 499. But there has been no substantial change in the statutes upon this subject since the decision in *Bigaouette v. Paulet*, 134 Mass. 123; 45 Am. Rep. 307. Notwithstanding the progress of legislation in giving to married women the control of their time and actions, this right of the husband is not destroyed. The unity and identity of interest which by the common law existed between hus-

band and wife have been impaired: *Butler v. Ives*, 139 Mass. 202. They are not, however, entirely done away with. The husband's right to compel his wife to work for him is abridged, but he still has a right to her society and assistance, which is different in character ³¹² and degree from that which other people, have, or which she is at liberty to give to them. By marriage, both husband and wife take upon themselves certain duties and obligations toward each other, in sickness and health, which it cannot be supposed that the legislature has intended wholly to uproot. A married woman may now perform any labor or services on her sole and separate account, as her husband may; nevertheless, each owes certain duties to the other which are not annulled by the statutes: *Mewhirter v. Hatten*, 42 Iowa, 288; 20 Am. Rep. 618. These duties are included in the word "consortium"; but the extent of these duties, or of the right of consortium, need not now be determined. The only question presented to us is, whether the presiding justice was right in allowing the jury to consider at all the loss of consortium.

It is argued by the defendant that, if a husband has a right to recover for the loss of consortium through an injury caused by negligence, a wife also would have the same right, by virtue of the existing statutes, in case of such an injury to her husband; and that this has never been held or even contended for. She has no such right at common law; but whether she has by statute we do not now consider. The question has been considered elsewhere, but the decisions are not in harmony.

Exceptions overruled.

HUSBAND AND WIFE—HUSBAND'S RIGHT TO WIFE'S COMPANIONSHIP.—One who injures another either in his rights, property, or reputation, is liable in damages to the extent of that injury, hence, as a husband is entitled to the services and companionship of his wife, one who willfully joins with her in doing an act which deprives her husband of her services and of her companionship is liable to the husband in damages for his conduct: *Holleman v. Harvard*, 119 N. C. 150; 56 Am. St. Rep. 672, and note. See, also, monographic note to *Shaddock v. Clifton*, 94 Am. Dec. 591-593; and note to *Edgar v. Castello*, 37 Am. Rep. 716-719.

TEELE v. BISHOP OF DERRY.

[168 MASSACHUSETTS, 341.]

GIFT FOR CHARITABLE USE, WHAT IS.—A bequest to trustees of moneys to purchase a lot and build a chapel to forever be used for purposes of public worship under the auspices of the Roman Catholic Church is a gift for a public charitable use.

GIFT FOR A FOREIGN CHARITABLE USE.—The fact that a charity would be administered in a foreign country does not of itself render the gift void.

PUBLIC CHARITY, DUTY OF COURT TO FORM A SCHEME TO CARRY OUT.—The fact that a bequest is in the nature of a public charity does not itself require that the court should form a scheme to carry it out as near as may be to the scheme of the testator, if for any reason that has become impossible of performance in the manner which he had provided.

CY PRES, RULE OF—WHEN INAPPLICABLE.—If a charitable purpose is limited to a particular object, which it becomes impossible to carry out, or to an institution which has ceased to exist before the gift takes effect, the doctrine of cy pres does not apply, and, in the absence of any limitation over or other provision, the legacy lapses. Hence, if there is a bequest in a will to trustees for the purpose of purchasing a lot and building a chapel in Carndrine, to be forever used for the purpose of public worship under the auspices of the Roman Catholic Church, and it is found to be impracticable to carry out this scheme, the court will not adopt some other scheme, but the legacy will lapse.

C. R. Darling and W. S. Slocum, for the Bishop of Derry.

W. M. Noble, for the residuary legatees.

³⁴² MORTON, J. We think that the bequest to trustees for the purpose of purchasing a lot and building a chapel in Carn-drine, Ireland, to “forever be used for purposes of public worship under the auspices of the Roman Catholic Church,” was a gift for a public charitable use: *Attorney General v. Briggs*, 164 Mass. 561, 567; *Bartlett*, petitioner, 163 Mass. 509, 514; *McAlister v. Burgess*, 161 Mass. 269; *Sears v. Chapman*, 158 Mass. 400; 35 Am. St. Rep. 502. The fact that the charity would be administered in a foreign country does not of itself render the gift void, and there is nothing to show that it would not be a good public charity by the law of Ireland: *Fellows v. Miner*, 119 Mass. 541, 546; *Washburn v. Sewall*, 9 Met. 280; *Burbank v. Whitney*, 24 Pick. 146, 154; 35 Am. Dec. 312; *Chamberlain v. Chamberlain*, 43 N. Y. 424, 432. Neither does the fact that the bequest is in the nature of a public charity require of itself that the court should frame a scheme to carry out as nearly as may be the purpose of the testatrix, if, for any reason, that has become impossible of performance in the manner which she has provided. “Assuming that the object is a charity, still there is no universal principle that the testator’s

particular intentions must be sacrificed by reason of that general object": *Bullard v. Shirley*, 153 Mass. 559, 560.

The difficulty in this case, and generally in cases like it, is ³⁴³ one of construction—to find out the intention of the testatrix. When that is arrived at, the rules of law which apply seem to be pretty well settled. If it appears from the will that the intention of the testatrix was that her property should be applied to a charitable purpose whose general nature is described so that a general charitable intent can be inferred, then if, by a change of circumstances or in the law, it becomes impracticable to administer the trust in the precise manner provided by the testatrix, the doctrine of *cy pres* will be applied in order that the general charitable intent which the court regards as the dominant one may not be altogether defeated. There are numerous cases in which this rule has been applied: *Attorney General v. Briggs*, 164 Mass. 561; *Sears v. Chapman*, 158 Mass. 400; 35 Am. St. Rep. 502; *Weeks v. Hobson*, 150 Mass. 377; *Theological etc. Soc. v. Attorney General*, 135 Mass. 285; *Jackson v. Phillips*, 14 Allen, 539; *American Academy v. Harvard College*, 12 Gray, 582; *Church of Jesus Christ v. United States*, 136 U. S. 1; *Lyons v. Advocate General etc.*, 1 App. Cas. 91; *In re Maguire*, L. R. 9 Eq. 632; *In re Prison Charities*, L. R. 16 Eq. 129, 140, note; *In re Campden Charities*, 18 Ch. Div. 310; *Biscoe v. Jackson*, 35 Ch. Div. 460; *In re Slevin* (1891), 2 Ch. 236.

But if the charitable purpose is limited to a particular object or to a particular institution, and there is no general charitable intent, then, if it becomes impossible to carry out the object, or the institution ceases to exist before the gift has taken effect, and possibly in some cases after it has taken effect, the doctrine of *cy pres* does not apply, and, in the absence of any limitation over or other provision, the legacy lapses. There are many cases which, it has been held, fall within this rule: *Bullard v. Shirley*, 153 Mass. 559; *Stratton v. Physio-Medical College*, 149 Mass. 505; 14 Am. St. Rep. 442; *Easterbrooks v. Tillinghast*, 5 Gray, 17; *Clark v. Taylor*, 1 Drew, 642; *Corbyn v. French*, 4 Ves. 418; *Russell v. Kellett*, 3 Smale & G. 264; *Fisk v. Attorney General*, L. R. 4 Eq. 521; *In re Ovey*, 29 Ch. Div. 560; *In re White's Trusts*, 33 Ch. Div. 449; *In re Rymer* (1895), 1 Ch. 19; *Carbery v. Cox*, 3 Ir. Ch. 231; *Attorney General v. Bishop of Chester*, 1 Bro. C. C. 444; *Cherry v. Mott*, 1 Mylne & C. 123.

The latest case in this commonwealth in which the doctrine of *cy pres* has been applied is *Attorney General v. Briggs*, 164 Mass. 561, ³⁴⁴ in which it was held that there was manifest on the part of the testator a general intent to promote education

in the neighborhood, and a purpose that the whole town would have the benefit of his bounty, if it could not otherwise be made available to the district which he had designated. In the present case, the bequest is not for general religious purposes, nor is there anything to indicate that the object of the testatrix was to benefit the parish as a whole. Her object evidently was to provide a place in the village of Carndrine where the inhabitants could attend religious services and have the rites of their church administered without being obliged to go several miles to the parish church at Aughayarron, or to Castlederg in the neighboring parish. Her purpose was that a lot should be purchased and a chapel built at Carndrine for the benefit of the inhabitants there, not that the bequest should be devoted to repairing the church at Aughayarron or otherwise for the general benefit of the parish. The particularity of the language used forbids, we think, any other construction. Thus she requests her trustees to set aside a sum "to be expended by them in the purchase of a lot and the building of a chapel thereon in my native place, Carndrine, . . . the title thereof to be vested in the Bishop, . . . upon the trust that said chapel and lot shall forever be used," etc. Again she says, "I do not intend to charge my trustees with the responsibility of attending in person to the purchase of the lot and the building of the chapel, but they may make the selection of the lot and contract for the erection of the chapel," etc. Still further, she provides that "the amount of money to be expended for such lot and chapel, and the time and manner of its payment, shall be left," etc.

From this it appears, we think, as already observed, that the leading purpose in the mind of the testatrix was the purchase of a lot and the building of a chapel at Carndrine for the benefit of those living there, and that to divert the bequest to repairing the parish church, or for a parish house, or to enlarging the parish graveyard at Aughayarron, which are the schemes suggested, would be devoting it to purposes inconsistent and at variance with those designated by the testatrix and not in furtherance of any general charitable intent on her part. We think that a general intent to advance religion in the parish hardly can be ³⁴⁵ inferred from the purpose thus particularly expressed to build a chapel in Carndrine.

It is found that it will be impracticable to carry out the scheme which the testatrix had in mind, and that it will be a wasteful expenditure of the trust fund to purchase a lot and build a chapel at Carndrine. The population is small, not over one hundred, of whom about four-fifths are Roman Catholics,

and is diminishing. The people are too poor to support a chapel, and the bishop refuses to assist in maintaining a chapel or supporting a priest, and without his help the people could do neither.

The purpose which the testatrix had in view has failed, therefore, and the case not being one in which the doctrine of cy pres properly can be invoked, it follows that the bequest must be held to have failed, and to pass under the residuary clause: See *New v. Bonaker*, L. R. 4 Eq. 655.

Decree accordingly.

CHARITABLE USE—WHEN CREATED.—A gift cannot be sustained as a charity unless made upon a trust (either express, or implied from the name and purposes of a charitable society to which it is made) that it shall be devoted to uses which the law recognizes as charitable: *Owens v. Missionary Soc.*, 14 N. Y. 380; 67 Am. Dec. 160, and note. See, also, *Mills v. Davison*, 54 N. J. Eq. 659; 55 Am. St. Rep. 594, and note. A charity is a gift to promote the welfare of others: *Philadelphia v. Masonic Home*, 160 Pa. St. 572; 40 Am. St. Rep. 736, and note.

CHARITIES—DOCTRINE OF CY PRES.—If a charitable trust were not sufficiently definite to admit of its practical administration, courts of equity would order a reference to a master in chancery to devise a scheme for its administration which should, as nearly as possible, conform to the intentions of the founder: *Holland v. Alcock*, 108 N. Y. 312; 2 Am. St. Rep. 420. As applied by the chancellor of England, the doctrine of cy pres is not, to its full extent, judicial doctrine, and, so far as it is ultrajudicial, it cannot be recognized by courts of equity here: *Curling v. Curling*, 8 Dana, 38; 33 Am. Dec. 475, and note. It does not prevail in New York: *Tilden v. Green*, 136 N. Y. 29; 27 Am. St. Rep. 487, and note; nor in Tennessee: *Johnson v. Johnson*, 92 Tenn. 559; 36 Am. St. Rep. 104, and note; and where it is applied it has recognized limitations: *Stratton v. Physio-Medical College*, 149 Mass. 505; 14 Am. St. Rep. 442, and note.

MITCHELL v. PACKARD.

[168 MASSACHUSETTS, 467.]

MECHANIC'S LIEN, ARCHITECT, WHEN ENTITLED TO. An architect is entitled to a lien for his services upon a building for supervising the work of construction, but not for preparing plans and specifications.

R. Lund and C. F. Atwood Smith, for the petitioner.

J. J. Higgins and W. M. McInness, for the respondent.

468 KNOWLTON, J. The questions presented by this case are: 1. Whether an architect, who has drawn plans and prepared specifications for the construction of five houses under a contract to draw the plans and specifications and supervise the construction of the houses, and who has supervised the construc-

tion of one of the houses until it was about half completed, and supervised the work of putting in the foundations of two of the others, involving an expenditure of about forty dollars upon one and about fifteen dollars upon the other, can have a lien under the Public Statutes, chapter 191, for the whole amount due him; and 2. If he cannot, whether he can have a lien for the value of his services in supervising the work upon the buildings, considered apart from the preparation of the plans and specifications.

The statutes of the different states in regard to mechanics' liens differ materially in their provisions, and the cases show a considerable conflict of authority upon the questions before us. But we are of opinion that, under statutes similar to ours, the weight of judicial opinion is in favor of holding that the services of an architect in preparing plans and specifications for a building are not the kind of labor intended to be protected by the statute, and, on the other hand, that services upon a building in supervising the work of construction enters directly into the construction so as fairly to be called "labor performed or furnished . . . and actually used in the erection" of a building, within the meaning of these words in section 1 of the statute above cited. It is also generally held that the fact that one who does such work is an architect does not prevent him from recovering for this kind of service, which is often performed by an intelligent mechanic. ⁴⁶⁹ This is the doctrine of the highest court in Pennsylvania, where the provisions of the statute are similar to ours: *Price v. Kirk*, 90 Pa. St. 47; *Rush v. Able*, 90 Pa. St. 153; *Bank of Pennsylvania v. Gries*, 35 Pa. St. 423. Under a like statute in Missouri, it was held in *Raeder v. Bensberg*, 6 Mo. App. 445, that the services of an architect "in drawing plans and specifications and giving directions to the builder under whose special superintendence the house is being erected cannot be called, in any proper sense of the words, 'work or labor upon the building.'" A similar decision was made in *Foushee v. Grigsby*, 12 Bush, 75. *Ames v. Dyer*, 41 Me. 397, was a case arising under a statute giving a lien for labor performed or materials furnished "for or on account of any vessel building or standing on the stocks," etc., and the attempt was to establish a lien for a mold constructed and used to form the timbers for a ship. The court said that "the plan of a house, the model of a ship, the molds by which its timbers are to be hewed, may be necessary and even indispensable, but they do not enter into any structure so as to be a part of its

materials, and cannot be regarded as within the provision of the statute."

The liens with which we are dealing are commonly called mechanics' liens in the statute and opinions, and we have no doubt that the primary purpose of the legislature in providing for them was to protect persons engaged in manual labor, as distinguished from those in the learned professions, or others whose activities are chiefly mental. We do not mean to say that the terms of our present statute exclude those whose mental labor is expended directly upon the construction of the building itself, and who do little with their hands, but they are not primarily within the consideration of the legislature. The Statute of 1851, chapter 343, is entitled "An act to secure to mechanics and laborers their payment for labor, by a lien on real estate." The Statute of 1852, chapter 307, embraces the same purpose in its title, while the Statute of 1855, chapter 431, is entitled "An act to secure to mechanics and others payment for labor and materials by them expended." While these statutes have been extended by subsequent legislation so as to include labor furnished, as well as labor performed, there is no indication in the legislation of a purpose to change the meaning of the word "labor": See *Crowell v. Cape Cod etc. Co.*, 470 168 Mass. 157; *Pennsylvania etc. R. R. Co. v. Leuffer*, 84 Pa. St. 168; 24 Am. Rep. 189; *Ericsson v. Brown*, 38 Barb. 390.

The preparation of plans and specifications is a preliminary to the construction of a building, and is often merely tentative. It may or may not be followed by a construction according to the plans. It is seldom that either the external or internal form of a building is determined upon, or that its identity is anything more than an indefinite mental conception until after the plans have been completed. We are of opinion that this professional work of the architect, in bringing into existence the definite form and conception of a building which may be erected if the landowner adopts the plan, is not "labor performed or furnished . . . and actually used in the erection" of a building, within the meaning of our statute.

We are of opinion that the work of supervision which is done directly upon the building, and which is partly physical, but in its more important part mental, may be the subject of a lien under our statute, even if done by the same person who prepared the plans as an architect. Where such work is done under an entire contract for a round sum, which covers compensation for other work which is not the subject of a lien, it may be difficult to separate the part of the price which belongs to this

work from that which belongs to the other, and in such a conceivable case it might be impossible to establish a lien for anything. In the present case, no sum was agreed upon for the whole or for any part of the petitioner's services, and the judge has found that a certain price is ordinarily allowed in such cases for supervision.

Judgment on the finding.

MECHANIC'S LIEN—WHO ENTITLED TO—ARCHITECTS.—An architect who prepares the drawings, plans, and specifications for a building, and superintends the erection thereof, has a lien thereon under the mechanic's lien statutes: *Hughes v. Torgerson*, 96 Ala. 346; 38 Am. St. Rep. 105; *Stryker v. Cassidy*, 76 N. Y. 50; 32 Am. Rep. 262, and note. But see, contra, *Thompson v. Baxter*, 92 Tenn. 305; 36 Am. St. Rep. 85; and see *Foster v. Tierney*, 91 Iowa, 253; 51 Am. St. Rep. 343.

STEWART v. THAYER.

[168 MASSACHUSETTS, 519.]

CONTRACT, WHEN ENTIRE.—A contract for the services of a band of musicians for two months at the rate of twenty-four dollars for a week of seven days for each man employed, and double pay for the leader, is an entire contract, under which no recovery can be had if any part of it is unlawful.

SUNDAY LAWS.—A CONTRACT IN VIOLATION OF the statutes for the observance of the Lord's Day cannot support an action for services performed under it on secular days as well as on the Sabbath.

SUNDAY LAWS—CONTRACTS TO BE PERFORMED PARTLY ON SUNDAYS.—If a contract is made for the services of a band of musicians to play for seven days each week, including the afternoons and evenings of each Sunday, it is in violation of the laws for the observance of the Sabbath, and, though fully performed, will not support an action for the services thus rendered.

G. A. O. Ernst, for the defendant.

R. W. Nason, for the plaintiff.

520 LATHROP, J. The plaintiff seeks to recover for a balance due him in pursuance of a contract made with the defendant in 1893, by the terms of which the plaintiff was to receive for the services of himself and band, during July and August of that year, twenty-four dollars for a week of seven days for each man, for the leader double pay, and for the soloist, when there was one, ten dollars. The plaintiff performed his part of the contract, playing with the band at a seaside resort of which the defendant was the proprietor. On Sundays, the afternoon concerts began from half past two to half past three, and there were also concerts in the evening. The defense is, that, as

some of the work and labor contracted for was to be done on the Lord's day, it was forbidden by the Public Statutes, chapter 98, sections 1, 2.

We have no doubt that the contract was an entire one: *Miner v. Bradley*, 22 Pick. 457, 459; *Clark v. Baker*, 5 Met. 452; *Morse v. Brac'tett*, 98 Mass. 205; *Mansfield v. Trigg*, 113 Mass. 350, 353; *Handy v. St. Paul Globe Pub. Co.*, 41 Minn. 188; 16 Am. St. Rep. 695; *McClanathan v. Friedel*, 85 Hun, 175; 32 N. Y. Supp. 588.

If a person makes a contract in violation of the statutes for the observance of the Lord's day, he cannot maintain an action thereon: *Hazard v. Day*, 14 Allen, 487; 92 Am. Dec. 790; *Myers v. Meinrath*, 101 Mass. 366; 3 Am. Rep. 368. Such a contract is absolutely void and cannot be ratified: *Day v. McAllister*, 15 Gray, 433; *Stevens v. Wood*, 127 Mass. 123.

The principal ground on which the plaintiff contends that he is entitled to recover, is that the concert might have been licensed, and that, as the plaintiff was ignorant that the defendant had not procured a license, he is entitled to recover, under the principle laid down in *Emery v. Kempton*, 2 Gray, 257, and *Roys v. Johnson*, 7 Gray, 162. We are of opinion, however, that under the Public Statutes, chapter 98, sections 1, 2, there was no authority in any person or board to license a concert on the Lord's day, except a ⁵²¹ concert of sacred music on the evening of that day; and that, as the plaintiff agreed to give concerts on that day, and not merely on the evening thereof, and actually did give them, he is precluded from recovery. The distinction between offenses committed during the daylight of the Lord's day and after sunset thereof, has been taken since early times: Colonial Laws, 1660-72, Whitmore's ed., 189, 190; Colonial Laws, 1672-86, Whitmore's ed., 132, 133, 249, 250, 269; Prov. Laws, 1692-93, c. 22; 1 Prov. Laws, state ed., 58; Prov. Laws, 1711-12, c. 6, secs. 14-16; 1 Prov. Laws, state ed., 681; Prov. Laws, 1727-28, c. 5, sec. 2; 2 Prov. Laws, state ed., 456.

In the first statute passed by the commonwealth on the subject (Stats. 1782, c. 23), where the Lord's day is declared to be "the time included between the midnight preceding and the sun setting of the same day," the doing of certain things on the Lord's day is forbidden, and certain other things are prohibited on the evening next preceding or succeeding the Lord's day, and among them is being present "at any concert of music." This statute was repealed by the Statutes of 1791, chapter 58, but its provisions were in substance re-enacted: See *Tracy v. Jenks*, 15 Pick. 465. This statute, however, differs from the

preceding in prohibiting, in section 1, the being present at any concert of music on the Lord's day, or any part thereof, and in section 5 prohibiting the same thing on the evening next preceding or succeeding the Lord's day.

Under the Statutes of 1816, chapter 112, section 1, which contains the words "on any part of the Lord's day or evening," it was held by this court that "the legislature intended Sunday and the evening immediately following sunset on that day; and not the evening immediately preceding Sunday": *Commonwealth v. Newton*, 8 Pick. 234.

The Revised Statutes, chapter 50, section 4, follow the Statutes of 1791 in its definition of the time included in the Lord's day, and section 5 provides, "No person shall be present at any game, sport, play, or public diversion, except concerts of sacred music, upon the evening next preceding or following the Lord's day." This we believe is the first time that concerts of sacred music are mentioned in our statutes relating to the observance of Sunday. Nothing is said about such concerts in the draft prepared by the commissioners, which followed the previous statutes.

⁵²² Section 3 of the Revised Statutes, chapter 50, related to innholders, retailers of spirituous liquors, or other persons keeping a house of public entertainment. This was amended by the Statutes of 1844, chapter 160, so as to include victualers, and persons keeping shops, cellars, or any other place of public entertainment or refreshment. For the purposes of this section so amended, the Lord's day was declared "to include the time between the midnight preceding, and the midnight succeeding said day."

By the Statutes of 1858, chapter 151, section 5 of the Revised Statutes, chapter 50, was repealed, and the following section was enacted: "No person shall be present at any game, sport, play, or public diversion, except concerts of sacred music, upon the evening following the Lord's day; nor upon the evening next preceding the Lord's day, unless such game, sport, play, or public diversion shall have been duly licensed by the persons or board authorized by law to grant licenses in such cases."

In the General Statutes, chapter 84, section 12, the legislature made a general provision, for the first time, applicable to all the sections of the act, as follows: "The Lord's day shall include the time from midnight to midnight." This does not appear either in the report of the commissioners or in the amendments proposed by the committee of the legislature. Section 4, however, contains the provisions of the Statutes of 1858, chap-

ter 151, relating to sacred concerts on the evening following the Lord's day, or on the evening of the day next preceding, though the word "following" was changed to "of."

The Public Statutes, chapter 98, follow the provisions of the General Statutes as amended, with some change in arrangement. In 1887, the words "or upon the evening next preceding the Lord's day" were struck out: Stats. 1887, c. 391, sec. 1.

As the law stood in 1893, while it implies that a sacred concert might be licensed on the evening of the Lord's day, and this could probably be done under the Public Statutes, chapter 102, section 115, yet we find no statute for licensing a concert of any kind on any other part of the day.

The decision of the learned judge of the court below, who found for the plaintiff, apparently was based upon the theory that a license could have been obtained; but this seems to us not warranted by the law in force at the time.

⁵²³ Subsequently, the legislature seems to have supposed that a license under the Public Statutes, chapter 102, section 115, might apply to the Lord's day, for there was added thereto the following proviso: "Provided, however, that in any city the mayor, without the concurrence of the aldermen, or the board of police commissioners in case there is such a board, may revoke or suspend such license for holding any such exhibition, show, or amusement on the Lord's day, if in the opinion of such mayor or board such revocation or suspension will be for the best interests of the public": Stats. 1894, c. 353.

Subsequently, the statutes of 1894, and sections 1, 2, of the Public Statutes, chapter 98, were repealed, and other provisions enacted: Stats. 1895, c. 434. But the validity of the contract must be determined by the law as it existed in 1893, and by that law, as we interpret it, no concert of any kind could be licensed on the Lord's day except after sunset. As the defendant could not have obtained a valid license for a concert of any kind in the afternoon of that day, we need not consider whether the concerts which were then given were sacred or not.

As there must be a new trial, we have no occasion to consider at length the requests asked for by the defendant. It is enough to say that they were in substance correct, and adapted to the case.

Exceptions sustained.

CONTRACTS — WHEN ENTIRE.—The principle by which the courts are governed when they declare that a contract about several things, but with a single consideration in gross, is entire and not severable, is that it is impossible to affirm that the party making the

contract would have consented to do so unless he had supposed that the rights to be acquired thereunder would extend to all the things in question: *Coleman v. Insurance Co.*, 49 Ohio St. 310; 34 Am. St. Rep. 565. The entirety of a contract depends upon the intention of the parties: *Shinn v. Bodine*, 60 Pa. St. 182; 100 Am. Dec. 560. And an entire contract when founded upon an indivisible consideration part of which is illegal, is void: *Filson v. Himes*, 5 Pa. St. 452; 47 Am. Dec. 422, and note. See extended note to *Gill v. Benjamin*, 54 Am. Rep. 624-630, on entire contracts.

SUNDAY LAWS—CONTRACTS IN VIOLATION OF.—Business transactions in violation of law cannot be made the foundation of a valid contract: *Buckley v. Humason*, 50 Minn. 195; 36 Am. St. Rep. 637, and note. At common law, Sunday contracts were valid unless expressly prohibited: *Amis v. Kyle*, 2 Yerg. 31; 24 Am. Dec. 463, and note. So it is held that contracts made on Sunday in matters of business, other than such as are prohibited by statute, are valid: *Roberts v. Barnes*, 127 Mo. 405; 48 Am. St. Rep. 640, and note. See note to *Handy v. St. Paul Globe Pub. Co.*, 16 Am. St. Rep. 699. As to the validity of Sunday contracts, see notes to *Coleman v. Henderson*, 12 Am. Dec. 292-294, and *Allen v. Duffie*, 38 Am. Rep. 165-167.

O'HERRON v. GRAY.

[168 MASSACHUSETTS, 578.]

A GUARDIAN HAS NO RIGHT TO PLEDGE a certificate of stock standing in the name of his ward.

A BONA FIDE PURCHASER OF PROPERTY FROM ONE WHO HAS STOLEN or embezzled it acquires no title, unless it consists of negotiable securities.

NEGOTIABLE INSTRUMENTS, WHAT ARE NOT.—Certificates of stock, even when indorsed in blank for the purpose of authorizing the making of an instrument of transfer over the signature, are not negotiable securities.

GUARDIAN'S SALE.—IT IS THE DUTY OF ONE PURCHASING PROPERTY held by a guardian to ascertain whether the sale is authorized.

ESTOPPEL.—HOLDERS OF CERTIFICATES OF STOCK are not estopped from reclaiming them by the fact that their guardian indorsed them in blank and left them in the possession of one who sold them to a bona fide purchaser. The guardian could not have anticipated that anyone would purchase the certificates without inquiring if their transfer by the guardian was authorized.

GUARDIAN'S SALE—WHEN VOID.—A petition for the sale of personal property presented in the name of a guardian by E. S. F., but without the guardian's knowledge or authority, does not give the court jurisdiction. The order of sale and a transfer based thereon are void.

H. S. Dewey, for the defendants.

R. Foster, for the plaintiffs.

574 KNOWLTON, J. Each of the plaintiffs is the owner of stock in the Boston and Albany Railroad Company, represented by certificates in the possession of Gray, Dewey & Co., the defendants. The plaintiff in the first case owned two certificates

—one for nineteen shares, and one for twelve shares—both of which passed into the hands of the defendants, and were surrendered by them in exchange for a new certificate for thirty-one shares, issued in their own names. The plaintiff in the second case is the owner of one certificate for twelve shares, which the defendants received, and which has not been surrendered. Both of the plaintiffs are minors, and their respective certificates were made in their own names. These certificates were deposited for safekeeping by their mother, who was their guardian, in the Pittsfield National Bank. While the certificates were in the bank, the guardian borrowed money from the bank for her personal use, for which she gave her notes, and at the same time signed upon the back of each of her son's certificates a blank form of transfer, with a signature as follows: "Simon John O'Herron, by Mrs. Catherine O'Herron, Guardian." In like manner on her daughter's certificate she signed with the signature, "Nora L. O'Herron, by Mrs. Catherine O'Herron, Guardian," and left the certificates as collateral security for the payment of her notes. This transaction occurred on or about December 17, 1889. On or about December 20, 1889, the cashier of the bank, one Francis, who had access to the vault where these certificates were kept, took them, without authority from anybody, and delivered them to the defendants, as security for one of his personal debts. In May, 1890, the guardian paid her notes at the bank. Some time in the year 1891, the defendants took the two certificates standing in the name of Simon John O'Herron to the office of the Boston and Albany Railroad Company, and asked to transfer the stock, and have a new ⁵⁷⁵ certificate issued in their own names. The corporation refused to permit a transfer of the stock or the issue of new certificates without a decree of the probate court authorizing the sale of the stock. Thereupon the defendants requested Francis to procure such a decree. He then had a petition prepared by the register of the probate court for the county of Berkshire, in the name of the guardian, praying for leave to sell and transfer the certificates, and he signed the petition as follows: "Catherine O'Herron, Guardian, by E. S. Francis." On this petition, on July, 21, 1891, the probate court issued a decree in the usual form, authorizing the guardian to sell or transfer the whole or any part of the stock. All this was done without notice of the petition by publication or otherwise, either to the plaintiffs or to their guardian, and without the knowledge of either of them. The transfer of the stock was then made on the books of the Boston and Albany Railroad Company, and a new certificate for thirty-one shares issued to

the defendants. Francis continued to act as cashier of the bank until his death by suicide, on or about July 27, 1893, when his fraudulent conduct was discovered, and his estate was found to be insolvent. He paid the dividends on the stock to the plaintiffs' guardian regularly as long as he lived. At the time of receiving the certificates the defendants supposed that Francis was rightfully in possession of them, and they had no notice of his want of authority to pledge them, except the form of the certificates and of the transfers. The question is, whether the defendants acquired a good title to the stock as against the plaintiffs. It not necessary to consider the original claim of the bank to the stock as security for the loans to the guardian, as the loans were paid. It is clear that the guardian had no right to pledge the stock, and we do not intimate that the bank acquired a valid title to it.

Francis, under whom the defendants derived their title, had no right to the certificates, but held them feloniously. They were the general property of the plaintiffs, and the special property of the bank, which had the possession of them as bailee. The act of Francis in taking them, and pledging them as his own, if not larceny at common law, was at least embezzlement, which by our statute is deemed to be larceny: Pub. Stats., c. 203, secs. 37, 41. A bona fide purchaser for value from one who has taken property in such a way acquires no title to it. The only exception ⁵⁷⁶ to this rule is when the property consists of negotiable securities: *Heckle v. Lurvey*, 101 Mass. 344, 345; 3 Am. Rep. 366; *Spooner v. Holmes*, 102 Mass. 503, 507; 3 Am. Rep. 491. But certificates of stock, even when indorsed in blank for the purpose of authorizing the making of an instrument of transfer over the signature, are not negotiable securities. This is settled by the highest authority: *Shaw v. Spencer*, 100 Mass. 382, 388; 97 Am. Dec. 107; 1 Am. Rep. 115; *Shaw v. Railroad Co.*, 101 U. S. 557, 565, 566; *Knox v. Eden Musee American Co.*, 148 N. Y. 441; 51 Am. St. Rep. 700; *Bangor Electric etc. Co. v. Robinson*, 52 Fed. Rep. 520; *London etc. Banking Co. v. London etc. Bank*, 20 Q. B. Div. 232. It is plain, therefore, that the defendants cannot maintain their claim on the ground that the nature of the property takes it out of the general rule that no title can be acquired from one who has no title.

It is contended that Statutes 1884, chapter 229, is applicable to these cases. If we assume in favor of the defendants that this statute will protect a bona fide purchaser or pledgee for value, to whom a certificate of stock has been delivered with

a written transfer of it, or a written power of attorney to sell, assign, or transfer it, signed by the owner, it does not help the defendants. The signature on the back of these certificates was not that of the owner, but of a guardian whose trust relation to the property was disclosed on the face of the papers. In their report on the revision of the statutes (1834), the commissioners say, in a note to chapter 79, section 22 (which is section 21 in the final enactment), that they have made the provision as to sales of property by guardians the same as that for trustees appointed under wills. The provision for trustees under wills is found in the Revised Statutes, chapter 69, section 11, in the General Statutes, chapter 100, section 14, and with certain broader provisions from more recent legislation in the Public Statutes, chapter 141, section 20. The provision in regard to guardians is found in General Statutes, chapter 109, section 22. As a part of the history of the legislation, see also the Statutes of 1817, chapter 190, section 35, and the Statutes of 1820, chapter 54, section 3. It is the duty of one purchasing property held by a trustee to ascertain whether the transaction appears to be within the trustee's authority: *Atkinson v. Atkinson*, 8 Allen, 15; *Shaw v. Spencer*, 100 Mass. 382; 97 Am. Dec. 107; 1 Am. Rep. 115; *Loring v. Salisbury Mills*, 125 Mass. 138; *Smith v. Burgess*, 123 Mass. 511; *Loring v. Brodie*, 134 Mass. 453; *Colonial Bank v. Cady*, 15 App. Cas. 267; *Duncan v. Jandon*, 15 Wall. 165. The statute does not protect the purchaser in a case like the present.

⁵⁷⁷ It is contended, further, that the plaintiffs are estopped from reclaiming their property by the negligence of their guardian in leaving their certificates at the bank, indorsed with her signature. The principle which the defendants invoke is not applicable to the facts. Negligence which will work an estoppel of this kind must be a proximate cause of the purchase or advancement of money by the holder of the property, and must enter into the transaction itself: *Swan v. North British Australasian Co.*, 7 Hurl. & N. 603; 2 Hurl. & C. 175; *Colonial Bank v. Cady*, 15 App. Cas. 267, 282; *Baxendale v. Bennett*, 3 Q. B. Div. 525, 530; *Picker v. London etc. Banking Co.*, 18 Q. B. Div. 515; *Knox v. Eden Musee American Co.*, 148 N. Y. 441; 51 Am. St. Rep. 700; *Arnold v. Cheque Bank*, 1 C. P. Div. 578, 587, 588; *Scholfield v. Londesborough* (1895), 1 Q. B. 536; (1896) App. Cas. 514; *Telegraph Co. v. Davenport*, 97 U. S. 369; *Bangor Electric Light etc. Co. v. Robinson*, 52 Fed. Rep. 520. If the negligence is such as might be an appropriate foundation for an action at law to recover damages by one who advances his

money, it may be availed of by way of estoppel, to avoid circuity of action. But the facts of this case fall short of showing such negligence. The guardian intrusted the certificates to a national bank of good reputation. Neither she nor anybody else had any reason to anticipate larceny or embezzlement of the property, and a fraudulent use of it, to deceive others, by a trusted officer of the bank. She had no reason to expect that, if the certificates were stolen, anybody would take them without inquiring whether, as trust property, they had been disposed of by the guardian for the benefit of her wards. The conduct of the guardian was not a cause, but a mere condition, of the defendants' advance of money upon the faith of the certificates. A criminal act of Francis intervened as the cause of the defendants' loss, and this the guardian had no reason to anticipate.

When the certificates of stock came into the hands of the defendants, they showed on their face that they had not been assigned or transferred by their owners, but only by one who stood in a relation of trust to the owners. The transfer had not been completed, and the stock still stood in the names of the plaintiffs on the books of the corporation. There was only a signature of the guardian upon each certificate, appended to a ⁵⁷⁸ blank which contained nothing to show the nature of the transaction by which it came into the hands of Francis. There was nothing to indicate that the plaintiffs had received value for the stock. Francis, who presented the certificates, was using them solely for his personal benefit. On the face of the paper there was notice to the defendants that they were trust property while in the hands of the guardian. The defendants were put upon inquiry, and they had no right to receive them as a pledge for Francis' debt, without at least having information of facts which would warrant them in believing that the plaintiffs' interests had been protected in the transaction by which they came into the hands of Francis. Apparently, they made no inquiry, but took them as they were, knowing that the plaintiffs were to receive nothing from the disposition which Francis then made of them. We are of opinion that there is no principle of estoppel that can be invoked in favor of the defendants to deprive the plaintiffs of their property.

The decree of the probate court does not give effect to the claim of the defendants. It was not made until long after the transfer to them. It purported to authorize a sale of the stock, and not a pledge of it, much less a pledge of it for the benefit of others than the plaintiffs. But, above all, the probate court acquired no jurisdiction of the case as against the plaintiffs.

No case nor any proper party was ever before the court in regard to the sale of the stock. The unauthorized signature and appearance of Francis availed nothing as against the plaintiffs or their guardian: *Jochumsen v. Suffolk Sav. Bank*, 3 Allen, 87; *Scott v. McNeal*, 154 U. S. 34, 46.

The fact that the Pittsfield National Bank is paying the expenses of the plaintiffs' litigation is immaterial. The plaintiffs are proceeding in their own rights and on their own equities. They may elect to proceed to recover back their stock, even though they might have a different kind of remedy against the bank. There is nothing in law or in equity to forbid their acceptance of such aid in the litigation as the bank may, for its own interest, choose to render them. There is no privity between the bank and the defendants. The act of Francis by which the defendants obtained their possession was a wrong against the bank and the plaintiffs, as well as against the defendants.

Decree in each case affirmed.

GUARDIAN AND WARD—POWERS OF GUARDIAN—SALES BY—PETITION.—The petition to a probate court by a guardian for leave to sell the real estate of his ward is the foundation upon which to base the jurisdiction of the court, and must allege sufficient facts to give the court power to authorize the sale: *Tracy v. Roberts*, 88 Me. 310; 51 Am. St. Rep. 394, and note. Parties who purchase from a guardian the real estate of his ward must ascertain whether he has full legal authority to make a valid title thereto before they deal with him. In such case, the doctrine of caveat emptor applies: *Leuders v. Thomas*, 35 Fla. 518; 48 Am. St. Rep. 255, and note.

NEGOTIABLE INSTRUMENTS—WHAT ARE—RIGHTS OF BONA FIDE PURCHASERS.—The term "negotiable," in its enlarged signification, applies to any written security which may be transferred by indorsement or delivery, so as to vest in the indorsee such legal title as will enable him to maintain an action thereon in his own name: *Odell v. Gray*, 15 Mo. 337; 55 Am. Dec. 147. An instrument to be negotiable should be payable in money, to order or bearer, unconditionally, and at all events, and should be for a sum certain: *Monographic note to Woolley v. Sergeant*, 14 Am. Dec. 422. One who deals in non-negotiable property acquires it subject to all equities concerning it, whether he knows thereof or not: *Goff v. Miller*, 41 W. Va. 683; 56 Am. St. Rep. 889, and note. But the rule is different as to bona fide purchasers of negotiable instruments: *Ditch v. Western Nat. Bank*, 79 Mo. 192; 47 Am. St. Rep. 375, and note; *Second Nat. Bank v. Morgan*, 165 Pa. St. 199; 44 Am. St. Rep. 652, and note.

SINGER MANUFACTURING COMPANY v. REYNOLDS.

[168 MASSACHUSETTS, 588.]

SURETIES ARE NOT RELEASED by the imposing of additional duties on their principal, when the bond stipulates that the principal is employed for the transaction of such business as the obligees in the bond may intrust to him, and that he will faithfully perform his duties under such employment, or otherwise, and whether under, or in the absence of, any present or future contract, agreement, or understanding or any changes therein, either with or without notice to either of the obligors.

PRINCIPAL AND SURETY—EVIDENCE.—THE **ADMISSIONS OF A PRINCIPAL** are evidence against his sureties to establish liability on the part of the principal for which the sureties are also answerable.

BONDS—ATTORNEY'S FEES, WHEN IN ADDITION TO PENALTY.—A bond in the sum of five hundred dollars and ten per cent attorney's fees is a promise to pay two different things, to wit, the sum of five hundred dollars and an attorney's fee of ten per cent, and a recovery of both may be had on a breach of the conditions of the bond.

J. D. McLaughlin, for the defendants.

A. M. Lyman, for the plaintiff.

589 BARKER, J. The bond was given by the defendants jointly and severally. The declaration is in one count against them both, and they appeared by the same counsel, who filed one answer for both. The finding is against them jointly for five hundred dollars as the penal sum of the bond, with an order for execution against both for a sum found due upon chancering the bond in accordance with the Public Statutes, chapter 171, sections 9, 10.

The defendant Reynolds was employed by the plaintiff, and three written contracts concerning his employment were entered into between him and the plaintiff, one at the same time as the bond, and the others on November 5, 1892, and June 17, 1893, respectively. The first and second were alike, and the third differed only in providing that Reynolds should be paid a commission on all moneys collected and paid over by him, in addition to the salary and commission on sales stipulated in the earlier contracts. It did not appear that the defendant Leonard had actual knowledge of the making of the last contract.

The presiding justice, sitting without a jury, held that the penal sum of the bond was five hundred dollars, found against the defendants in that sum, and included in his award of the amount for which execution should issue, a sum of fifty dollars, which was agreed to be a reasonable sum for services rendered by the plaintiff's attorney.

1. The first contention is, that neither defendant is liable upon the bond, because Reynolds' defaults occurred after the making of the last contract, by which they contend that he was newly employed and the risk substantially increased. The bond states that it "is expressly intended as a continuing guaranty"; and the condition, after reciting that Reynolds has entered the employ of the plaintiff company "for the transaction of such business as they may intrust to him," is, in substance, that he shall faithfully perform his duties to the plaintiff "by virtue of his said employment, or otherwise, and whether under or in the absence of any present or future contract, agreement, or understanding, verbal or written, or any change whatever therein, either with or without notice to either of said obligors other than the said employé." These explicit stipulations cover the defaults of Reynolds under ⁵⁹⁰ the last contract, which is within the precise terms of the bond: See *Amicable Ins. Co. v. Sedgwick*, 110 Mass. 163; *Singer Mfg. Co. v. Allen*, 122 Mass. 467; *Rollstone Nat. Bank v. Carleton*, 136 Mass. 226; *Eastern R. R. Corp. v. Loring*, 138 Mass. 381. The cases of *Chelmsford Co. v. Demarest*, 7 Gray, 1, *Middlesex Mfg. Co. v. Lawrence*, 1 Allen, 339, *Lexington etc. R. R. Co. v. Elwell*, 8 Allen, 371, and *Richardson School Fund v. Dean*, 130 Mass. 242, cited by the defendants, are not in point.

2. The defendants contend that the written statement or admission of Reynolds was not admissible in evidence against Leonard. But the action was a joint action against both. It sufficiently appears that Reynolds was the principal and Leonard a surety. The admission of the principal was, under our decisions, admissible against both: *Martin v. Root*, 17 Mass. 222, 227; *Frye v. Barker*, 4 Pick. 382, 384; *Bridge v. Gray*, 14 Pick. 55, 61; 25 Am. Dec. 358; *Amherst Bank v. Root*, 2 Met. 522, 541. It is urged that this doctrine should no longer be applied, because parties to actions may now testify, and because several judgments may now be rendered against joint defendants. But the doctrine has been restated by this court since those changes in practice have occurred: See *Choate v. Arrington*, 116 Mass. 552, 556; *Dennie v. Williams*, 135 Mass. 28, 29. We are disposed to adhere to it, so far as it is involved in the present case.

3. The remaining contention is, that execution should not have been ordered for the attorney's fee as damages. The bond is, in substance, a bond of indemnity against loss by the misconduct of Reynolds, and it recites that the obligors are bound to the plaintiff "in the sum of five hundred dollars, and ten per cent attorney's fees," for the payment of which they bind

themselves jointly and severally. The defendants asked a ruling that this provision was a part of the penalty of the bond. Upon that construction the bond would be the same in effect as if in the penal sum of ⁵⁹¹ five hundred and fifty dollars, in which case the judgment, under our practice, would be for that sum, and if that was the only effect of the provision, nothing would be included upon that account in the amount for which execution would be ordered.

We do not construe the provision as intended merely to increase by ten per cent the penalty of five hundred dollars. If it had merely been the intention to make the penal sum five hundred and fifty dollars, the parties would have caused the bond to be so written. The language makes the obligors' promise to pay two separate things, a sum of five hundred dollars, and a ten per cent attorney's fee. Each of these provisions was to be void if Reynolds dealt faithfully. He has not so dealt, each promise has been broken, and the plaintiff asks to have each promise enforced. If the promise to pay an attorney's fee is an added penalty, one effect would be to increase the judgment, which must be for the amount of the penal sum. The defendants cannot complain that the judgment was not larger. The fair interpretation of the language is, that the obligors promised to pay to the plaintiff an attorney's fee of ten per cent unless Reynolds made no default, and this in addition to the payments which the bond would have obliged them to make if there had been nothing said in it as to an attorney's fee.

The defendant does not contend that the ten per cent should be reckoned upon the amount for which execution would otherwise issue, rather than upon the penal sum specified, nor that the provision for an attorney's fee is invalid, and we express no opinion upon those questions.

Exceptions overruled.

SURETYSHIP—CONSTRUCTION OF CONTRACT—RELEASE OF SURETY.—A contract of suretyship, though only enforced according to its terms, is, nevertheless, nothing more than a contract, and, in construing it, the actual intention of the parties must prevail: *Fink v. Farmer's Bank*, 178 Pa. St. 154; 56 Am. St. Rep. 746. Ordinarily, sureties are not answerable for extraofficial acts or undertakings of their principal: *Wilkes-Barre v. Rockafellow*, 171 Pa. St. 177; 50 Am. St. Rep. 795, and note. But in order that a change in the principal's duties may release his surety, the change must be such as to make it inequitable to enforce his undertaking upon a state of facts not within the contemplation of the parties and not consented to by the surety: *Shackamaxon Bank v. Yard*, 150 Pa. St. 351; 30 Am. St. Rep. 807, and note. See *Garnett v. Farmers' Nat. Bank*, 91 Ky. 614; 34 Am. St. Rep. 246, and note.

SURETYSHIP—EVIDENCE—ADMISSIONS OF PRINCIPAL.—A principal's admissions are prima facie evidence against his sureties, and cast the burden of proof upon them: *Stephens v. Crawford*, 1 Ga. 574; 44 Am. Dec. 680. But they must be made in the course of the business for which the surety obligates himself, so as to become part of the *res gestae*: *Blair v. Perpetual Ins. Co.*, 10 Mo. 559; 47 Am. Dec. 129. See *Wilson v. Green*, 25 Vt. 450; 60 Am. Dec. 279, and note.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

**LITTLE v. CHICAGO, ST. PAUL, MINNEAPOLIS &
OMAHA RAILWAY COMPANY.**

[65 MINNESOTA, 48.]

ACTIONS FOR INJURY TO LAND ARE TRANSITORY.—An action for damages for injuries to real property is on principle just as transitory in its nature as one on contract or for a tort committed on the person or personal property. It is a personal action and may, therefore, be maintained in this state for injury to land lying in another state.

ACTIONS—INJURY TO LAND IN ANOTHER STATE—CONSTRUCTION OF STATUTE.—A statute requiring actions for injuries to real property to be brought in the county where the subject of the action is situated settles the rule and indicates the policy of the state as to actions for injuries to real property within the state, but does not affect such causes of action arising out of the state.

Action brought by Little against the railway company to recover damages for injuries to land situate in Wisconsin, caused by the negligence of the defendant, while running its train past the plaintiffs' land, in setting a fire which damaged the land and burned the personal property. The defendant denied the jurisdiction of the court, on the ground that the legislature of Wisconsin had, before the time at which the alleged damages arose, enacted that all actions for injury to real property should be tried within the county in which the subject of the action was situated. The plaintiff demurred to this portion of the answer, and it was stipulated that, for the purpose of the demurrer, the action should be treated as if it were solely for the recovery of injuries to real property in Wisconsin. The plaintiff appealed from an order overruling the demurrer on the ground that the complaint did not state a cause of action.

Henry C. James, for the appellant.

L. K. Luse and Thomas Wilson, for the respondent.

50 MITCHELL, J. This action was brought to recover damages for injuries to real estate situated in Wisconsin, caused by the negligence of the defendant. The question presented is, Can the courts of this state take cognizance of actions to recover damages to real estate lying without the state? In other words, Is such an action local or transitory in its nature?

The history of the progress of the English common law respecting the locality of actions will aid in determining how this question ought to be decided on principle. Originally, all actions were local. This arose out of the constitution of the old jury, who were but witnesses to prove or disprove the allegations of the parties, and hence every case had to be tried by a jury of the vicinage, who were presumed to have personal knowledge of the parties as well as of the facts. But, as circumstances and conditions changed, the courts modified the rule in fact, although not in form. For that purpose they invented a fiction by which a party was permitted to allege, under a *vide licet*, that the place where the contract was made or the transaction occurred was in any county in England. The courts took upon themselves to determine when this fictitious averment should and when it should not be traversable. They would hold it not traversable for the purpose of defeating an action it was invented to sustain, but always traversable for the purpose of contesting a jurisdiction not intended to be protected by the fiction. Those actions in which it was held not traversable came to be known as transitory, and those in which it was held traversable as local, actions. Actions for personal torts, wherever committed, and upon contracts (including those respecting lands), wherever executed, were deemed transitory, and might be brought wherever the defendant could be found.

51 As respects actions for injuries to real property, we cannot discover that it was definitely settled in England to which class they belonged prior to the American Revolution. As late as 1774, in the leading case of *Mostyn v. Fabrigas*, 1 Cowp. 161, 2 Smith Lead. Cas., 9th ed., 916, Lord Mansfield, who did more than any other jurist to brush away those mere technicalities which had so long obstructed the course of justice, referred to two cases in which he had held that actions would lie in England for injuries to real estate situated abroad. In that same case he said: "Can it be doubted that actions may be maintained here, not only upon contracts, which follow the persons, but

for injuries done by subject to subject, especially for injuries where the whole that is prayed is a reparation in damages or satisfaction to be made by process against the person or his effects within the jurisdiction of the court?" While all that is there said as to actions for injuries to real property is obiter, yet it clearly indicates the views of that great jurist on the subject. And we cannot discover that it was fully settled in England that actions for injuries to lands were local until the decision of *Doulson v. Matthews*, 4 Term Rep. 503, in 1792—sixteen years after the declaration of American independence. The courts of England seem to have finally settled down upon the rule that an action is transitory where the transaction on which it is founded might have taken place anywhere, but is local when the transaction is necessarily local—that is, could only have happened in a particular place. As an injury to land can only be committed where the land lies, it followed that, according to this test, actions for such injuries were held to be local. As the distinction between local and transitory venues was abolished by the judicature act of 1873, we infer that actions for injuries to lands lying abroad may now be maintained in England.

It is somewhat surprising that the American courts have generally given more weight to the English decisions on the subject rendered after the Revolution than to those rendered before, and hence have almost universally held that actions for injuries to lands are local. In the leading case of *Livingston v. Jefferson*, 1 Brock. 203, 4 Hughes, 606, which has done more than any other to mold ⁵² the law on the subject in this country, Chief Justice Marshall argued against the rule, showing that it was merely technical, founded on no sound principle, and often defeated justice; but concluded that it was so thoroughly established by authority that he was not at liberty to disregard it. But so unsatisfactory and unreasonable is the rule that since that time it has, in a number of states, been changed by statute, and in others the courts have frequently evaded it by metaphysical distinctions in order to prevent a miscarriage of justice. Chief Justice Marshall's own state of Virginia changed the rule by statute as early as 1819. Some courts have made a subtle distinction between faults of omission and of commission. Thus in *Titus v. Frankfort*, 15 Me. 89, which was an action against a town for damages sustained by reason of defects in a highway, it was held that, while highways must be local, the neglect of the defendant to do its duty, being a mere nonfeasance, was transitory. It has also been held that where trespass upon land is followed by the asportation of timber severed from the land, if the plaintiff waives the original trespass,

and sues simply for the conversion of the property so carried away, the action would become transitory: *American Union Tel. Co. v. Middleton*, 80 N. Y. 408; *Whidden v. Seelye*, 40 Me. 247; 63 Am. Dec. 661. Again, it has been sometimes held that an action for injuries to real estate is transitory where the gravamen of the action is negligence—as for negligently setting fire to the plaintiff's premises: *Home Ins. Co. v. Pennsylvania R. R. Co.*, 11 Hun, 182; *Barney v. Burstenbinder*, 7 Lans. 210. In Ohio, the rule has been repudiated, at least as to causes of action arising within the state, as being wholly unsuited to their condition, because, under their judicial system, it would result in many cases in a total denial of justice: *Genin v. Grier*, 10 Ohio, 209.

Almost every court or judge who has ever discussed the question has criticised or condemned the rule as technical, wrong on principle and often resulting in a total denial of justice, and yet has considered himself bound to adhere to it under the doctrine of *stare decisis*.

An action for damages for injuries to real property is on principle just as transitory in its nature as one on contract or for a tort committed on the person or personal property. The reparation is purely personal, and for damages. Such an action is purely personal, and in no sense real. Every argument founded on practical considerations⁵³ against entertaining jurisdiction of actions for injuries to lands lying in another state could be urged as to actions on contracts executed, or for personal torts committed, out of the state, at least where the subject matter of the transaction is not within the state. Take, for example, personal actions on contracts respecting lands which are conceded to be transitory. An investigation of title of boundaries, etc., may be desirable, and often would be essential to the determination of the case, yet such considerations have never been held to render the actions local. Another serious objection to the rule is, that under it a party may have a clear, legal right without a remedy where the wrongdoer cannot be found, and has no property within the state where the land is situated. As suggested by plaintiff's counsel, if the rule be adhered to, all that the one who commits an injury to land, whether negligently or willfully, has to do in order to escape liability, is to depart from the state where the tort was committed, and refrain from returning. In such case the owner of the land is absolutely remediless.

We recognize the respect due to judicial precedents, and the authority of the doctrine of *stare decisis*; but, inasmuch as this rule is in no sense a rule of property, and as it is purely technical, wrong in principle, and in practice often results in a total denial

of justice, and has been so generally criticised by eminent jurists, we do not feel bound to adhere to it, notwithstanding the great array of judicial decisions in its favor. If the courts of England, generations ago, were at liberty to invent a fiction in order to change the ancient rule that all actions were local, and then fix their own limitations to the application of the fiction, we cannot see why the courts of the present day should deem themselves slavishly bound by those limitations.

It is suggested that the statutes of this state, in conformity to the old rule, make actions for injuries to real property local: Gen. Stats. 1894, secs. 5182, 5183. This is true, and, strangely enough, in 1885 the legislature went so far as to provide that, if the county designated in the complaint is not the proper one, the court should have no jurisdiction of the action. But this statute has no application to causes of action arising out of the state. While it settles the rule and indicates the policy of this state as to actions for injuries to real property within the state, we do not think it ought to have any weight ⁵⁴ in determining what the rule should be as to causes of action arising out of the state, which can have no local venue here under the provisions of the statute. It does not appear whether the plaintiff lives in this state or in Wisconsin, but this is immaterial, for the place of his residence cannot affect the nature of the action. It is also true that in this particular case jurisdiction of the defendant could be obtained in Wisconsin, but this fact is likewise immaterial, and for the same reason.

Order reversed.

BUCK, J., DISSENTED. "The doctrine," he said, "laid down in the foregoing opinion is conceded to be against the great weight of judicial authority, and, according to my view, is unsound in principle, and contrary to a wise public policy. The plaintiff is a citizen of the state of Wisconsin, and the defendant a railroad corporation organized under the laws of that state with its line constructed therein and extending into this state. The action is brought in Minnesota to recover for damages done by the defendant to plaintiff's real estate situate in the state of Wisconsin. In my opinion, the action is one clearly local in its nature, and not transitory, and the courts of this state have no jurisdiction over the subject matter.

"In Cooley on Torts, page 471, it is said that: 'The distinction between transitory and local actions is this: If the cause of action is one that might have arisen anywhere, then it is transitory; but if it could only have arisen in one place, then it is local. Therefore, while an action of trespass to the person or for the conversion of goods is transitory, an action for flowing lands is local, because they can be flooded only where they are. For the most part, the actions which are local are those brought for the recovery of real estate,

or for injuries thereto or to easements. [Here the injury alleged consisted in burning the grass, roots, vegetable mold, and other material forming part of the plaintiff's land.] . . . That actions for trespasses on lands in a foreign country cannot be sustained is the settled law in England and in this country.'

"I am not able to state whether it has been changed by statutory enactment, and the majority opinion merely infers that it has been so changed. Blackstone, whose Commentaries were written and delivered in the form of lectures before the students of Oxford University in 1758, says, (in volume 3, page 384), that: 'All over the world actions transitory follow the person of the defendant, while territorial suits must be discussed in the territorial tribunal. I may sue a Frenchman here for a debt contracted abroad; but lands lying in France must be sued for there, and English lands must be sued for in the kingdom of England.'

"The case of *Mostyn v. Fabrigas*, 1 Cowp. 161, decided in 1774, is referred to as a leading case, yet the question here involved was not before the court in that case. There the plaintiff, Fabrigas, brought an action against Mostyn for assault and false imprisonment committed on the island of Minorena, and it was held that the court had jurisdiction of the subject matter. This was a transitory action, within the rules of all the courts. That a jurist as great as Lord Mansfield should inject into his opinion in that case a remark that was entirely without any relevancy to the question under consideration adds but little force to its weight. And its force is still further lessened by the fact that ever since that decision the law of England has been settled by other eminent jurists as otherwise, and contrary to the majority opinion in this case. It seems to me misleading to call the case of *Mostyn v. Fabrigas*, 1 Cowp. 161, a leading one, and cite it as such upon an important legal question, when the point here involved was not there in issue. While the great weight of authority is manifestly against the doctrine laid down by the majority opinion, it may be well to refer to some of them more in detail.

"In the case of *Allin v. Connecticut etc. Co.*, 150 Mass. 560, it was held that an action of tort for breaking and entering the plaintiff's close, situated in another state, could not be brought in the commonwealth of Massachusetts; and the court, in commenting upon the statute of that state which required actions for trespass *quare clausum* to be brought in the county where the land lies, said: "There seems to be no reason for holding that the statute renders an action for trespass to lands outside the state transitory which does not apply to an action for trespass to lands within the state.' The statute has been in existence nearly one hundred years, and we have not been referred to any authority or dictum to sustain the position of the plaintiff. On the contrary, the action of trespass *quare clausum* has always been treated as a local action. In the case of *Niles v. Howe*, 57 Vt. 388, it was held that trespass on the freehold would not lie in that state for a trespass committed on lands situated in the state of Massachusetts.

"In *Du Breuil v. Pennsylvania Co.*, 130 Ind. 137, the court say an action cannot be maintained in this state for an injury to land lying in another state, caused by a railway company having a line of rail-

road running through this and such other state. That court also applied the same doctrine to an action for injury to land caused by fire escaping from locomotives in the case of *Indiana etc. Ry. Co. v. Foster*, 107 Ind. 430. In the first Indiana case above cited Chief Justice Elliott says (at page 138): 'The case before us is one in which the land lies within the territory of another sovereignty, and there can be no doubt upon principle or authority that our courts have no jurisdiction.' In *Eachus v. Trustees*, 17 Ill. 534, it was held that the courts of Illinois had no jurisdiction in an action to recover for injuries to land situate in Lake county, in the state of Indiana. In *Bettys v. Milwaukee etc. Ry. Co.*, 37 Wis. 323, it was held that an action for injury to realty situated in Iowa could not be maintained in the courts of the state of Wisconsin. Chief Justice Ryan, delivering the opinion of the court, said that it was plainly a local action under all of the authorities, which could not be maintained in the state of Wisconsin; and he cited Coke on Littleton, 282 a; Bacon's Abridgment, 'Action,' A, 79; Comyn's Digest, 'Action,' N, 4, 5, p. 251; *Doulson v. Matthews*, 4 Term Rep. 503.

"In the state of New York, the doctrine is well settled by numerous decisions of its highest court that suits cannot be there maintained for injuries to lands situated in other states: See *American etc. Tel. Co. v. Middleton*, 80 N. Y. 408; *Cragin v. Lovell*, 88 N. Y. 258; *Sentems v. Ladew*, 140 N. Y. 463; 37 Am. St. Rep. 569; *Dodge v. Colby*, 108 N. Y. 445. In the last case, Chief Justice Ruger, in delivering the opinion, says (at page 451): 'The doctrine that the courts of this state have no jurisdiction of actions for trespass upon lands situated in other states is too well settled to admit of discussion or dispute. . . . The claim urged by the plaintiff, that if not permitted to maintain this action he is without remedy for a most serious injury, is quite groundless, and affords no reason for the assumption of a jurisdiction by this court which it does not possess. The plaintiff would seem to have the same remedy for the trespasses alleged that all other parties have for similar injuries. His lands cannot be intruded upon without the presence in the state of the wrongdoer, and no reason is suggested why he could not seek his remedy against the actual wrongdoers in the courts having jurisdiction. His remedy is ample, and it is no excuse for assuming a jurisdiction which we do not have that the plaintiff desires a remedy against a particular person, rather than one against the real perpetrators of the injury, who were exposed to prosecution in the place where the wrong was committed.'

"This language would apply to the plaintiff in this case. The defendant is a resident of the state of Wisconsin, subject to its laws, and service of summons can there be readily and easily made upon it. The gravamen of the complaint is injury to the freehold, and the records of title to that freehold, whether in or out of the plaintiff, are accessible without trouble, and witnesses, doubtless, are obtainable without extra expense. The plaintiff is not without redress otherwise than in the courts of Minnesota. In fact, it is not claimed that the courts of Wisconsin have no jurisdiction to try this action, and it is plain that they have such jurisdiction.

"As a matter of policy, citizens of other states should not be per-

mitted the use of our courts to redress wrongs and injuries to real property committed within their own territory. That is not what our courts were created or organized for. Nonresidents should not be invited to bring to our courts litigation arising over injuries to real property outside of our territorial limits. Certainly, there is nothing in our constitution or laws which justifies them in imposing the burden of maintaining courts at our expense for their use and benefit. Protection of our own citizens is the primary object and duty of our own courts, and it is, to say the least, a very generous and liberal interpretation of the law which accords to suitors residing in other states the right to litigate in our courts questions of injury to real estate there situate, while the courts of those states reject the claim of our own citizens to litigate their injury to real estate situate here; notably, the adjoining state of Wisconsin, which adjoins our state, and where the subject matter of this litigation is situated. It is clearly against our interests that those living in the state of Wisconsin near the division line should be encouraged in this class of litigation because our laws may be more favorable as to the rules of evidence, or for any other cause, and thus necessitate taxation of our people that nonresidents may have a forum to litigate that which ought to be and is a local action in the state of Wisconsin. Our citizens have no such right in the courts of Wisconsin. Comity should be reciprocal, and this can be more properly obtained by legislative enactments of the respective states than by an interpretation in direct conflict with the almost universal judicial decisions elsewhere. But I should seriously doubt the wisdom of any such enactment. It might, perhaps, prevent the miscarriage of justice in some cases, but it would aid such miscarriage in many instances.

"The defendant, like many other railroad corporations, extends its line from other states to this, and owns a vast amount of lands here. It may allege that citizens of our state are committing injuries to its real property here, and if such a person owns land in Wisconsin, or shall be found there, it could, under such a law, commence a suit in the courts of Wisconsin, and thus put our own citizens to the trouble and expense of going to that state for trial of a case which in all fairness should be tried here. Railroad companies thus situated have great facilities for transporting their witnesses over their own lines without expense to themselves, while a poor man, charged, perhaps unjustly, with a trespass, must travel hundreds of miles into another state to meet his accusers, or suffer judgment by default. The majority opinion means defeat for the railroad company in this case, but it would mean victory for them hereafter if an alleged trespasser upon their lands in Minnesota is caught in Wisconsin and made to answer in its courts, if such a law should prevail there. Now citizens of Wisconsin will have an unjust advantage over citizens of Minnesota. Again, suppose the courts of California should adopt the doctrine of the majority opinion, and one of our citizens should visit that state for pleasure, health, or business, and is there sued by some one claiming that lands belonging to him situate here have been damaged by such citizen of Minnesota, would it not seem a miscarriage of justice that the trial in

such case must take place thousands of miles away from the man's home, and from the situs of the property alleged to have been injured? The hardship of such a proceeding would seem to be intolerable, and I cannot give my assent to any such doctrine, whatever may be the rule as to the trial of actions upon voluntary contracts between parties; and I prefer that the rule should be that for injuries to real property the jurisdiction of our courts should only be coextensive with its territorial sovereignty.

"This doctrine, which is so strongly imbedded in the common law and judicial authorities of the country, is further adhered to by our own statute, which provides that actions for injuries to real property shall be brought in the county where the subject of the action is situated, and prohibits the court from having jurisdiction if brought in any other county: Gen. Stats. 1894, sec. 5183. Thus we have a legislative recognition of the doctrine that actions for injuries to real estate are local. If there is any implication arising from legislative enactments as to the jurisdiction of courts to try actions for injury to real estate elsewhere, it would be against the contention of the plaintiff. The statute makes no distinction between trespass to lands within and without the state. It does not make the action for trespass to lands outside the state transitory. There is no warrant in the language of the constitution or statute which justifies the majority opinion, and, if sound, it must rest upon some other foundation than is to be found in the letter of the law. It is a rule which is more favorable to the plaintiff than the defendant. The former can select his own forum; the latter is helpless. No change of venue can be granted, because none is authorized.

"In criminal cases the doctrine of local venue applies. One of the specifications of complaint in the immortal Declaration of Independence against Great Britain was, 'For transporting us beyond seas to be tried for pretended offenses.' Our constitution, article 1, section 6, provides that: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county or district wherein the crime shall have been committed, which county or district shall have been previously ascertained by law.' No one pretends but that this is a sound and reasonable principle of law and I have never known of its being assailed as tending to a miscarriage of justice. This constitutional guaranty applies to petty offenses wherever a small fine might be imposed, and yet where, perhaps, all the property which a man owns might be at stake, he can, if found in another state, perhaps thousands of miles away from home and witnesses and the location of the alleged injured property, be tried civilly in a foreign sovereignty. Why could he not also in a civil action be tried in China, Russia, England, Spain, Cuba, or Mexico, if found there, and there served with process, if the doctrine of the majority opinion is to prevail? In the case of *Niles v. Howe*, 57 Vt. 388, the court say: 'It would hardly be claimed that our courts had jurisdiction over a crime committed in another state. And yet the same reasoning that supports the doctrine of local venue applies equally to crimes and real actions.' I think that the order should be affirmed."

ACTIONS—LOCAL AND TRANSITORY—INJURY TO REAL PROPERTY.—An action for trespass to land situated in one country or state cannot be maintained in the courts of another state: *Morris v. Missouri Pac. Ry. Co.*, 78 Tex. 17; 22 Am. St. Rep. 17. Compare monographic note to this case showing when actions are local and when transitory; also note to *Eingartner v. Illinois Steel Co.*, 59 Am. St. Rep. 859, on the right to maintain suit in one state or country on a cause of action arising in another.

SIEMERS v. SIEMERS.

[65 MINNESOTA, 104.]

CONTRACTS — STATUTE OF FRAUDS — CONSIDERATION—"REASONABLE CLEARNESS."—The "reasonable clearness" with which the consideration for an agreement, promise, or undertaking, in writing, must appear, in order to satisfy a statute of frauds requiring the consideration, when not expressly stated, to appear with reasonable clearness, cannot be made to depend upon what may be conjectured from that which has been written.

CONTRACTS—STATUTE OF FRAUDS — INSUFFICIENT APPEARANCE OF CONSIDERATION.—An agreement as follows: "I, the undersigned, herewith promise to pay to the widow Margarethe Gruenenfelder, on the wedding day when she shall become my wife, the sum of one thousand dollars," does not satisfy a statute of frauds requiring the consideration, when not expressly stated, to appear with "reasonable clearness."

Appeal from an order denying a motion for a new trial.

Somerville & Olsen, for the appellant.

John Lind and C. A. Hagberg, for the respondent.

105 COLLINS, J. The parties to this action are husband and wife, having been married July 20, 1894. About July 6th he wrote, in German, signed, and delivered to her a purported agreement, which she has lost; but, as testified to on the trial, it read as follows: "I, the undersigned, herewith promise to pay to the Widow Margarethe Gruenenfelder, on the wedding day when she shall become my wife, the sum of \$1,000." The parties separated soon after the marriage, and, alleging in her complaint that the writing was executed and delivered in consideration of her promise to marry defendant, the plaintiff brought this action to recover the amount claimed to be due. She had a verdict, and defendant appeals from an order denying his motion for a new trial.

The only question we find it necessary to discuss lies at the threshold of the right of action, and is whether the consideration for the agreement, promise, or undertaking was sufficiently expressed in the agreement. The statutory provision is imperative in this state, and no action can be maintained on the writing before us unless it has been complied with: Gen. Stats., 1894, sec.

4209. It is not required that what the consideration was shall be expressly stated, but upon what consideration the promise or undertaking was given must appear with reasonable clearness. There was no express statement of the consideration, and, if it appears at all, it must be gathered from the clause, "On the wedding day when she shall become my wife." And counsel for plaintiff concede that it can only be found in this clause by construing it as if written, "On the wedding day, 'if' she shall become my wife." The position is, that with this construction, the consideration would appear with reasonable clearness, and would evidently be plaintiff's promise to marry, and her marriage to defendant. ¹⁰⁸ We are not prepared to say that this would not be correct if the clause had been written as counsel ask to have it construed. But it was not, for the word "when" was used, instead of the word "if." Upon its face this clause simply fixes the time when the payment shall be made. To be sure the time would have been fixed with sufficient certainty had the words "on the wedding day" been used, and nothing further, or had the only expression been "when she becomes my wife." But it does not follow, because both phrases were written, that we should depart from the language used, by substituting one word for another, thus forcing a construction as to what was intended by the promisor. The reasonable clearness with which the consideration for the agreement must appear, when not expressly stated, cannot be made to depend upon what would be conjectured from that which has been written. The order must be reversed, and a new trial granted.

Order reversed.

START, C. J. I dissent. The agreement in question is evidently a homemade one, reduced to writing without the assistance or advice of counsel. It is therefore to be interpreted from the standpoint of the plain unlettered parties to it, not from that of a technical lawyer. So construing the contract, it appears with reasonable clearness that the consideration for the defendant's promise to pay the plaintiff one thousand dollars was the marriage of the parties. It must not be assumed that the contract is tautological in its terms, if effect can be given to all of the words used, by any fair construction. It is not a forced or unreasonable construction to hold that the words of the contract "on the wedding day" refer to the time of payment, and the further words "when she shall become my wife" to the condition or consideration of the promise to pay the thousand dollars.

This is manifestly the intention of the parties, as disclosed by the words which they used. Where such is the clear intention of the party using it, the word "when" is construed as the equiva-

lent of "if" in a will or contract. It appears from the record that the parties are Germans, and that their conversation relating to their marriage was carried on in the German language; that the contract was in that language, and seems to have been translated into English by a German. Such being the case, it is probable that the fact, if ¹⁰⁷ it be one, that in the German language the word corresponding to the English word "when" is frequently used in the sense of "if" explains the use of the word "when" instead of "if" in this contract. But, this aside, I am of the opinion that it appears on the face of the contract that the parties used the word "when" as a word of condition, and in the sense of "if." If any other construction is adopted, no effect can be given to the words "when she shall become my wife."

BUCK, J., concurred in the foregoing views of the chief justice.

When the Consideration of a Contract Must be Expressed, and What is a Sufficient Expression of It.

General Observations. — When a writing is under seal, no consideration need be expressed in it. The seal itself imports a consideration, and is sufficient to satisfy the statute of frauds: *Edelen v. Gough*, 5 Gill, 103; *United States v. Linn*, 15 Pet. 290; *Smith v. Northrup*, 80 Hun, 65; *Childs v. Barnum*, 11 Barb. 14; *Johnston v. Wadsworth*, 24 Or. 494. But while the common law makes it essential to the validity of every contract not under seal that it be supported by a sufficient consideration (*Williams v. Robinson*, 73 Me. 186; 40 Am. Rep. 352; *Wynman v. Gray*, 7 Harr. & J. 409, 415), it is not necessary that a contract in writing, if not within the statute of frauds, should express a consideration, as it may be proved by parol evidence, or may be inferred from the terms and obvious import of the contract: *Gillingham v. Boardman*, 29 Me. 79; *Patchin v. Swift*, 21 Vt. 292; *Horn v. Hansen*, 56 Minn. 43; *Ashford v. Robinson*, 8 Ired. 114; *Cummings v. Dennett*, 26 Me. 397; *Bean v. Burbank*, 16 Me. 458; 33 Am. Dec. 681.

The statute of frauds did not dispense with anything which was before essential to the validity of a contract, and it was just as necessary that there should be a consideration for the contract to pay the debt of another after as before the statute of frauds. The effect of that statute was, with respect to the subject under consideration, simply to add something in the case of a promise to pay the debt of another, by requiring it to be in writing, when before no writing was necessary. The fourth section of the original statute of frauds (29 Car. II, c. 3), provides that no action shall be brought upon any of the classes of contracts there enumerated, "unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some person thereunto by him lawfully authorized." And the provision in regard to the memorandum under the seventeenth section, relating to the sales of goods, is substan-

tially the same, except in the use of the plural, "parties to be charged." While this statute has been generally re-enacted in the United States, it has not, in all cases, been done in the words of the original statute. The word "promise" is sometimes coupled with the word "agreement," and a difference of opinion, respecting the proper construction of the word "agreement," added to by a further divergence of opinion as to its proper construction when coupled with the word "promise," has led to a marked contrariety of judicial opinion upon the question as to whether or not it is necessary that the agreement or memorandum, or note thereof, shall express the consideration for the promise as well as the promise itself. The question as to when the consideration is sufficiently expressed is, of course, important only in those jurisdictions where an expression of the consideration is essential to the validity of the contract. Under these circumstances, it would subserve no useful purpose to discuss, in detail, the reasons by which courts have arrived at conclusions so much at war with one another, and we shall, therefore, simplify the subject under consideration by merely stating the conclusions themselves with little more discussion than is necessary to show the broad ground upon which the doctrines adhered to rest.

English Rule.—Prior to the passage of the mercantile law amendment act, 19 and 20 Victoria, chapter 97, section 3, it was firmly settled by the English courts that the writing must express the consideration for the promise. The leading case in support of this doctrine was *Wain v. Warlters*, 5 East, 10. Its correctness was denied in *Ex parte Minet*, 14 Ves. 189, and in *Ex parte Gordon*, 15 Ves. 286, and was doubted in *Phillips v. Bateman*, 16 East, 356; *Goodman v. Chase*, 1 Barn. & Ald. 297; but upon the presentation of the question in *Saunders v. Wakefield*, 4 Barn. & Ald. 595, the court unanimously held that the consideration must appear from the writing. This settled the English law until the act mentioned was passed: See *Morley v. Boothby*, 3 Bing. 107; *Jenkins v. Reynolds*, 3 Brod. & B. 14; 6 Moore, 86; *Cole v. Dyer*, 1 Crompt. & J. 461; *Clancy v. Piggott*, 4 Nev. & M. 496; 2 Ad. & E. 473; *James v. Williams*, 3 Nev. & M. 196; 5 Barn. & Adol. 1109; *Raikes v. Todd*, 8 Ad. & E. 846; *Hawes v. Armstrong*, 1 Bing. N. C. 761; *Bainbridge v. Wade*, 16 Q. B. 89; *Sweet v. Lee*, 3 Man. & G. 452. The mercantile law amendment act, 19 and 20 Victoria, chapter 97, section 3, provided that: "No special promise . . . to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document." The reason why this statute was passed was because the rule requiring the consideration to appear from the writing was a great hardship on the commercial world, and produced much more fraud than it prevented.

United States Rule.—In this country, some of the state statutes expressly require the consideration to be stated, while others provide that it need not be stated. Outside of those jurisdictions which have

provided for the matter, one way or the other, by statute, the states seem to be about equally divided upon the question whether or not the consideration must be expressed in the agreement, memorandum, or note thereof. It is held in some of those states where the word "agreement" is retained, as in the original statute of frauds, that the consideration must be expressed or appear from the writing in order to satisfy the statute: *Sanders v. Barlow*, 21 Fed. Rep. 836; *Eppich v. Clifford*, 6 Colo. 493; *Weldin v. Porter*, 4 Houst. 236; *Henderson v. Johnson*, 6 Ga. 390; *Hargroves v. Cooke*, 15 Ga. 321; *Fry v. Platt*, 32 Kan. 62; *Sloan v. Wilson*, 4 Harr. & J. 322; 7 Am. Dec. 672; *Wyman v. Gray*, 7 Harr. & J. 409; *Elliott v. Giese*, 7 Harr. & J. 457; *Edelen v. Gough*, 5 Gill, 103; *Hutton v. Padgett*, 26 Md. 228; *Orde-man v. Lawson*, 49 Md. 135; *Culbertson v. Smith*, 52 Md. 628; 36 Am. Rep. 384; *Emerson v. Aultman*, 69 Md. 125; *Straight v. Wight*, 60 Minn. 515; *O'Bannon v. Chumaseso*, 3 Mont. 419; *Neelson v. Sanborne*, 2 N. H. 413; 9 Am. Dec. 108; *Underwood v. Campbell*, 14 N. H. 393; *Sears v. Brink*, 3 Johns. 210; 3 Am. Dec. 475; *Kerr v. Shaw*, 13 Johns. 236; *Staats v. Howlett*, 4 Denio, 559; *Castle v. Beardsley*, 10 Hun, 343; *Smith v. Northrup*, 80 Hun, 65; *Church v. Brown*, 21 N. Y. 315; *Newberry v. Wall*, 65 N. Y. 484; *Drake v. Seaman*, 97 N. Y. 230; *Douglass v. Howland*, 24 Wend. 35; *Reynolds v. Carpenter*, 3 Chand. 31; *Taylor v. Pratt*, 3 Wis. 674; *Parry v. Spikes*, 49 Wis. 384; 35 Am. Rep. 782; *Evoy v. Tewksbury*, 5 Cal. 285; *Jones v. Post*, 6 Cal. 102, 104; *Hazeltine v. Larco*, 7 Cal. 32, 34; *Ellison v. Jackson Water Co.*, 12 Cal. 542; *Stephens v. Winn*, 2 Nott & McC. 372.

This rule, it will be seen from the cases above cited, applies to contracts respecting real property, such as a warranty, in writing, not under seal, for the quiet enjoyment of land, as well as to contracts of guaranty, and those concerning personal property: See *Kerr v. Shaw*, 13 Johns. 236; *Smith v. Northrup*, 80 Hun, 65.

On the other hand, it is held in many of the states where the word "agreement" is retained, as in the original statute of frauds, that the consideration of a contract need not be expressed or appear in order to satisfy the statute of frauds: *Ringgold v. Newkirk*, 3 Ark. 97; *Sage v. Wilcox*, 6 Conn. 81; *Black v. McBarn*, 32 Ga. 128; *Davis v. Tift*, 70 Ga. 52; *Gregory v. Logan*, 7 Blackf. 112; *Levy v. Merrill*, 4 Greenl. 180; *Williams v. Robinson*, 73 Me. 186; 40 Am. Rep. 352; *Packard v. Richardson*, 17 Mass. 122; 9 Am. Dec. 123; *Jones v. Palmer*, 1 Doug. 379; *Bean v. Valle*, 2 Mo. 103; *Halsa v. Halsa*, 8 Mo. 303; *Little v. Nabb*, 10 Mo. 3; *McWilliams v. Lawless*, 15 Neb. 131; *Thornburg v. Marten*, 88 N. C. 293; *Britton v. Angier*, 48 N. H. 420; *Goodnow v. Bond*, 59 N. H. 150; *Reed v. Evans*, 17 Ohio, 128; *Leonard v. Vredenburgh*, 8 Johns. 29; 5 Am. Dec. 317; *Woodward v. Pickett*, Dudl. (S. C.) 30; *Campbell v. Flindley*, 3 Humph. 330; *Smith v. Ide*, 3 Vt. 290; *Gregory v. Gleed*, 33 Vt. 405. In *Laing v. Lee*, 20 N. J. L. 337, and *Lecat v. Tavel*, 3 McCord, 158, it was considered questionable whether it was necessary for the consideration to appear, in any way, on the memorandum, either by inference or otherwise. Thus, the consideration of a contract to convey land need not be set out in the writing: *Thornburg v. Masten*, 88 N. C. 293. The recital of a consideration in a written promise to

pay the debt of another is not necessary to its sufficiency as a memorandum within the statute of frauds: *Goodnow v. Bond*, 59 N. H. 150. So, under a statute providing that no action shall be brought to charge an executor or administrator upon a special promise to answer damages out of his own estate, nor to charge any person upon a special promise to answer for the debt, default, or miscarriage of another, unless the promise is in writing, etc., it is not essential that the writing should state the consideration of the promise: *Britton v. Angier*, 48 N. H. 420.

In other states, the word "promise" is coupled, in the statute of frauds, with the word "agreement," and where this is the case it has been held that the consideration need not be expressed: *Ratcliff v. Trout*, 6 J. J. Marsh. 605; *Wren v. Pearce*, 4 Smedes & M. 91; *Fulton v. Robinson*, 55 Tex. 401; *Ellett v. Britton*, 10 Tex. 208; *Violett v. Patton*, 5 Cranch, 142; *Taylor v. Ross*, 3 Yerg. 330; *Gilman v. Kibler*, 5 Humph. 19; *Colgin v. Henley*, 6 Leigh, 85. The Connecticut statute speaks of "any contract or agreement"; *Edgerton v. Edgerton*, 8 Conn. 6, 10; but it is well said that: "The attempt, in some of the cases to make a distinction, founded merely on the supposed different meanings of the terms 'promise,' 'agreement,' and 'contract,' as used in the statute, is altogether too refined for practical purposes. It would seem to be absurd, by force of nice verbal distinctions, to establish different rules of evidence in respect to the several classes of cases defined in the statute, in which written evidence is made necessary to the validity of the agreement, so that in some cases the consideration must be expressed, because, as it is said, this is implied by the use of the words 'agreement,' or 'contract'; but that in other cases the consideration need not be expressed, because no such thing is to be implied from the use of the word 'promise'": *Whitby v. Whitby*, 4 Sneed, 473. Compare *Taylor v. Ross*, 3 Yerg. 330.

The statutes of Alabama, Nevada, and Oregon expressly require a statement of the consideration; but those of Illinois, Indiana, Kentucky, Maine, Massachusetts, Michigan, New Jersey, and Virginia provide that it need not be stated: *Stimson's American Statute Law*, sec. 4142. The Alabama statute of frauds not only requires that a promise to pay the debt of another shall be in writing, but that the writing shall express the consideration on which the promise is founded: *White v. White*, 107 Ala. 417; *Foster v. Napier*, 74 Ala. 393. Under a statute of frauds requiring the consideration of a promise to answer for the debt of another to be expressed in writing, a third person's guaranty of the payment of a negotiable promissory note need not itself express any consideration, if written upon the note before it is delivered and first takes effect as a contract; but it must do so if it is written afterward: *Moses v. Lawrence County Bank*, 149 U. S. 298, showing that a state statute of frauds, even when applied to commercial instruments, is a rule of decision in the courts of the United States. In Illinois, the writing need not state the consideration of a promise to answer for the debt, etc., of another. The provision of the statute of frauds of that state of 1869, that a contract for the sale of land should be in writing, required the consideration as well as the promise itself to appear in writing, but this requirement was dispensed with by the revision of

1874: *Patmor v. Haggard*, 78 Ill. 607. Under the Massachusetts statute providing that the consideration need not be set forth, a memorandum of a contract for the sale of land is sufficient although the consideration is not expressed: *Hayes v. Allen*, 159 Mass. 451. The amendment of the statute of frauds of New York, chapter 464 of the laws of 1863, which struck out the clause, that the consideration be expressed, from the provision requiring a written memorandum of an agreement, did not, it is said, destroy or annul the requirement that the note or memorandum must contain all of the substantial and material elements of the contract: *Drake v. Seaman*, 97 N. Y. 230, holding that the writing must show on its face what the whole agreement is so far as it is executory and remains to be performed. Since that statute was passed it has been held not essential that the consideration should be expressed in a contract of guaranty: *Evansville Nat. Bank v. Kauffman*, 93 N. Y. 273; 45 Am. Rep. 204; that if a contract of guaranty is entered into concurrently with the principal obligation, a consideration which supports the principal contract supports the subsidiary one also, and that the consideration need not be expressed in the guaranty, but may be shown by parol: *Erie Co. etc. Bank v. Colt*, 104 N. Y. 532, 537. Compare *Leonard v. Vredenburg*, 8 Johns. 29; 5 Am. Dec. 317, and extended note thereto. See, also, *Davis v. Tift*, 70 Ga. 52; *Black v. McBain*, 32 Ga. 128, showing that the memorandum of a guaranty need not state the consideration. The statute of Wisconsin requires the consideration to be expressed: *Twohy Mercantile Co. v. Ryan Drug Co.*, 94 Wis. 319; *Wall v. Minneapolis etc. Ry. Co.*, 86 Wis. 48; though the courts of that state required it before the statute was passed: *Parry v. Spikes*, 49 Wis. 384; 35 Am. Rep. 782, holding that a written guaranty upon a negotiable promissory note, though referring to the note, and made at the same time with it, and constituting a ground of the credit given to the maker, is void by the statute of frauds, if it does not express the consideration. So, in that state, if there is a liability by one party to another, and a third person guarantees or becomes surety for the individual bound, the agreement, promise, or contract of such third person must not only be in writing, but the writing must express the consideration for the promise or contract: *Taylor v. Pratt*, 3 Wis. 674, containing a masterly review of a "long train of vacillating and inconsistent decisions" of New York. And an agreement guaranteeing the payment of another person's debt, which does not, in writing, signed by the party to be charged therewith, express the consideration, is void under a statute of frauds requiring the consideration to be expressed: *Twohy Mercantile Co. v. Ryan Drug Co.*, 94 Wis. 319. A guaranty indorsed upon a promissory note must express the consideration. It is a distinct collateral contract, and must conform to the statute of frauds: *Brewster v. Silence*, 8 N. Y. 207.

"The reasoning of the judges," says Marshall, C. J., in *Violett v. Patton*, 5 Cranch, 151, "in the cases in which they have decided that the consideration ought to be in writing, turns upon the word 'agreement,' of which the consideration forms an integral part"; but the reasoning in cases holding that the consideration need not be expressed appears to turn on the "agreement" as understood in

the popular sense, as declaring the engagement of one party only to a contract, and which does not necessarily include the consideration for it: See extended discussion in *Packard v. Richardson*, 17 Mass. 122; 9 Am. Dec. 123.

Another reason for holding that the consideration must appear from the writing is, that if the consideration was allowed to be proved by parol, it would open the door to all the evils which the statute of frauds was designed to remedy; but experience proves this not to be true in point of fact, for there is no more danger of perjury in allowing the consideration for the promise to pay the debt of another to be proved by parol than in allowing the consideration for any other contract to be proved in the same way. The same objection might exclude parol evidence from every case. The effect of statutes providing that a written promise to pay the debt of another need not express the consideration, and that it may be proved by parol, seem to be highly satisfactory instead of disastrous.

Sufficient Expression of Consideration.—It is well understood that the terms of a contract may be contained in several instruments of writing; and there is no reason why the undertaking may not be in one instrument, and the consideration of it expressed in another: *Otis v. Haseltine*, 27 Cal. 80, 84. Hence, under a statute of frauds requiring certain contracts to be in writing, the form of the writing is immaterial, and it may be evidenced by one or more writings: *Atlantic Phosphate Co. v. Sullivan*, 34 S. C. 301, 309; *Jones v. Post*, 6 Cal. 102, 105; *Hazeltine v. Larco*, 7 Cal. 32, 34; *Strouse v. Elting*, 110 Ala. 132, 140; *White v. Breen*, 106 Ala. 159; *Beckwith v. Talbot*, 95 U. S. 289, 292. That correspondence or different instruments may be used to complete the memorandum required by the statute of frauds, see *Lee v. Butler*, 167 Mass. 426; 58 Am. St. Rep. 466; *Wilson v. Lewiston Mill Co.*, 150 N. Y. 314; 55 Am. St. Rep. 680. In those jurisdictions requiring the consideration of a contract to be expressed in order to satisfy the statute of frauds, it is not necessary that it should be stated in express terms. It is sufficient if the consideration may be collected or implied with certainty from the instrument itself: *Ordeman v. Lawson*, 49 Md. 135; *Hutton v. Padgett*, 26 Md. 228; *Straight v. Wight*, 60 Minn. 515. It is sufficient if, from the whole writing, it appears with reasonable clearness what the consideration was: *Smith v. Northrup*, 80 Hun, 65; as, for example, to procure credit from a promisee for a third party: *Straight v. Wight*, 60 Minn. 515. But if a guaranty which contains no express consideration is a distinct instrument, written upon a separate piece of paper, its reference to the note intended to be guaranteed must be so clear as to identify it with certainty before the consideration of the one can be taken to support the other: *Ordeman v. Lawson*, 49 Md. 135. The consideration of a promise made to answer for the debt, default, or miscarriage of another person must appear either expressly or by necessary implication, in the note or memorandum in writing required by the statute of frauds: *Castle v. Beardsley*, 10 Hun, 343. It is not necessary that the consideration should be expressed in any set phrase: *Otis v. Hazeltine*, 27 Cal. 80, 84; or formally stated, but it must, at least, appear clear and without ambiguity. A mere conjecture, however

plausible, is not sufficient to satisfy the statute of frauds: *Hargroves v. Cooke*, 15 Ga. 321.

The statute of frauds is, however, satisfied where the consideration of a contract is expressed in writing, although fictitious: *Happe v. Stout*, 2 Cal. 460, or, under a bill to foreclose a mortgage, where the consideration of the instrument is expressed by a recital of the payment of one dollar, the receipt of which is acknowledged: *Bolling v. Munchus*, 65 Ala. 558. The words "for value received," in a contract of guaranty is a sufficient expression of the consideration in a contract: *Day v. Elmore*, 4 Wis. 190; *Connecticut etc. Ins. Co. v. Cleveland etc. R. R. Co.*, 41 Barb. 9; *Howard v. Holbrook*, 9 Bos. 237; *Whitney v. Stearns*, 16 Me. 394; *Douglass v. Howland*, 24 Wend. 35; *Dahlman v. Hammel*, 45 Wis. 466. This is true in a contract for the sale of lands: *Cheney v. Cook*, 7 Wis. 413; or of a contract of guaranty of a promissory note: *Miller v. Cook*, 23 N. Y. 495; *Osborne v. Baker*, 34 Minn. 307; 57 Am. Rep. 55; *Dahlman v. Hammel*, 45 Wis. 466; *Martin v. Hazzard Powder Co.*, 2 Colo. 596; *Cooper v. Dedrick*, 22 Barb. 516; *Woodward v. Pickett*, Dudl. (S. C.) 30; *Emerson v. Aultman*, 69 Md. 125; or in a written guaranty of the payment of a bond and mortgage: *Smith v. Northrup*, 80 Hun, 65; or other written instrument: *Edelen v. Gough*, 5 Gill, 103; *Flowers v. Steiner*, 108 Ala. 410. A negotiable promissory note imports consideration, and an agreement to extend the time of the payment of a debt is sufficient consideration for the execution by a third party of his note to the creditor as collateral security for the payment of the debt. Hence, such a note made for such a purpose sufficiently expresses the consideration, to satisfy the statute of frauds: *Nichols v. Dedrick*, 61 Minn. 513.

A written guaranty in the following words, "I hereby hold myself responsible to W. A. and W. W. Padgett, of Baltimore, Maryland, to the amount of \$2,000, for any drafts they have accepted, or may hereafter accept, for John Latouche, now of Alexandria, Va.," satisfies the statute of frauds so far as the expression of a consideration is concerned, because the plain meaning of the contract is, that in consideration of an acceptance for Latouche, the guarantor will be answerable for the payment of subsequent acceptances to the amount of two thousand dollars: *Hutton v. Padgett*, 26 Md. 228. So an undertaking in writing to be answerable "for all such goods as W. shall buy of C. within one year from date," indorsed upon and executed at the same time with a contract between A. and C. for the purchase and sale of the goods, sufficiently expresses the consideration of the guaranty within the statute of frauds: *Church v. Brown*, 21 N. Y. 315, 319. Construing the instruments together as one, the consideration plainly appears on the face of the writing, and is the sale and delivery by C. to W., of such goods as the latter may want from C's store, for one year from the date of the agreement: *Church v. Brown*, 21 N. Y. 315, 319, reversing *Church v. Brown*. 29 Barb. 486. If A gives B a note on the back of which C afterward signs the following agreement, "I guarantee the payment of the contents of the within note to B, the one-half within six months, and the other half within twelve months," a sufficient consideration is necessarily implied from the terms of the

contract, namely, forbearance: *Neelson v. Sanborne*, 2 N. H. 413; 9 Am. Dec. 108.

In a guaranty as follows, "I guaranty the payment of any goods which J. Stadt delivers to J. Nichols," it sufficiently appears that the delivery of the goods is the consideration for the promise: *Stadt v. Lill*, 9 East, 348. So, if the words are as follows, "I will be accountable to you for the payment, within six months, of the seed order forwarded by my son," naming him, the consideration is sufficiently expressed on the face of the instrument: *Nash v. Hartland*, 2 I. R. C. L. 190. A guaranty in these terms, "I do hereby agree to become surety for Mr. R. G., now your traveler, in the sum of five hundred pounds, for all money he may receive on your account," sufficiently expresses the consideration for the undertaking, namely, the continuation of the traveler in the service of his employers: *Ryde v. Curtis*, Dowl. & R. 62. A letter of guaranty informing the persons to whom it is addressed that Mr. Clark, the bearer of the letter, "will purchase a small stock of clothes and clothing of you, which I hope you will sell to him cheap, and I have no doubt he will make you a valuable customer," and concluding with the words, "I hereby guaranty the collection of any amount which you credit him with not exceeding two thousand dollars," sufficiently expresses a consideration: *Eastman v. Bennett*, 6 Wis. 232, 242; approved in *Young v. Brown*, 53 Wis. 333. The consideration is sufficiently expressed on the face of an instrument which reads as follows, "I hereby guaranty to you the sum of two hundred and fifty pounds, in case Mr. P. should make default in the capacity of agent and traveler to you": *Kennaway v. Treleavan*, 5 Mees. & W. 498. So in a guaranty reading, "I agree to be security to you for J. C., late in the employ of J. P. for whatever you may entrust him with while in your employ, to the amount of fifty pounds": *Newbury v. Armstrong*, 6 Bing. 201; *Moody & M.* 389; 3 *Moore & P.* 509. A memorandum in the following form expresses a consideration: "I will be responsible for the purchase of goods from W. S. & Co., for H. C. D., or by his order until I give them notice to the contrary": *Williams v. Ketchum*, 19 Wis. 231. Illustrations of this kind might be multiplied indefinitely, without much profit. If a contract of guaranty is entered into contemporaneously with the principal contract, and is either incorporated in the latter, or so distinctly refers to it as to show that both agreements are parts of an entire transaction, no consideration need be expressed in the guaranty distinct from that expressed in the principal contract. In such a case, the consideration of the guaranty is apparent upon the face of the whole agreement, and that is enough: *Highland v. Dresser*, 35 Minn. 345; *Church v. Brown*, 21 N. Y. 315; *Bailey v. Freeman*, 11 Johns. 221; 6 Am. Dec. 371; *Wilson Sewing-Machine Co. v. Schnell*, 20 Minn. 40; *Simons v. Steele*, 36 N. H. 73, 83; *Nabb v. Koontz*, 17 Md. 283. But, if the guaranty and the principal obligation are not contemporaneous, the memorandum of the guaranty must express the consideration: *Rigby v. Norwood*, 34 Ala. 129; *Brewster v. Silence*, 8 N. Y. 207. And so when made at the same time if the principal obligation is given for a pre-existing debt: *Hall v. Farmer*, 2 N. Y. 553.

If the consideration is forbearance, it must appear plainly: *Emmott v. Kearns*, 5 Bing. N. C. 559. The fact that a memorandum of guaranty refers to the principal debt as already due is not necessarily enough to prove that forbearance to enforce that debt was the consideration for the guaranty: *Smith v. Ives*, 15 Wend. 182.

For other cases of guaranty in which it was held that the consideration was sufficiently expressed, or appeared from the writing, see *Dutchman v. Tooth*, 7 Scott, 710; 5 Bing. N. C. 577; *Boehm v. Campbell*, 8 Taunt. 679; 3 Moore, 15; *Shortrede v. Cheek*, 1 Ad. & E. 57; *Broom v. Batchelor*, 1 Hurl. & N. 255; *Oldershaw v. King*, 2 Hurl. & N. 517; *Gorrie v. Woodley*, 17 L. R. C. L. 221; *Pace v. Marsh*, 1 Bing. 216; 8 Moore, 59; *Bainbridge v. Wade*, 16 Q. B. 89; *Jarvis v. Wilkins*, 7 Mees. & W. 410; *Russell v. Moseley*, 3 Brod. & B. 211; *Hoad v. Grace*, 7 Hurl. & N. 494; *Lysaght v. Walker*, 5 Bligh, N. S., 1; *Caballero v. Slater*, 14 Com. B. 300; *Stead v. Liddard*, 8 Moore, 2; *Grant v. Hotchkiss*, 26 Barb. 63; *Staats v. Howlett*, 4 Denio, 559; *Gottsberger v. Radway*, 2 Hilt. 342; *O'Bannon v. Chumasero*, 3 Mont. 419.

Insufficient Expression of Consideration.—A letter admitting the purchase of goods by the writer from the person to whom the letter is written, but without expressing any consideration, or stating the terms of the purchase, is not a sufficient note or memorandum in writing to take the case out of the operation of the statute of frauds: *Newbery v. Wall*, 65 N. Y. 484. Compare *Drake v. Seaman*, 97 N. Y. 230. A letter agreeing to deed land does not take a contract respecting it out of the statute of frauds where the letter does not express the consideration: *Cooley v. Lobdell*, 82 Hun, 98; affirmed in *Cooley v. Lobdell*, 153 N. Y. 596, 600. A written agreement "to remain with A B two years for the purpose of learning a trade" is not binding, because no consideration is expressed: *Lees v. Whitcomb*, 5 Bing, 34.

A guaranty upon a separate piece of paper from a note to which reference is made, in the following language, to wit, "We guaranty the payment of a note indorsed by . . . the amount being five hundred dollars," is void for want of a sufficient consideration appearing on its face: *Ordeman v. Lawson*, 49 Md. 135. An indorsement of a note has been held an insufficient memorandum of guaranty: *Schafer v. Farmers' etc. Bank*, 59 Pa. St. 144; 98 Am. Dec. 323. The following instruments have been held invalid, as guaranties, under the statute of frauds, because no consideration was expressed or appeared: "I hereby guaranty to pay W. H., etc., ten dollars per month until the sum of three hundred dollars due by . . . shall be paid": *Palsgrave v. Murphy*, 14 U. C. C. P. 153. "I will see you paid for five pounds or ten pounds worth of leather, on December 6, for Thomas Lewis, shoemaker": *Price v. Richardson*, 15 Mees. & W. 539. "To the amount of one hundred pounds consider me as security on J. G's account": *Jenkins v. Reynolds*, 3 Brod. & B. 14. "I undertake to secure to you the payment of any sums you have advanced, or may hereafter advance, to D. on his account with you, commencing November 1, 1831, not exceeding two thousand pounds": *Ralkes v. Todd*, 8 Ad. & E. 846. "As you have a claim on my brother for five pounds and seventeen shillings for boots and shoes, I hereby

undertake to pay you the amount within six weeks from this day": James *v.* Williams, 5 Barn. & Adol. 1109; 3 Nev. & M. 196. No consideration is to be implied from an undertaking as follows: "Inclosed I forward you the bills drawn per J. T. A. upon and accepted by L. D., which I doubt not will meet due honor, but, in default thereof, I will see the same paid": Hawes *v.* Armstrong, 1 Scott, 661.

For other cases holding that the consideration is not expressed, or that an insufficient consideration is expressed in contracts of guaranty, see Elliott *v.* Giese, 7 Har. & J. 457; Allnutt *v.* Ashenden, 6 Scott N. R. 127; 5 Man. & G. 392; Wain *v.* Warlters, 5 East, 10; Raikes *v.* Todd, 1 Perry & D. 138; Morley *v.* Boothby, 3 Bing. 107; 10 Moore, 395; Bushell *v.* Beaven, 1 Bing. N. C. 103; Cole *v.* Dyer, 1 Crompt. & J. 461; Bentham *v.* Cooper, 5 Mees. & W. 621; Weed *v.* Clark, 4 Sand. 31; Spicer *v.* Norton, 13 Barb. 542

SIEBERT *v.* QUESNEL.

[65 MINNESOTA, 107.]

SURETYSHIP — RELEASE OF DEBTOR RELEASES SURETY—FAILURE TO PRESENT CLAIM AGAINST ESTATE. A voluntary release of the estate of the principal debtor has the effect of releasing his surety from personal liability, and the failure to present a claim against it, within the time fixed for the allowance and presentation of claims, amounts to a release of the claim, where the estate is sufficient to pay all claims against it.

SURETYSHIP—RIGHT AND RELEASE OF MARRIED WOMAN AS SURETY—FAILURE TO PRESENT CLAIM AGAINST ESTATE.—If a married woman, without consideration to herself, joins with her husband in a mortgage of his land whereby they covenant to pay the mortgage debt, which is evidenced by a note signed by him alone, she becomes a surety and is entitled to all the rights of a surety. Hence, if he dies leaving an estate sufficient to pay all claims against it, and the mortgagee or his assigns fail to present their claim in the probate court for allowance within the period fixed for the presentation and allowance of claims, she is released, as surety, from any further personal liability, because the principal debtor, the husband, has been discharged by the creditors' act.

Action by Siebert and wife to foreclose a mortgage executed by E. Langevin, since deceased, and the defendant Eleanor Langevin, his wife, afterward Eleanor Quesnel. It was adjudged that the defendant Eleanor Quesnel was personally liable upon the note and mortgage, and that the plaintiffs have execution against her for any deficiency that might arise upon the foreclosure sale. The defendants appealed from an order denying a motion to set aside the judgment and for a new trial.

J. L. Macdonald, for the appellants.

Butts & Jaques, for the respondents.

108 COLLINS, J. There are really but two questions for determination in this cause. First, on the face of the note and mortgage, which are to be considered as one instrument, what were the relations existing between Mrs. Langevin (now the defendant Mrs. Quesnel) and the mortgagee and her assigns? Was Mrs. Langevin a surety for the payment of Mr. Langevin's debt, evidenced by a note signed only by him, or was she simply and strictly a joint principal or obligor? If she occupied the position of a surety, any defense open to her, as such surety, at the time of the assignment of the mortgage to plaintiffs, or which has since arisen, is available in this action, brought to foreclose the mortgage, and to recover from her personally any deficit upon a sale of the mortgaged premises. The second question depends upon the answer to the first, and is, If Mrs. Langevin was a surety, in what manner have her rights and liabilities been affected by the death of her husband, the principal debtor, and plaintiffs' failure to file the note in the probate court, as a claim against the estate, within the time fixed for the presentation and allowance of claims, which expired January 21, 1892, some months after the note and mortgage were transferred to plaintiffs, and more than two years prior to the commencement of this action?

The note was given by Mr. Langevin, alone, for his pre-existing individual debt; and the failure to file it for allowance has barred all right to recover the amount as a claim against Langevin's estate, or to recover as against any of the heirs: *Hill v. Nichols*, 47 Minn. 382. This failure amounts to a voluntary release of the claim against the estate of Mr. Langevin, which was more than sufficient to meet and pay all claims against it; and, if his wife was a surety, a voluntary release of the estate of the principal debtor must have had the effect of releasing her from personal liability. The rights of a surety, the fact of suretyship being known to the creditor, are well established by repeated adjudications, and need not be stated here.

109 This leads to an inquiry as to the relationship which actually existed between Mrs. Langevin and the mortgagee, of which the plaintiffs had notice in the note and mortgage. Mrs. Langevin joined in all of the covenants contained in the mortgage, binding herself, her heirs, executors, and administrators, including a covenant or condition to pay the sum of money represented by his note, thus becoming obligated to pay the mortgage debt. But primarily it was the debt of Mr. Langevin. This clearly appeared from the note and mortgage, and was actually known to the mortgagee. Mrs. Langevin took no part in the negotiations which led up to the execution of the

papers, and had nothing to do with the transaction, except to sign the mortgage and acknowledge its execution when presented to her. The mortgagee's agent, who transacted the business, testified that it was agreed between Mr. Langevin and himself that the wife should join in the obligation of the covenants and the promise to pay, as recited in the mortgage, but it was not claimed that she had any knowledge of this agreement. She did not contract for or receive, either in person or estate, any part of the consideration for the note, nor was her separate property bound in any way for the pre-existing debt which formed the consideration.

It is well settled that a wife is entitled to the ordinary rights and privileges of a surety, where she mortgages her separate estate for the debt of her husband: *Wolf v. Banning*, 3 Minn. 133 (202); *Agnew v. Merritt*, 10 Minn. 242 (308), and cases cited. If Mrs. Langevin had mortgaged her separate estate as security for her husband's note, she would have occupied the position of a surety. And, on principle, it can make no difference that, instead of pledging her separate estate to pay the debt, she became personally obligated to pay that debt out of her own funds or estate. Although Mrs. Langevin was a joint principal or obligor, she was also and in fact a surety, and is entitled to all of the rights of a surety, where the principal debtor has been discharged by the creditor's act. If so, it follows that when the estate of the principal debtor was released by the omission of the creditor to file a claim for allowance, it appearing that the estate was abundantly able to discharge the debt in the due course of administration, the surety for that debt was released from any further personal liability.

There is nothing in defendants' claim that because of this omission ¹¹⁰ the mortgage security was also discharged, or in the contention that the trial court erred when it directed a separate judgment for plaintiffs' costs and disbursements, as to each, against such of the defendants as were duly notified that no personal claim was made against them, and then answered and took part in the trial. It is evident that they unreasonably defended, and must pay for the privilege: *Gen. Stats. 1894, sec. 5867*.

There are no other questions presented which need discussion, and the result is, that in so far as the judgment appealed from relates to the personal liability of defendant Eleanor Quesnel for the amount of the debt, it must be modified in accordance with the views herein expressed. As to the remainder of the judgment, it stands affirmed.

SURETYSHIP—RELEASE OF DEBTOR RELEASES SURETY—FAILURE TO PRESENT CLAIM AGAINST ESTATE.—The liability of a surety is dependent upon the liability of his principal, and an action cannot, therefore, be maintained against one as surety if his principal is not liable: *Henline v. Reese*, 54 Ohio St. 599; 56 Am. St. Rep. 736; note to *Scott v. Fisher*, 28 Am. St. Rep. 692. A surety is discharged if the creditor having the means of satisfaction, actually or potentially, in his hands, neglects or refuses to avail himself thereof: Notes to *Mingus v. Daugherty*, 43 Am. St. Rep. 358; *Scott v. Fisher*, 28 Am. St. Rep. 692. A claim against an estate is unavailing unless it is presented within the time prescribed by law: *Judy v. Kelley*, 11 Ill. 211; 50 Am. Dec. 455; monographic note to *Bradford v. Brooks*, 16 Am. Dec. 719, on the effect of a statute reviving a right to present claims against a decedent. Under the laws of California, a surety is not discharged by the creditor's failure to present his claim against the estate of the principal debtor: *Bull v. Coe*, 77 Cal. 54; 11 Am. St. Rep. 235, showing when a mortgagee need not present his claim against a husband's estate.

ST. PAUL TRUST COMPANY v. MINTZER.

[65 MINNESOTA, 124.]

ESTATES—LIFE TENANT—TAXES—REPAIRS.—A tenant for life of real estate is compelled to pay taxes and expense of repairs out of the rents and profits, whether such life estate comes by will, conveyance, or operation of law, unless he voluntarily pays them out of other funds.

ESTATES—FAILURE OF LIFE TENANT TO PAY TAXES AND EXPENSES OF REPAIRS—REMEDY OF ADMINISTRATOR—EQUITY.—If the life tenant in a homestead estate fails, for many years, to pay the taxes and to make repairs in order to save the estate for the reversioners, the administrator, with the will annexed, being authorized by the express terms of the will to collect the rents and to pay the taxes, is entitled to maintain a bill in equity to have a receiver appointed to take charge of the premises, to collect the rents sufficient in amount to discharge the liabilities of the life tenant's estate for which he is answerable, to reimburse the administrator for taxes and expenses paid by him, and to pay unpaid taxes, and expenses for repairs, necessarily incurred to preserve the property.

Appeal by the plaintiff, the St. Paul Trust Company, administrator, from an order sustaining a demurrer to its complaint, interposed by the defendant, Anna R. Mintzer.

Harvey Officer, for the appellant.

Stevens, O'Brien, Cole & Albrecht, for the respondent.

127 BUCK, J. William L. Mintzer died February 23, 1883, at the city of St. Paul, Minnesota, leaving a will, which was duly probated, and one John Jones, one of the executors named in the will, duly qualified as such, and entered upon the discharge of his duties, but he died about May 4, 1886, leaving the will unexecuted, and on or about June 11, 1886, this plaintiff was duly

appointed by the probate court of Ramsey county as administrator de bonis non with the will annexed, and duly qualified and entered upon the discharge of its duties, and ever since has been, and now is, acting as such administrator. Mintzer left surviving him a widow, but no issue. The will has been so far executed that all the just debts and demands existing against him at the time of his death have been paid in full, and all specific legacies of money or personal property and all lawful devises of specific real estate have been paid and satisfied in full, save and except that the tenth subdivision of the will has not been executed. The tenth subdivision reads as follows:

"All the rest, residue, and remainder of my estate I give, bequeath, and devise as follows: I direct my executors to take charge of the same, collecting the rents, paying all taxes, assessments, and charges thereon, and to make report of all their doings to the probate court of Ramsey county, Minnesota, at least once a year. The balance in their hands, if anything shall remain of said rents after paying the charges aforesaid, shall be distributed to the persons entitled to the real estate as hereinafter provided. I wish this to continue during the life of my nephew, William Mintzer, son of George Mintzer, and the life of George A. Hicks, provided, however, that at the expiration of ten years from my death, if either or both of said parties, William Mintzer and George A. Hicks, should be living, nevertheless the property may be sold by the executor or their successors, and the proceeds divided among my nephews and nieces hereinabove named, viz., Sarah Mintzer, daughter of Adam Mintzer (married to one Clough), George, Charles, Fred, John, Amelia, Josephine, Maggie, Charles, Charles Titus, Dr. William Titus, Almira Egbert, and the ¹²⁸ children of Adam Snyder one share, except and provided that I wish one lot in Dunwell & Spencer's addition to West St. Paul to be given and conveyed to Charles Flynn, aforesaid, his heirs and assigns; the selection of the lot to be left to my executors, but I request them to give him one of the best."

The ten years limitation provided for in the will for the division and distribution of the estate expired on February 23, 1893, at which time the plaintiff fully accounted to the probate court for all business and transactions performed by it in behalf of the estate, and said court, on March 13, 1893, by its decree and judgment duly made and entered in the matter of said estate, duly decreed and adjudged that there was then due and owing to this plaintiff, as such administrator, for taxes, assessments, and other lawful charges, disbursements, and expenses of administration, a balance and sum of \$16,750.69 over and above all moneys by it

then had and received. There was no money or personal property belonging to said estate wherewith the said balance due this administrator could be paid, and the devisees and legatees under said will, including this defendant, failed, neglected, and refused to pay said balance, or any part thereof, and by reason thereof no final decree assigning and awarding the said estate to the persons entitled thereto was made, or could be lawfully made, in the matter of said estate in said probate court.

By reason of the nonpayment to plaintiff of such balance, it was necessarily compelled, against its wishes, to exercise the duties as such administrator; and, upon a subsequent accounting in said probate court, it was decreed and adjudged that there was due upon said estate to this plaintiff, as such administrator, the sum of \$20,143.02. There was not, and is not now, any money or personal property belonging to said estate in the hands of this administrator, and there is no real property belonging to said estate except one small house or shanty, the rents whereof were and are nominal, and do not exceed the sum of \$60 per annum, and except the homestead tract, which consists of 30 acres and 36-100 of an acre, particularly described in the plaintiff's complaint, and of which the testator died seised in fee, at which time there were valuable tenements, improvements, fences, and buildings, to wit, a dwelling-house, barn, and outhouses thereon, and which premises, prior to the time of his decease, were occupied by the testator and his wife as a homestead, and which premises the defendant, as the widow of the testator, continued to hold as a ¹²⁹ homestead until about March 10, 1891, at which time she removed from said homestead to another dwelling-house in the county of Ramsey, where she has ever since continuously resided, and occupied the same as her homestead, having rented her first-described homestead to tenants not members of her family, and received the rents and income therefrom, but has wholly failed and neglected to pay the taxes assessed thereon, amounting to the sum of \$2,507.04, for the years 1885 to 1890, inclusive, which plaintiff, as such administrator, was compelled to pay to save said homestead from tax sale for taxes, penalties, costs, charges, and expenses; said taxes having been so paid also under the order and authority of the probate court of Ramsey county, and at the request of the reversioners.

The unpaid taxes, costs, and penalties upon said homestead now due for the years 1891 to 1894, inclusive, amount to \$2,321.91, which have not been paid by this plaintiff for want of funds. The defendant has also, ever since she became entitled to the right and use of said premises as a homestead, refused and neg-

lected to keep the buildings, fences, and other improvements thereon situated in proper repair, and has suffered the same to become dilapidated and out of repair. The plaintiff paid said taxes upon the said estate at the written request of all persons interested therein except this defendant, first exhausting all rentals received from other premises for such purpose, and made the advances to save such estate. The reasonable market value of said homestead does not exceed \$23,100, and, in the present condition of the real estate market, it would not sell for a sum exceeding \$10,000; and the defendant, while having ample means outside of said homestead to pay the taxes thereon and keep the same in repair, refuses and neglects to do so. The defendant still collects the rental from said homestead, which is continually depreciating in value, and is not adequate security for the taxes paid and unpaid thereon.

The relief asked is for an accounting; that the value of defendant's life estate in the premises be ascertained; that a receiver be appointed of said premises; that the defendant be enjoined from leasing or collecting rents from said homestead; that her life estate be adjudged terminated, or her homestead right adjudged forfeited; and that the names of persons now in possession as tenants be disclosed, that they may be made parties herein.

¹³⁰ A demurrer was interposed to the complaint upon three grounds: 1. That the plaintiff had not the legal capacity to sue; 2. That several causes of action are improperly united; 3. That the complaint does not state facts sufficient to constitute a cause of action. The demurrer was sustained upon the ground that the facts alleged in the complaint do not show that the plaintiff is entitled to the reversion of the real estate so as to entitle it to an eviction, and because the facts pleaded do not show that the plaintiff is a creditor of the defendant, and that the facts pleaded as an abandonment do not operate as such in favor of the plaintiff.

The facts pleaded, however, do show the very strongest grounds for equitable relief. We regard the certain persons named as beneficiaries in the tenth subdivision of the will as reversioners, within the legal or equitable definition of that term. But we do not consider the abandonment of the homestead by the defendant, and her subsequent acquirement of another, at all material. She had only a life estate in the premises, and it was therefore her duty to pay all taxes properly assessed against them. This she refused or neglected to do. Upon the death of John Jones, the executor, this plaintiff was appointed administrator with the will annexed of the estate not administered. Section 4453 of the

General Statutes provides that the term "executor" in this code shall be construed to include an administrator with the will annexed. Referring again to the tenth subdivision of the will, we find that it was the duty of the executor to take charge of all the rest, residue, and remainder of the testator's property not specifically devised, collect the rents, pay all taxes, assessments, and charges thereon, and make report to the probate court of Ramsey county at least once a year. The duties of the administrator in this respect were those of a trustee, and, whatever plaintiff did in this respect in regard to paying taxes upon the homestead, it was not as a volunteer, but performing a duty specifically enjoined by the terms of the will itself. When the defendant refused or neglected to pay the taxes for years upon the homestead, and there was danger of the premises being thereby lost to the reversioners, the homestead fell within the provision in the will, viz., "all the rest, residue, and remainder of my estate," which it was plaintiff's duty to save if the life tenant was guilty of not paying the taxes thereon.

The reversioners were under no obligations to pay taxes, or protect ¹³¹ the property as against waste by reason of nonrepairs, so far as concerned the life estate of the defendant. That was the duty of the defendant herself, for the law is too well settled to need discussion that a tenant for life of real estate is compelled to pay taxes and the expense of repairs out of the rents and profits, whether such life estate comes by will, conveyance, or operation of law, unless the life tenant voluntarily pays them out of other funds. In this case, if the life tenancy ceased by reason of the death of the defendant or otherwise, the reversioners would be entitled to take the fee, unless, after the death of the testator's nephews William Mintzer and George Hicks, subject to the right of the trustee to sell the premises, and divide the proceeds among the nephews and nieces of the testator, as specifically provided by the terms of the will. Of course, a power may be granted by devise in a last will and testament: Gen. Stats. 1894, sec. 4334. And the trust conferred by the terms of the will upon the executor was valid as a power, and, this being so, the acceptance of the trust made the duty of the trustee co-ordinate with the power conferred. One of the duties or trusts expressly enjoined by the will was that the executor should collect the rents and pay taxes, and, the plaintiff having been duly substituted in place of the executor as administrator with the will annexed, it was its duty to use due diligence in this matter: 2 Perry on Trusts, sec. 527. The power of an administrator with the will annexed to perform the duty conferred upon the execu-

tor by the terms of the will is expressly authorized by the General Statutes of 1894, section 4464, viz: "To perform every act and discharge every trust as the executor named in the will would have had, and their acts shall be as valid and effectual for every purpose."

The right of the plaintiff to be reimbursed out of the life estate does not rest upon the fact that she has abandoned it as a homestead, but upon the broader ground that, she having failed to pay the taxes thereon and to keep the same in repair, and having thereby allowed it to depreciate in value, with great danger of entire loss to the reversioners, it became the duty of the plaintiff, under the terms of the will, to discharge this duty, and for the expense so incurred it is entitled to be reimbursed out of the life estate. These taxes were paid at the request of all of the reversioners, and with the approval of the probate court; and while these facts do not constitute plaintiff's authority for so doing, they materially aid in showing ¹³² its good faith. Therefore, assuming that it was the duty of the life tenant to keep down the taxes, to keep the premises in repair, and also preserve the property from decay to the extent, at least, of the rental value of the premises, she having neglected and refused to do so, the plaintiff is entitled to have a receiver appointed to collect the rents sufficient in amount to discharge the liabilities of the life tenant's estate for which she is answerable: *Murch v. Smith Mfg. Co.*, 47 N. J. Eq. 193; *Cairns v. Chabert*, 3 Edw. Ch. 312. In the latter case, a bill in equity was sustained against the life tenant to restrain the disposition of property, and to compel the tenant to keep down assessments and taxes; and upon motion an order was entered for the appointment of a receiver of so much of the rents and income of the estate as should be necessary to pay off the taxes in arrear, unless within forty days from the service of a copy of the order the tenant should show to the satisfaction of the master that the taxes had been paid. This case is cited with approval in *Phelan v. Boylan*, 25 Wis. 679.

If the life tenant permits the premises to decay for want of repair, and neglects to pay the taxes, subjecting the estate to sale therefor, with accumulated costs and penalties, it must diminish the value of the estate, and thus there is a resulting, lasting damage to the freehold or inheritance, and this constitutes waste: *Stetson v. Day*, 51 Me. 434; *Phelan v. Boylan*, 25 Wis. 679; 1 Washburn on Real Property, 107. But, although the defendant has been guilty of permissive waste, we do not think that it is such waste as would constitute an absolute forfeiture of the estate, and therefore the action does not come within the provisions

of the General Statutes of 1894, sections 5882, 5883. But the facts alleged constitute substantial ground for relief in equity, and entitle the plaintiff to protect the inheritance, and, if possible, have it restored to the condition it would be in if the defendant had not been guilty of wrongdoing.

Our conclusion is, that while the plaintiff is not a remainderman or reversioner, so as to entitle it to maintain a common-law action of waste, yet it is entitled to maintain this action for equitable relief; to have a receiver appointed, as prayed for in the complaint; to have an accounting of all rentals received by defendant and taxes paid by plaintiff, as well as the amount of unpaid taxes ascertained, and of the amount necessary to make repairs to save the property ¹³³ from loss to the reversioners; and that, if the same, with necessary expenses, are not paid by the defendant within a reasonable time, to be fixed by the trial court, the life estate of the defendant in the homestead premises described in the complaint may be sold by decree and judgment of the trial court to reimburse the plaintiff for all such necessary disbursements, and to pay the unpaid taxes on said premises and keep them in repair; and to have an injunction against defendant that she be restrained from collecting any more rentals of the premises until the further order therein of the trial court.

The order sustaining the demurrer is overruled, and the cause remanded, with instructions to the trial court to proceed in the matter not inconsistently with the views herein expressed.

ESTATES—LIFE TENANT—REPAIRS—WASTE.—A life tenant is bound to repair a house which is out of repair, if repairs would make it tenantable: *Clemence v. Steere*, 1 R. I. 272; 53 Am. Dec. 621; and the reversioner or remainderman is entitled to an appropriate remedy, either to restrain waste, or to recover compensation for it, if consummated: See monographic note to *Allen v. De Groodt*, 14 Am. St. Rep. 632, on reversioners and remaindermen.

LOMMEN v. MINNEAPOLIS GASLIGHT COMPANY.

[65 MINNESOTA, 196.]

CONSTITUTIONAL LAW—SPECIAL OR STRUCK JURIES.—A statute providing for struck juries is not obnoxious as "class legislation," is not in violation of a constitutional provision that "every person ought to obtain justice freely and without purchase," and does not infringe a constitutional mandate that "the right of trial by jury shall remain inviolate."

TRIAL BY JURY—DEFINITION—METHOD OF SELECTION—LEGISLATURE.—Constitutions do not define "trial by jury," but the essential and substantive attributes or elements of jury trial are, and always have been, impartiality and unanimity.

The jury must consist of twelve; they must be impartial and indifferent between the parties; and their verdict must be unanimous. So long as the fundamental requisite of impartiality is not violated, the method of selection is entirely within the control of the legislature.

LEGISLATURE—POLICY OF LAW.—COURTS do not deal with the policy of a law. That is a question for the legislature.

Action in which there was a demand, filed by the defendant, with the clerk, at the proper time, for a struck jury. The plaintiff appeared, at the time designated by the sheriff for striking the jury, and filed with him written objections to the proceeding, on the ground that the act authorizing struck juries was not constitutional. Notwithstanding this, the sheriff did strike a jury. The plaintiff gave notice, on the first day of the term, of a motion to quash the proceedings for a struck jury, on the ground that no venire had been issued or made returnable for the first day of the term, and also on the ground that all the proceedings were null and void, by reason of the unconstitutionality of the struck jury law. This motion was denied. A venire for the jury struck by the sheriff was then issued, returnable on the day set for trial. After the call of the calendar, on trial day, and after the struck jury had been called, the plaintiff filed a motion to quash the venire, for the reason that all proceedings in the matter were unauthorized, null, and void, and because the act providing for struck juries was unconstitutional, contrary to the letter and spirit of the constitution, contrary to public policy, and null and void. This motion was denied upon its submission when the case was reached and the jury called. An exception was allowed, but, before the jury was sworn, the plaintiff, Mary Lommen, moved the court to have a jury come from the county at large, and insisted upon her constitutional right to have the action tried by a jury summoned, drawn, and selected in the usual manner. She also objected to having the action tried by a struck jury. The plaintiff's motion, demand, and objection were overruled and denied, and exceptions taken. As the struck jury was about to be sworn, the plaintiff again objected to the swearing of the jury, for the reason that it was not such a jury as was guaranteed by the constitution. This objection was also overruled, and the plaintiff excepted. Finally, the struck jury was sworn, and the defendant obtained a verdict. The plaintiff thereafter, on a bill of exceptions, moved for a new trial: 1. On the ground of irregularities in the proceedings of the court whereby the plaintiff was prevented from having a fair trial, in that the court refused a jury trial, and denied the plaintiff a trial by jury as guar-

anted by the constitution; 2. Because of errors of law occurring at the trial and duly excepted to, namely, the rulings on the plaintiff's motions and objections with reference to the struck jury. The court denied the motion for a new trial, and judgment was entered for the defendant. The plaintiff appealed. Error in overruling the plaintiff's different motions on the ground that the jury had not been summoned for the first day of the term was expressly waived on the appeal, and a decision on the merits invoked.

John W. Arctander and Ludwig Arctander, for the appellant.

A. B. Jackson, and Koon, Whelan & Bennett, for the respondent.

²⁰⁶ MITCHELL, J. The only question presented by this appeal is the constitutionality of the Laws of 1895, chapter 328, entitled "An act to provide for struck juries," etc. This was merely a re-enactment of the Laws of 1864, chapter 31 (Gen. Stats. 1878, c. 71, secs. 15-19), which had been repealed by the Laws of 1891, chapter 84.

The essential provisions of the act are as follows: Whenever a struck jury is deemed necessary by either party for the trial of the issue in any action in the district court, he may file with the clerk of the court a demand in writing for such a jury; whereupon the clerk shall forthwith deliver a certified copy of such demand to the sheriff, who shall give both parties four days' notice of the time of striking the same. At the time designated, the sheriff shall attend at his office, and, in the presence of the parties or their attorneys, or such of them as attend, shall select, from the number of persons qualified to act as jurors in the county, forty such persons as he shall think most indifferent between the parties, and best qualified to try such issue; and then the party requiring such jury shall first strike off one of the names, and the opposite party another, and so on alternately until each has struck off twelve. If either party shall not attend in person or by attorney, the sheriff shall strike off for him. When each party has thus struck off twelve names, the sheriff shall make a copy of the remaining sixteen names, and certify the same to be the list of jurors struck for the trial of the cause, and deliver the same to the clerk of the court, who shall thereupon issue and deliver to the sheriff a venire with the names in said list annexed thereto; and thereupon the sheriff shall summon the persons named according to the command of the writ. Upon the trial of the cause, the jury ²⁰⁷ so struck shall be called as they stand on the panel, and the first twelve of them who shall appear, and are not chal-

lenged for cause or set aside by the court, shall constitute the jury, provided that, if enough do not appear for the trial of the cause, the court shall cause talesman to be called, as in other cases. The act provides, however, that if the sheriff is interested in the cause, or is related to either of the parties, or does not stand indifferent between them, the judge may name some judicious and disinterested person to strike the jury, and perform all things required to be done in the premises by the sheriff. The jury must be struck at least six days, and the venire served at least three days, previous to the term of court at which the action is to be tried. The party demanding the struck jury is required to pay the fees for striking the same, and the mileage and per diem of the jurors, and shall not have any allowance therefor in the taxation of costs. The provisions of the act do not extend to the trial of any indictment for any offense where the defendant is entitled to two or more peremptory challenges.

The grounds upon which it is claimed that this act is unconstitutional are: 1. That it is in conflict with section 4 of the bill of rights of the constitution, which provides that "the right of trial by jury shall remain inviolate"; 2. That it is in conflict with the provisions of section 8 of the bill of rights, that "every person . . . ought to obtain justice freely and without purchase"; 3. That it is class legislation, and unequal in its operation, and therefore obnoxious to the spirit of the constitution; 4. That it is against public policy, contrary to the American system of jury trial, and liable to become "an engine of oppression and a vehicle for the corruption of justice."

Inasmuch as the legislature is a co-ordinate branch of the government, the courts do not sit to review or revise their legislative action; and hence, if they hold an act invalid, it must be because the legislature has failed to keep within its constitutional limits. A court has no right to declare an act invalid solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights guaranteed or protected by the constitution. Except where the constitution has ²⁰⁸ imposed limits upon the legislative power, it must be considered as practically absolute. The courts are not the guardians of the rights of the people, except as these rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against, and remedy for, unwise or oppressive legislation, within constitutional bounds, is by appeal to the justice and patriotism of the people themselves, or their legislative representatives. Neither are courts

at liberty to declare an act void merely because, in their judgment, it is opposed to the spirit of the constitution. They must be able to point out the specific provision of the constitution, either expressed or clearly implied from what is expressed, which the act violates. Moreover, courts will never declare a statute invalid unless its invalidity is, in their judgment, placed beyond reasonable doubt: *Cooley's Constitutional Limitations*, c. 7.

In view of these principles, which are elementary, counsel's third and fourth objections present considerations which should mainly, if not entirely, be addressed to the legislature. They involve nothing of judicial cognizance, unless it be the question whether the provisions of the act are what, in a constitutional sense, is known as "class legislation." The act, however, is not obnoxious to that objection. Its provisions apply alike to all litigants. The right to avail himself of them on the same terms is open to everyone. It is true that it is not every litigant that may be financially able to avail himself of that right. That is a consideration that may go to the fairness or justice of the law, but not to its constitutionality. There are a great many laws of whose privileges many persons, because of their financial condition, are unable to avail themselves; but it was never heard that this fact alone rendered an act obnoxious to the constitution, as being class legislation.

Neither is there any merit in the point that the act is in violation of the constitutional provision that everyone "ought to obtain justice freely and without purchase." This is as old as *Magna Charta*, and has a well-understood historical meaning. It was aimed against the corrupt practice of taking bribes and exacting illegal fees in the administration of justice, and never meant that a litigant should have the right to conduct his suit in court without cost. At common law, every suitor bought his writ, and had to pay the cost of every ministerial act done at his request as the cause proceeded. ²⁰⁰ Costs and fees imposed on suitors to defray the expenses of courts might be made so great as to be unreasonable, and to result in a practical denial of justice, and for that reason be unconstitutional. Where the limit is we need not now inquire, for the party who demands a struck jury cannot complain, for he voluntarily incurs the expense, and the opposite party has no ground for complaint, because it costs him nothing, and cannot be taxed against him as costs, even if he proves to be the losing party.

Therefore, the only remaining question is, Does the act under consideration violate the provision of the constitution that "the right of trial by jury shall remain inviolate"?

What is "trial by jury" to which the constitution refers? The constitution nowhere defines it. The question is an historical one, for an answer to which reference must be had to "jury trial" as known at common law and as it existed in the territory of Minnesota at the time of the adoption of the constitution. From *Whallon v. Bancroft*, 4 Minn. 70 (109), down to its latest utterance on the subject, this court has always held that the effect of this clause in the constitution is: 1. To recognize the right of trial of jury as it then existed in the territory; and, 2. To continue such right unimpaired and inviolate. In all former cases the question was, In what cases are parties entitled to a trial by jury? And the answer has always been, in those cases in which they were entitled to jury trial by the laws of the territory at the time of the adoption of the constitution.

The question in the present case is, What is a trial by jury, within the meaning of the constitution? The expression "trial by jury" is as old as Magna Charta, and has obtained a definite historical meaning, which is well understood by all English speaking peoples; and, for that reason, no American constitution has ever assumed to define it. We are therefore relegated to the history of the common law to ascertain its meaning.

The essential and substantive attributes or elements of jury trial are and always have been number, impartiality, and unanimity. The jury must consist of twelve; they must be impartial and indifferent between the parties; and their verdict must be unanimous. It cannot be claimed that the act under consideration affects either the first or third of these essential attributes of a jury trial. If it affects ²¹⁰ any of them, it must be the second, viz., impartiality. The mode of selecting the jury is only a means to an end, and only goes to the question of impartiality. No court ever held or intimated that, in order to preserve the right of trial by jury "inviolable," it is necessary to continue the particular method of selecting jurors in force at the time of the adoption of the constitution. On the contrary, it has always been held that the method of selection is entirely within the control of the legislature, provided only that the fundamental requisite of impartiality is not violated: *Perry v. State*, 9 Wis. 19; *Proffatt on Jury Trials*, sec. 106. No case is cited, and we think none can be found, to the contrary. Our own legislation, general and special, enacted since the adoption of the constitution, changing the mode of selecting jurors, is a witness to the correctness of this proposition; and, if the mode adopted provides for the selection of the jury with substantial fairness, a court would have no right to declare the act unconstitutional merely because, in its

judgment, some other method would be better calculated to secure impartiality, at least when the mode adopted was one previously known to and recognized by law as a proper mode of selecting a jury.

The objections urged by counsel to the mode of selecting jurors provided by the struck jury act are: 1. That it eliminates the element of lot or fortuity; and 2. That it deprives the party of the right of peremptory challenge.

As already suggested, these are not essential or substantive elements of a jury trial, but merely means of securing one of those elements, viz., impartiality. Fortuity in the selection of a jury was unknown at common law, the panel being selected by the sheriff from his list of freeholders; and it was not until 3 George II that he was required to select a panel for the trial of all causes at the assizes, instead of, as previously, a separate panel for the trial of each separate case. This mode of selection was subject to the objection that it opened the door for jury packing by the sheriff. Hence, most of the American states have long since taken the selection of jury lists out of the hands of the sheriff, and placed it in the hands of other officers or bodies, such as the selectmen of the towns, town supervisors, county commissioners, county courts, or certain officers constituted ²¹¹ a board for that purpose; and, as an additional means of insuring impartiality, they have introduced an element of lot in selecting from the jury lists those who should constitute the panel for the term, and again in selecting from this panel those who should compose the jury for the trial of a particular cause. It is likewise true that most of the American states have, as an additional means of securing impartiality, permitted a limited number of peremptory challenges in civil causes, the object of which, doubtless, was to give a party an opportunity to strike off a juror whom he suspected of prejudice, but without being able to give sufficient reasons for his exclusion for cause. The right of peremptory challenge in civil causes was unknown to the common law, and does not exist in England even at the present day. But it will be found that even under these modern statutes there is no element of fortuity in selecting the original jury list, but only in subsequent selections from that list; also, that if, by reason of challenge or otherwise, there is not a sufficient number of jurors for the trial of a cause, the court has the power to direct the sheriff to summon bystanders, or to issue to the sheriff a special venire, directing him to return an additional number of jurors from the body of the county; also, that in courts, such as justices' courts, where a jury is only

wanted occasionally and at irregular intervals, it has usually been provided that the jury should be selected substantially in the manner provided in our struck jury act, which involves no element of fortuity, and when there is no right of peremptory challenge *eo nomine*. This is, and at the date of the adoption of the constitution was, the mode of selecting a jury in justice's court in Minnesota. It was the mode prescribed for selecting a jury in the county court by the act under consideration in *Perry v. State*, 9 Wis. 19.

Special or struck juries were well known to the common law, their origin being so ancient that its date cannot be ascertained. As early as 8 William III a rule as to the manner of striking such a jury provided that if one party came, and the other did not, "he that appears shall, according to the ancient course, strike out twelve, and the master shall strike out the other twelve for him that is absent": *Anonymous*, 1 Salk. 405. See, also, *King v. Edmonds*, 4 Barn. & Ald. 471. ²¹² The main object of special juries was protection against packed or incompetent common juries. Blackstone states the mode of procedure for selecting a special jury as follows: "Upon motion in court and a rule granted thereupon [the sheriff is required] to attend the prothonotary or other proper officer with his freeholders' book, and the officer is to take indifferently forty-eight of the principal freeholders, in the presence of the attorneys on both sides, who are each of them to strike off twelve, and the remaining twenty-four are returned upon the panel": 3 Blackstone's Commentaries, 357. This, it may be suggested, is the model after which all the American special or struck jury acts have been framed. Indeed, it would perhaps be more accurate to say that these statutes are merely declaratory or amendatory of the common law on the subject; and, as respects the mode of selecting a special jury, the essential feature of all of them is that a list (generally from forty to forty-eight) of persons qualified to serve as jurors is selected from the body of the county by some officer who is impartial between the parties, and from this list the parties alternatively strike off a name, until the list is reduced to a specified number, and the jury for the trial of the cause is taken from such of the remainder as are not challenged for cause. It will be observed that the element of lot and the right of peremptory challenge were entirely wanting at common law in the selection of a special jury. It will also be found that the same is true of all the American statutes, except that in New York and Pennsylvania it seems that, under comparatively recent statutes, a limited right of peremptory challenge is given.

We regret that time has not permitted us to make anything

like a complete examination of the legislation of this country on the subject of special or struck juries. We have found nothing on the subject in the New England states, but the middle and southern states seem generally to have recognized special juries as an existing common-law institution, and to have commenced to regulate it by statute at an early day. Thus, in 1801, New York enacted (Laws 1801, c. 98, sec. 22) that "no struck jury shall be allowed unless on the order of the court when they may deem it necessary by reason of the importance or intricacy of the case," which is evidently intended to be restrictive of an existing and well-known common-law right. This statute was amended in 1829, and again in 1857, so that it now reads: "Where it appears to the court that a fair and impartial trial . . . cannot ²¹³ be had without a struck jury, or that the importance or intricacy of the case requires such a jury, the court must make an order," etc: 2 Rev. Stats. 1829, pt. 3, c. 7, tit. 4, art. 3; 2 Bliss' Code 1890, sec. 1063. Delaware has had a statute providing for special juries at least since 1852: Rev. Code 1852, c. 109, sec. 16; Pennsylvania, since 1785; 1 Pepper & Lewis' Digest, 2517. In the latter state, however, under what they call a common law of their own, no special venire is issued, but the jury is struck from the general venire issued for the term: *McDermott v. Hoffman*, 70 Pa. St. 31. In Maryland all juries seem to be, in a modified form, "struck." They select a list of twenty from the panel, and each party strikes four names from the list, and the remaining twelve constitute the jury: Code 1860, art. 50, sec. 7; Code 1878, art. 62, sec. 12. Virginia has had a statute, at least since 1849, authorizing the court, except in cases of felony, to allow a special jury; but in that state eighteen out of a list or panel of twenty-four are chosen by lot, and the parties strike from the eighteen until it is reduced to twelve, who constitute the jury: Code 1849, c. 162, sec. 8; Code 1860, c. 162, sec. 25. In Georgia the statutes have provided for struck juries ever since 1799. The peculiarity in that state is, that the grand jury list is taken as the list from which the parties strike off names: Acts 1869, No. 127, sec. 6; Code 1882, sec. 3925; *Winter v. Muscogee Ry. Co.*, 11 Ga. 438; *Walker v. Bivins*, 57 Ga. 322. The statutes of Alabama have provided for struck juries at least since 1852: Code 1852, sec. 2264; Code 1876, sec. 3018; also of Arkansas, as early as 1837: Rev. Stats. 1837, c. 85, sec. 18; also Missouri, at least since 1872: *Wagner's Stats.* 1872, c. 80, sec. 23; Rev. Stats. 1879, sec. 2802.

Turning now to the states formed out of the Northwestern territory, of which Minnesota was a part, we find that, as early as 1824, Ohio passed an act providing for struck juries, which, as

re-enacted in 1831 and amended in 1853, is identical with that of Minnesota: Stats. 1841, c. 64, sec. 22; Swan's Rev. Stats. 1854, c. 62, sec. 30; Rev. Stats. 1880, sec. 5185. Indiana has had statutes on the same subject at least since 1861: Acts 1861, c. 22; 2 Gavin & Hord's Ind. Stats. 1862, pt. 2, c. 1, sec. 310; Laws 1881, c. 38, sec. 359; Rev. Stats. 1881, sec. 525; Rev. Stats. 1894, sec. 534; also Michigan, since 1827: 2 Terr. Laws, p. 471, sec. 16, Rev. Stats. 1838, pt. 3, tit. 2, c. 5, sec. 19; Howell's Ann. Stats. 1882, sec. 7585. As both Wisconsin and Minnesota were originally part of Michigan, it would seem that the struck jury act of that state continued to be the law of Wisconsin until the latter state passed another act on the subject, ²¹⁴ in 1889, and continued to be the law of Minnesota until the adoption of the Revised Statutes, in 1851. Wisconsin passed a struck jury act in 1889, which is substantially the same as that of Minnesota: Laws 1889, c. 268; 2 Sanborn and Berryman's Annotated Statutes, sec. 2544 s.

Under all of these statutes, except where we have mentioned the differences, the method of selecting the jury was, in all essential particulars, the same as under our statute, and as at common law in England. Most, if not all, of these statutes, were enacted in the several states after the adoption of their constitutions, containing the same or similar provisions as to the right of trial by jury which are contained in the constitution of Minnesota; and yet, until in the present case, the constitutionality of these statutes has never, so far as we can discover, been even questioned, except once in Missouri, when the constitutional objections to the act were very promptly overruled: *Vierling v. Stifel Brewing Co.*, 15 Mo. App. 125. The courts and the bar everywhere seem to have assumed that the constitutionality of such laws was beyond question. This act was first passed in 1864, less than seven years after the adoption of the constitution, and remained on our statute books unchallenged for twenty-seven years. Struck or special juries, and the present mode of selecting them, had been known to and recognized by the law, as being in accordance with the common-law right of trial by jury, for ages before the adoption of the constitution of this state. It is rather late in the day to discover the unconstitutionality of such acts; and it would certainly require great temerity for courts now to assume to have discovered some new ground on which to hold them invalid.

But, even if the question was one of first impression, we do not see why the act does not provide a method of selection sufficient to secure substantial impartiality. If the sheriff does not

stand impartial between the parties, the judge may (shall) appoint some judicious and disinterested party to make the list; and, if a showing was made that furnished any reasonable ground for believing that the sheriff was not entirely impartial, it would be error for the court to refuse to appoint some one else to act in his stead. Moreover, if the sheriff selected a partial or unfair list—as, for example, largely of the personal friends or neighbors of one of the parties, or persons who, from business interests, were presumably biased in favor of one side of the issue to be tried—we have no doubt of the power, as well as duty, ²¹⁵ of the court to set aside the list, on motion analogous to the old motion to quash the array. If the list is honestly selected, it would seem that, under the right to strike off twelve, it could be purged not only of all that could be successfully challenged for cause, but also of all even suspected of bias. But, if not, the party has at least six days after this, and before trial, in which to investigate the remainder, and his right of challenge for cause at the trial is still unlimited. Counsel has much to say about abuses that have grown up by reason of collusion between dishonest litigants and friendly or corrupt sheriffs; but, if such abuses have grown up, this is an argument to address to the legislature, rather than to the courts. All laws are subject to be abused by corrupt and dishonest men.

The most serious objection to the policy of the law (although not urged by counsel as of itself any ground for holding the law unconstitutional) is, that it gives a party an absolute right to a struck jury without cause shown. But, whatever may be said of the propriety or policy of this feature of the act, we cannot see how it infringes upon the constitutional right of trial by jury, provided the act still leaves an impartial jury between the parties. If this is a valid objection to the constitutionality of the act, it would obtain against many of the struck jury laws in other states; and yet we have not been able to discover that such an objection was ever even suggested. At common law, while an order and rule of court were required, yet the rule for a struck jury was made as of course on the motion of the party, and without any cause shown; and we do not discover that this was ever changed by statute in England, at least prior to the American Revolution. The first statute in that country on the subject of struck juries appears to have been 3 George II, chapter 25. That act was passed to remove a doubt that had arisen as to the power of the courts of law at Westminster on a matter not here material; but the language of the act is: "The said courts are hereby respectively authorized and required, upon motion as aforesaid in any of the

cases before mentioned, to order and appoint a jury to be struck," etc. Section 2, chapter 37, 6 George II, was in the nature of a special act for the counties palatine of Chester, Lancaster, and Durham, authorizing the justices of the session or assizes in those counties, in their discretion, to order and appoint a jury to be struck. Chapter 18, 24 George II, requiring a party calling a struck jury to pay the jurors' fees, as ²¹⁶ well as the cost of striking the jury, and providing that he should not be entitled to any more costs than if the case had been tried by a common jury, was intended to prevent parties from calling struck juries unnecessarily in small and trivial cases, and indicates that a party had a right to such a jury as of course, and not merely in the discretion of the court, or upon cause shown. In this country a number of the states have by statute restricted this common-law right to a struck jury, and provided that such a jury should be allowed only in the discretion of the court or upon certain cause shown. This was, and still is, the law in New York, Michigan, and a number of other states. But in Delaware, Pennsylvania, Georgia (until 1869), Alabama, Ohio (since 1853), Indiana (at least since 1861), Missouri (since 1879), and Wisconsin (since 1889), a party is or was entitled to demand a struck jury as a matter of right without showing any cause. In Pennsylvania, in 1789, in order to prevent defendants from calling for special juries merely for delay, it was provided that, except in cases involving the title to real estate, no rule for such a jury should be entered on the defendant's application, unless he filed an affidavit that he believed that there was a just and legal defense to the plaintiff's demand: Dunlop's Pa. Laws, 1700-1849, c. 95.

In view of such a consensus of opinion on the part of the legislatures, and impliedly of the courts and bar, of the country, that statutes of this kind do not impair the common-law right of trial by jury as known and understood in American constitutional law, we would not be warranted in holding this act unconstitutional. With the policy of the law we have nothing to do. If conditions have so changed that it results in abuses such as counsel suggest, the remedy is with the legislature.

Judgment affirmed.

CANTY, J., DISSENTED. He said: "I cannot concur in the foregoing opinion. At the time of the adoption of our constitution, no man had a right in the territory of Minnesota to resort to the one man method of having a jury selected for him, when he showed no shadow of cause for it, and when there were plenty of presumptively fair and competent jurors in court on the regular panel. No man ever had such a right in the territory. And further, for more than

one hundred and fifty years prior to the adoption of our constitution, such one man power in the selection of juries had been almost universally discarded in all the American colonies, states, and territories east of Minnesota, through which we trace our customs and traditions. It is true, as I will hereafter show, that there were a few of these states which retained a form of struck jury practice, under which the party might apply to the court for a jury struck, and the court, in its discretion, could grant or refuse the application. But, under the watchful discretion of the court, this was not in fact a one man power in the selection of juries, and was not at all as likely to result in the selection of unfair juries as the absolute right of the party given by our statute to elect to have one certain man select the jury. For these reasons, I claim that, even if it is constitutional to allow such one man power in this state at all, it is so only to the extent that it was practiced in the states aforesaid, and with as many safeguards thrown around it. I claim that, under our constitution, the party cannot be made the judge of his own cause as to when he will set aside the regular panel, and have this one man power exercised for him; that the court, and not he, must be the judge of this, and, in its discretion, determine in each case whether or not the ends of justice will, under all the circumstances, be better subserved by allowing or denying a struck jury. But our present law attempts to vest practically the whole of this discretion in the party, and make him the judge of his own cause as to these matters. I claim that the removal of the safeguard of this watchful discretion of the judge leaves it less likely that an impartial jury will be selected, and therefore the law is unconstitutional.

"The one man power in the selection of jurors has always led to gross abuses. This is historical. But the opportunity for such abuse is much greater when the sheriff selects the jury for the particular case than when he selects a panel to try all the cases on the calendar. It is hardly necessary to cite authorities to show the evils of jury-packing which have resulted from the practice of allowing one man to select juries. 'In this are pointed out two abuses, which have always weakened and undermined the integrity of the body [the jury], and against which we have had to make stringent and special provisions. These were the improper selection from the body of the people, and an unfair impaneling of those selected. . . . The English practice allowed the officer summoning a jury a large, and, as we think, a dangerous degree of discretion as to the selection of the persons who formed the jury. This gave rise to the very common and grievous complaint, so frequently made in English judicial proceedings, of a packed jury, which, under the system there, was possible, and the evils and dangers of which have been so forcibly pointed out by writers, especially by Bentham in his *Art of Packing Juries*': Proffatt on Jury Trials, sec. 114. 'At common law, no such thing was known as the preparation of a list of persons who were liable to be summoned to serve as jurors at a succeeding term of court; but the uncontrolled discretion was vested in the

sheriff, in the coroner, or in officials called elisors, of summoning such good and lawful men as they might choose under the command of the writ of venire facias. This led to enormous abuses, chiefly in the packing of juries and the blackmailing of citizens, to remedy which American statutes have generally provided, with more or less particularity, for the preparation, a given time before the commencement of any term of court, or at other stated periods, of a list of persons, within the county or other jurisdiction, from whom jurors are to be summoned. The preparation of this list is generally, though not always, confined to officials other than the sheriff, such as the judges of general elections, or the county canvassers of the votes polled at general elections, the trustees of the township or the councilmen of wards, other town officers, special boards, county courts, or jury commissioners': 1 Thompson on Trials, sec. 13.

"I will not multiply authorities on this point. We have no right to assume, as the majority do, that human nature is any better now than it always has been, or that the practically unrestricted exercise of this one man power will produce a jury up to the standard of impartiality which existed when our constitution was adopted, and when no right to exercise this one man power existed. The millennium has not come. The experience of ages shows that this one man power has always led to abuse. Any increase in it, or any dispensing with the safeguards which should surround it, greatly detracts from the required standard of impartiality. In one breath the majority say that one of the requirements of a constitutional jury is impartiality, and in another breath they say that a law which so far fails to secure this impartiality as to be unjust and oppressive is still constitutional. In one breath they say: 'The essential and substantive attributes or elements of jury trial are and always have been number, impartiality, and unanimity.' In another breath they say: 'A court has no right to declare an act invalid solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights guaranteed or protected by the constitution.' For my part, I hope I shall never sit on a bench under such a constitution, when I have not got 'temerity' enough to declare invalid a law for the selection of juries which is likely to result in 'such injustice'—which fosters the selection of juries so lacking in impartiality that the 'provisions' of the law are 'unjust and oppressive.'

"It is conceded by all parties to this case that impartiality is one of the constitutional requirements of a legal jury. In the exceedingly able brief filed on behalf of respondent by intervening counsel, the following are stated as three of the essential elements of a constitutional jury: '2. The right to have them [the twelve men] each lawful, upright, and well qualified. 3. The right to have them each disinterested and impartial. . . . 7. The right to have them each drawn and selected by officers free from all bias in favor of or against either party.' Neither can there be any doubt about the correctness of this proposition.

"I also fully agree with the majority that the particular statutory machinery by which, at the date of our constitution, an impartial jury was secured, is not a part of the constitutional right to an impartial jury. It is the standard of impartiality which then existed that the constitution says shall remain inviolate, not merely the statutory machinery by which that standard was attained. It is the right to a certain grade of impartiality which the constitution preserves. What that grade is, is a historical or traditional question, not a statutory one. But the question has reference to the living customs and traditions of the people of Minnesota territory at the time the constitution was adopted, not to the dead customs and traditions of some prior time. But to determine what that constitutional impartiality is, we can look backward over some length of time immediately prior to the date of the constitution, not solely to the statute law which existed at that date; and, by doing so, we will discover that the same standard of impartiality had existed for a considerable length of time. Then such statutory machinery did not provide the right itself, but merely the means of regulating and enforcing that right. It never was intended by the makers of our constitution to tie the hands of the legislature to the particular statutory mode of selecting a jury in force when the constitution was adopted. But it furnishes the standard of impartiality, and the legislature is not at liberty to go back and take as such standard the crude practices of the distant past—practices which had been long discontinued.

"As to the provision of the constitution that 'the right of trial by jury shall remain inviolate,' the majority say at one moment that the standard of impartiality which shall remain inviolate is that which existed in the Minnesota territory; and at the next moment they go back to the border of the Dark Ages to find that standard; and utterly ignore the fact that the world has moved in the mean time. If you go back thus far, why not go back still further, to the days when the standard of impartiality was such as was attained by the practice of deciding lawsuits by wager of battle? Why not take that as the standard of impartiality which prevailed in Minnesota territory and should prevail in the state to-day. It is hardly necessary to say that the safeguards which were thrown around the selection of a jury under the laws of the territory insured a standard of impartiality very much higher than did the English common law or the English statutes up to the time of the Revolution. The revision of 1851 of the territory of Minnesota provided that the board of county commissioners should select from the poll lists a list of seventy-two persons for petit jurors (c. 8, art. 1, secs. 15, 16); that the panel should be drawn by lot from this list (c. 126, secs. 146-149; c. 115, sec. 5); that the jury should be drawn by lot from this panel (c. 71, secs. 14, 16; c. 126, secs. 151-161); and the parties had the right both to challenge peremptorily and for cause (c. 71, sec. 17; c. 128). There never was in the territory of Minnesota any provision for a struck jury or any one man power in the selection of jurors, except talesmen in case of deficiency and juries in justices'

courts. As we shall hereafter see, safeguards securing as high, or nearly as high, a standard of impartiality, had long been in force in those states through which we obtained our laws, customs, and traditions, and, while but few of these particular safeguards are a part of our constitutional right, the standard of impartiality thus attained is.

"The majority dwell much on the statutes passed during the time of George II, and the practice in England both before and after. But they fail to tell us that long prior to the time of George II the odious one man power in the selection of juries had been abolished in most of the American colonies through which we trace our traditions. As early as 1692, the colony of Massachusetts Bay provided that the freeholders of each town should select the number of petit jurors apportioned by the clerk of the court to such town: 1 Acts & Resolves 1692-1714 sec. 11, p. 74. A similar provision was enacted in 1697: 1 Acts & Resolves 1692-1714, sec. 10, p. 286; and again in 1699: 4 Acts & Resolves 1692-1714, sec. 4, p. 368. As early as 1736 the panel of jurors was drawn by lot from lists similarly prepared by the selectmen of the town: 2 Acts & Resolves 1715-41, c. 10, p. 828. See, also, 2 Acts & Resolves, 1715-41, c. 18, p. 1090; 3 Acts & Resolves 1742-56, c. 5, p. 474; 3 Acts & Resolves 1742-56, c. 13, p. 995; 4 Acts & Resolves 1757-68, c. 29, p. 318. See, also, 4 Mass. Laws 1807-1816, p. 41; Rev. Stats. 1836, c. 95. The statutes of Vermont have always been similar: Rev. Laws 1808, c. 6, sec. 58; Rev. Laws 1824, c. 7, sec. 58; Rev. Stats. 1840, c. 13, secs. 71, 72, c. 32, secs. 2-6. So have the statutes of New Hampshire: Act June 17, 1785, found in Rev. Laws 1815, secs. 1, 2, p. 121; Rev. Laws 1830, tit. 100, secs. 1-5; Rev. Stats. 1842, c. 176, secs. 1-17. So have the statutes of Connecticut: Act Oct. 1744, found in Rev. Laws 1808, secs. 1-5, p. 426; Rev. Laws 1838, secs. 36-40, p. 51; Rev. Stats. 1849, tit. 1, c. 9, secs. 105-110. So, also, have the statutes of Rhode Island: Act 1729, found in Pub. Laws 1798, secs. 1-13, p. 180; Rev. Laws 1822, secs. 1-14, p. 136; Pub. Laws 1844, secs. 1-10, p. 154. And the statutes of Maine have always been similar: 1 Rev. Laws 1821, c. 84; Rev. Laws 1830, c. 84. So far as I can ascertain, there never has been in all New England, since the earliest settlements, anything resembling a struck jury or any one man power in the selection of any jury, except in the selection of talesmen in case of deficiency.

"We come now to states where the statutes provided for struck juries. But it will be observed that in none of these states, up to the time our constitution was adopted, could a struck jury be had as a matter of right, or without submitting the request for it to the watchful discretion of the judge; and in every instance the right to an impartial jury was much better guarded by the practice prescribed, and such practice was much less liable to abuse, and much more likely to attain impartiality, than the present struck jury law of this state. In 1786, the legislature of New York enacted: "That it shall and may be lawful for the supreme court and the several inferior courts . . . upon motion . . . in any action . . . to order

and appoint a jury to be struck for the trial thereof': 1 Greenleaf's N. Y. Laws, sec. 19, p. 268. In 1801, the legislature of New York provided for the selection by the town supervisors and city assessors of jury lists (1 Laws 1801, c. 98, sec. 13); the drawing of the regular panel by lot from such list (sec. 11); and the drawing by lot of the jury from such panel (sec. 20). This statute also provided (sec. 22): 'That no struck jury shall be allowed unless on the order of the court, when they shall deem it necessary by reason of the importance or intricacy of the case, and whenever they shall so deem it necessary' they may order such jury: See, also, 1 Stats. 1813, sec. 22, p. 333. 2 Revised Statutes of 1829, part 3, chapter 7, title 4, article 3, section 46, provides: 'When it shall appear to the supreme court or to any court of common pleas . . . that a fair and impartial jury will be more likely to be obtained by having a struck jury, or that the importance or intricacy of the cause requires such a jury, such court shall order a special jury to be struck for the trial of such cause.' The statute is still in the same form: 1 Stovers' N. Y. Code 1892, sec. 1063. Under these statutes, the New York courts have scrutinized very closely applications for struck juries, and have ordered them only in very exceptional cases: See *Livingston v. Columbian Ins. Co.*, 2 Caines, 28; *Manhattan Co. v. Lydic*, 2 Caines, 380; *Foot v. Croswell*, 1 Caines, 498; *Anonymous*, 1 Johns. 314; *Wright v. Columbian Ins. Co.*, 2 Johns. 211; *Genet v. Mitchell*, 4 Johns. 186; *Poucher v. Livingston*, 2 Wend. 296. In every one of these cases the court denied the application for a struck jury. Section 19 of the 'Fundamental Constitutions' of the province of East New Jersey, passed in 1683, provides: 'The manner of returning juries shall be thus: The names of all the freemen above five and twenty years of age, within the district or borough out of which the jury is to be returned, shall be written on equal pieces of parchment and put into a box, and then the number of the jury shall be drawn out by a child under ten years of age': See N. J. Grants, Concessions, etc., by Leaming & Spicer, 163. In 1797 it was enacted: 'That it shall and may be lawful for the supreme court, the courts of common pleas and the courts of general quarter sessions of the peace respectively on motion . . . to order a jury to be struck.' And, when the jury was ordered, the judge himself selected the names from the sheriff's list of all the qualified jurors in the county: Rev. Laws 1821, secs. 14, 15, p. 313. See, also, *Elmer's Digest* 1838, secs. 14, 15, p. 268. As stated by the majority, Pennsylvania, since 1785, has had a struck jury law which provides that the names shall be chosen by lot from the general venire, or, as it is expressed in the statute, 'from the proper wheel.' Surely, there is no one man power in this. In 1824 the legislature of Ohio enacted: 'That it shall and may be lawful for the supreme court and courts of common pleas respectively on motion . . . to order a jury to be struck': Rev. Laws 1824, sec. 19, p. 99. See, also, Rev. Laws 1831, sec. 21, p. 99; Stats. 1841, c. 64. This statute was enacted in Michigan in 1827: 2 Mich. Terr. Laws, sec. 16, p. 471; sec. 19, p. 658; 3 Mich. Terr. Laws,

sec. 16, p. 1246. No struck jury law was enacted in Wisconsin or Minnesota until after the adoption of our constitution.

"I have now examined substantially all the statutes of all the states through which we trace our customs and traditions, from early colonial times up to a later time than the period during which we trace such customs and traditions; and, since the early periods of colonial history, I find practically nothing which permits the exercise of any such one man power in the selection of juries as is permitted by our present struck jury law. The territory of Michigan was organized, Wisconsin was carved off of Michigan, and Minnesota off of Wisconsin, before 1851, when Ohio changed her struck jury law so as to give the party an absolute right to resort to one man power in the selection of a jury; and no struck jury law was passed in Indiana until 1861. Of all the states east of us through which we trace our customs and traditions, only New York, New Jersey, Ohio, and Michigan had a struck jury law which permitted anything which had any semblance to one man power in the selection of the jury. None of these laws allowed a struck jury as a matter of right. It was allowed only when the court or judge ordered it. This certainly had a great tendency to curb the abuses which would otherwise arise from the exercise of the one man power in selecting the jury. In fact, it could hardly be called a one man power at all under such circumstances. The judge would scrutinize closely the motives of the party applying for the struck jury, and deny the application if he had the least suspicion that the sheriff would not be perfectly fair in the selection of the jury. But, under our statutes, a struck jury is a matter of right, and the one man power in the selection of it practically absolute. There is no way of curbing the abuses which may arise, until they become so gross that the opposing party can successfully impeach the sheriff by an affirmative showing that he is not indifferent; mere suspicion is not enough.

"Under the statutes of such other states above referred to, if an application to the court for a struck jury was opposed, it would hardly be granted as of course. The party applying for it would, at least, have to throw some suspicion on the regular panel, or on the intelligence, fairness, or impartiality of a considerable number of the regular jurors. But, conceding that he would not, the court would hardly grant the application if the least suspicion was thrown by the opposing party on the fairness or impartiality of the sheriff. As long as the presumption remained that the regular jurors were fair and impartial, no judge would require more than a suspicion to be thrown on the motives of the party applying for the struck jury, or on the impartiality of the sheriff. But now the motives of such party cannot be inquired into at all, and nothing but the strongest evidence will impeach the sheriff. The difference is neither slight nor fanciful, but the infringement on the right to an impartial jury is substantial. The change in the struck jury law not only gives the moving party a struck jury as a matter of right, and without regard to the question of necessity or propriety, but it also shifts

onto the opposing party the burden of showing the unfairness of the sheriff, or at least greatly increases such burden. If, for illustration, a statute gave the right to challenge a juror peremptorily, who would say that the party was not prejudiced by the denial of that right, as long as he still had the right to challenge for cause? Certainly no one. And yet in that case the party would have the right to examine the juror under oath as to his bias, and also to subpoena and produce other witnesses to prove that bias. But, when the sheriff is challenged for cause in such a case as this, he cannot be examined on oath, nor can any witnesses be subpoenaed and sworn to prove his bias, so as to have the court designate some one else to select the struck jury. The statute has changed the burden of proof as to facts, and under circumstances which make it exceedingly difficult for the opposing party to sustain that burden. The slightest innovation which increases the one man power in the selection of juries, or puts that power beyond the absolute control of the court, should be held unconstitutional. But, as I have shown, the innovation here in question is not slight. Indeed, it is a notorious fact that the putting of the selection of struck juries practically beyond the control of the court too often results in a favored litigant selecting his own jury. The litigant who happens to own the sheriff has a special privilege, which I contend it is unconstitutional to give him. The most un-American custom that can be found in the most un-American state in the Union is not, as the majority hold, the measure of our constitutional rights.

"The question is not, as the majority seem to argue, whether you would sometimes or in some cases get as impartial a jury, or in fact the same jury, as you would if the court had a veto power on the demand for a struck jury, but whether you would at all times and under all circumstances be as likely to get as impartial a jury; and the majority do not pretend to say that you would. When a party has considerable litigation in the same court, and makes a practice of demanding struck juries, the judge presiding at the trials has the best opportunity in the world for observing whether such juries are being selected with the strictest impartiality; and no upright judge who had the power to deny a struck jury would allow it after he once commenced to suspect that the sheriff or some obscure deputy on whom such work was imposed was the mere tool of the party applying for such struck juries. Again, the sheriff would not be at all as likely to abuse his powers and select unfair juries when he knew he was being watched by a judge who could and would promptly deprive him of those powers if he did not act with strict impartiality. While admitting that the test of the constitutional right of trial by jury is the character of that right as enjoyed and practiced in the territory at the date of our constitution, yet the majority persist in making the mistake of going back to the English common law to determine the right which was so enjoyed and practiced in Minnesota territory.' This is not a question of common law, but a question of what actually existed at a particular time.

All the authorities agree on that point. But, even if it were a question of common law, it would be such common law as we had adopted and up to that time retained, not such as we had long prior thereto discarded. The common law is progressive, and this is especially true of it in its transition from England to America. In both countries statutes have often wiped out portions of the common law, which the repeal of those statutes long afterward would never revive: See Bouvier's Law Dictionary, tit. 'Common Law.'

"Neither can I agree with the majority that the right of challenge or something equivalent, which will produce a jury of as high standard or impartiality, is not a constitutional right. It is also, in a greater or less degree, an ancient right: Proffatt on Jury Trials, sec. 147. But I do not think that this question is controlling in this case, as the opportunity to strike twelve jurors from the list might be a sufficient equivalent for the right of peremptory challenge, if there were other sufficient safeguards to maintain in other respects the required grade or standard of impartiality, which, in my opinion, there are not.

"The fact is also noted by the majority that a one man power has always been exercised in the selection of talesmen. That proves nothing. Neither the litigant nor the sheriff can ordinarily anticipate such a contingency in advance, so as to be prepared to take advantage of it; and no such litigant would attempt to procure the nomination and election of a sheriff, or charter him after he was elected, in anticipation of any such contingency. Besides, the practice adopted in the selection of talesmen is a matter of necessity, which is not true as to the practice adopted in the selection of struck juries.

"Again, we are told that struck juries have always been selected in justices' court in a similar manner. That proves nothing. It is held under most constitutions that there is no right of trial by jury at all in the petty cases of which a justice has jurisdiction: Proffatt on Jury Trials, sec. 99. Then it is certainly competent to try such cases with a kind of jury which would not be in all respects a constitutional jury in the district court, if for no other reason, because it has always been so. The right of appeal is a most effectual remedy for abuse of the one man power in the selection of a jury in justice's court.

"For the reasons stated, I am of the opinion that our present struck jury law is unconstitutional. The legislature have a perfect right to raise the grade of impartiality higher than it ever has been—higher than it was either at the date of our constitution or at any time since. But they have no right to lower that grade below what it was when the constitution was adopted, by increasing the influence of either party in the selection of the jury. There is much room for the improvement of our jury system, but, under the guise of such improvement, it is not constitutional to open the door for giving a party the opportunity to select his own jury. It is undoubtedly true that many corporations are being plundered by the unjust ver-

dicts of prejudiced juries—juries blind even to the fact that the unjust tax thus imposed is, in turn, levied by these corporations on the general public, who, in the end, have to pay for most of this plundering. It cannot be questioned that there is a crying need for reform in the jury system, but it does not follow from this that these corporations should in their own cases be permitted to name the persons who should sit as jurors. In my opinion, the judgment appealed from should be reversed."

COLLINS, J., ALSO DISSENTED. He said: "As stated in the majority opinion, the effect of that clause of our constitution which provides that 'the right of trial by jury shall remain inviolate' is to recognize the right of trial by jury as it then existed, and to continue such right unimpaired and inviolate. It seems to be clear that the right to a struck jury never existed in the territory, and from the statutes of other states and territories from which we derive our traditions and customs concerning juries and the right of trial thereby, cited in the dissenting opinion, that only a qualified right to a struck jury ever existed in traditions of the territory. In any event, it did not exist absolutely. Possibly, the qualified right to a struck jury was in existence where a showing was made to the court and an order obtained for the impaneling of such a jury. But in these cases the selection of the jury was more or less under the supervision of the court itself. In either case, if this was the situation when our constitution was adopted, I think it evident that the right of trial by jury as it existed in territorial days has been encroached upon and impaired by the 1895 statute, which grants to any litigant who has the money and the disposition the unqualified right to have his cause submitted to a specially selected jury.

"Nor am I willing to admit that this statute is not obnoxious to section 8 of the bill of rights. This clause does not guarantee to the citizen the right to litigate without expense, but simply protects him from the imposition of such terms as unreasonably and injuriously interfere with the right to a remedy in the law, or impede the due administration of justice. Under the law in question, A, having an action against B, may deem it necessary to have a struck jury, and having the money with which to pay the expense, which may amount to a large sum, can obtain such a jury. But he is compelled to pay for it, in order that there may be a due administration of justice. He thus secures an extraordinary privilege, and is not obliged to rely for justice on a selection of the jury from the regular panel. Now, let us suppose that A is satisfied with the regular panel, but that B deems it necessary to have a struck jury, and is without money with which to meet the expense. Is he not denied that which his wealthy opponent is privileged to purchase? Can he obtain justice freely and without purchase, completely and without delay, when he is deprived of a specially selected and presumably specially qualified jury, which his adversary may deem it necessary to have, and may be able to obtain? Of course, these re-

marks are made with reference to my views as to the conditions existing when our fundamental law was adopted. Although the constitutional provision is as ancient as Magna Charta, its scope and meaning have changed and kept pace with our institutions. The imposition of terms and costs of litigation, which were formerly, and are now, regarded in England as not opposed to this provision, would not be tolerated for a moment under our traditions and customs.

"The enormous amount of business now before the court prevents further elaboration upon this feature of the case, and I drop it here, confident that it is not wholly without merit. I concur in the conclusion reached by Mr. Justice Cauty."

LEGISLATURE—POLICY OF LAW.—Courts have nothing to do with the wisdom, sound policy, or expediency of a law: *Winter v. Jones*, 10 Ga. 190; 54 Am. Dec. 379. Courts cannot declare policy except as it is indicated by legislation or results from the spirit and object of the statutes: *Mahorner v. Hooe*, 9 Smedes & M. 247; 48 Am. Dec. 706.

COWLING v. ZENITH IRON COMPANY.

[65 MINNESOTA, 263.]

CORPORATIONS—"MECHANICAL BUSINESS"—MINING OF IRON ORE—EXEMPTION OF STOCKHOLDERS FROM "DOUBLE LIABILITY."—A "mechanical business," within the meaning of a constitutional provision that "each stockholder in any corporation, excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of his stock," is closely allied with, or incidental to, some kind of manufacturing business. The mining of iron ore is such a "mechanical business," and stockholders of a corporation organized for that purpose are, therefore, exempt from the stockholders' "double liability."

CORPORATIONS — STATUTE — ORGANIZATION—TAKING OF STOCK IN OTHER CORPORATIONS—CONSTITUTIONAL EXEMPTION OF STOCKHOLDERS FROM LIABILITY.—The fact that a corporation has been organized under a statute which allows it to "take, acquire, and hold stock in any other corporation, if a majority in amount of the stockholders shall so elect," does not prevent it from being a corporation whose stockholders are exempt under the constitution, where the corporation has never taken the benefit of such statute, with respect to the taking and holding of such other stock.

Action by Cowling against the Zenith Iron Company and others. The defendant Carpenter appealed from an order overruling his demurrer to the complaint.

Towne & Davis and Billson, Congdon & Dickinson, for the appellant.

Pealer, Titus & Lemmon, for the respondent.

Draper, Davis & Hollister, for Marshall-Wells Hardware Company, intervenor.

268 CANTY, J. This is an action under the General Statutes of 1894, chapter 76, and a defendant stockholder appeals from an order overruling his demurrer to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action. The question involved is the important one of whether the stockholders of a corporation organized to mine iron ore are exempt from the stockholders' "double liability."

In article 10, section 3, of the constitution it is provided: "Each stockholder in any corporation, excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of stock held or owned by him."

The general nature of the business of the defendant corporation, as expressed in its articles of incorporation, is "the mining, smelting, reducing, refining, and working of iron ores and other minerals, and the manufacture of iron, steel, copper, and other metals." The only business actually carried on was that of mining.

We cannot hold that mining is a "manufacturing" business, in any proper sense of the word: See *Byers v. Franklin Coal Co.*, 106 Mass. 131. If this corporation comes within the exception, it must be because the business of mining iron ore is a "mechanical business," within the meaning of the constitution. But, if the stockholders of a mining corporation are exempt, why are not the stockholders of a corporation organized to grade and construct railroads, or a corporation to build houses, or one to grade streets, or one to build sewers or ditches, or one to fence, clear, and break farms? Thus, the list of the corporations carrying on different kinds of business more or less of a mechanical nature could be expanded **269** until the exception contained in the constitution would be the rule, and the rule the exception—until the corporations whose stockholders were exempt would be far more numerous than those whose stockholders were not exempt. Clearly, this was not the intention of the makers of the constitution.

On the other hand, we cannot wipe the word "mechanical" out of the constitution; we must give it some effect. What, then, is the proper interpretation of this constitutional provision?

We must determine that by considering what object the makers of the constitution had in view when this exception was inserted by the amendment of 1872. The exemption provided for by this amendment was intended to foster manufacturing within this state, and, to that end, to promote the establishment of manufacturing corporations. This is a matter of

common knowledge. We are of the opinion that it was the intention of the makers of the constitution to exempt from liability the stockholders of corporations organized to carry on any such kind of mechanical business as is incidental to or closely allied with some kind of manufacturing business. Thus, a concern engaged in the business of manufacturing iron might well, as a mere extension of that business or as incidental to it, mine its own ore, especially so if the manufacturing plant and the mines were in the same locality. In any event, the mining of iron ore and the manufacturing of iron are allied industries; the prosecution of the former tends to promote the latter. It is true that, up to the present time, the iron ore mined in this state has all been carried out of it, to promote manufacturing elsewhere, and the vast development of our iron mines has not appreciably increased the manufacture of iron within this state. But that does not change the principle. And, besides, the conditions may in time change so that a large portion of the iron mined in the state will also be smelted and manufactured here. Then, we are of the opinion that corporations organized to mine iron ore come within the exception in the constitutional provision, and the stockholders of such corporations holding none but fully paid-up stock are exempt from further liability.

Section 2834 of the General Statutes of 1894 (being one of the sections of the act under which the defendant corporation was organized) provides: ²⁷⁰ "Any corporation organized under this act may take, acquire, and hold stock in any other corporation, if a majority in amount of the stockholders shall so elect."

This section seems to authorize the corporation, by such election, and without regard to what its articles of incorporation may provide, to engage in the business of owning and holding the stock of other corporations, of any and all kinds. Respondent contends that, therefore, a corporation organized under this act is not a corporation organized for the purpose of carrying on an exclusively manufacturing or mechanical business, and its stockholders are not exempt. This is certainly a peculiar statutory provision. But as section 2829 (one of the sections of the same act) attempts to exempt from liability the stockholders of all corporations organized under the act, and as this section could not be given effect if it was held that every corporation organized under the act was necessarily "organized" to hold stock in all other kinds of corporations, we must hold that it is not so "organized" until "a majority in amount of the stockholders shall elect" to take and hold such other stock. In other words, we are of the opinion that, under the different provisions of the act,

it is proper to regard the election of such stockholders to take and hold such other stock, under section 2834, as an amendment to the articles of the corporation. It does not appear that the stockholders of the defendant corporation ever made any such election. Therefore it is not organized for any such purpose.

This disposes of the case, and the order appealed from is reversed.

THE CASE of *Anderson v. Anderson Iron Co.*, 65 Minn. 281, was argued with the principal case, and, like that case, was an action under the General Statutes of 1894, chapter 76. But the articles of incorporation in *Anderson v. Anderson Iron Co.*, 65 Minn. 281, were somewhat different, and provided: "The general nature of the business to be carried on shall be mining, smelting, reducing, refining, and working iron, copper, and other minerals, working stone quarries, and marketing the material from all the same; also buying, selling, leasing, and dealing in mineral lands for the above purposes."

In *Anderson v. Anderson Iron Co.*, 65 Minn. 281, the defendant stockholders also demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action as against them, and appealed from an order overruling the demurrer.

"We only need," said the court, in deciding that case, "to consider the effect to be given to the clause 'buying, selling, leasing, and dealing in mineral lands for the above purposes.' Appellants contend that the 'buying, selling, leasing, and dealing' here contemplated is for the purpose of carrying on mining operations on the land by the defendant company, and as incidental to such mining operations. We cannot agree with appellants. We can see how a mining company might, as incidental to the mining business, buy mineral lands for the purpose of operating mines upon them, and sell them after the mines were exhausted. But this is not the meaning of the clause in question, and, though somewhat awkwardly worded, its meaning evidently is that the corporation may buy, sell, lease, and deal in mineral lands, which are so bought, sold, leased, and dealt in for the purpose of having some one mine them. In other words, the corporation may, as a part of its general business, speculate in mineral lands. This being so, the case is quite similar in principle to that of *First Nat. Bank v. Winona Plow Co.*, 53 Minn. 167, and cases cited.

"Then the defendant company is not an exclusively mechanical corporation, such that its stockholders would be exempt under the rule laid down in *Cowling v. Zenith Iron Co.*, 65 Minn. 263, ante, page 471, and the defendant stockholders are subject to the 'double liability.' It is true that the articles of incorporation here in question are no broader than is authorized by the General Statutes of 1894, section 2827, and that section 2829 declares that a corporation so organized 'shall be deemed to exist . . . as a manufacturing and mechanical corporation under the constitution and laws of this state.' But the

very purpose of the constitutional amendment was to prevent the legislature from exempting the stockholders of such corporations as this from liability; and, so far as section 2829 contravenes the constitution, we must hold it void.

"The other questions involved in this case are disposed of in the Cowling case. The order overruling the demurrer is sustained."

CORPORATIONS — "MANUFACTURING OR MECHANICAL BUSINESS."—A corporation organized, not only for the purpose of mining, but also for the business of "buying and selling and dealing in mineral lands," is not organized for "manufacturing or mechanical business" within the meaning of a constitutional provision that "each stockholder in any corporation, excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of his stock": *Holland v. Duluth Iron Min. etc. Co.*, 65 Minn. 324, post, p. 480.

DAVIS v. COUNTY COMMISSIONERS.

[65 MINNESOTA, 310.]

SURVEYS—CONSTITUTIONAL LAW—DUE PROCESS OF LAW.—A statute authorizing a county surveyor to locate section and quarter section corners on the application of resident owners of the section, and assessing the costs of survey on the land, is unconstitutional as depriving landowners of their property without due process of law. It is not an exercise of the power of taxation; and the surveyor is not entitled to pay for his work from the county, although the act provides that he shall be paid by the county, as the work is not done for the county, or pursuant to any contract, express or implied, with it.

O. W. Baldwin, for the appellant.

Phelps, Towne & Harris, for the respondent.

310 **START, C. J.** This is an action by the plaintiff, who is county surveyor of the defendant county, to recover from the defendant the **311** sum of one hundred and eight dollars for establishing the section corners of a certain section of land in the county under the provisions of chapter 249 of the Laws of 1895. The defendant demurred to the complaint, and the plaintiff appeals from an order sustaining the demurrer. The principal question for our decision is the constitutionality of the statute under which the services in question were rendered. The material provisions of the statute are these:

"Section 1. Whenever a majority of the resident landowners, in any government section in this state, wish the corners of the said section permanently marked, and the subdivisional lines definitely located and the notes of the same duly recorded in the record-books of the surveyor's office of the county, they shall, after giving at least ten (10) days' notice to each of the resident

landowners of such intention, notify the county surveyor that they wish to have the section subdivided, the corners permanently marked, and the notes of the same recorded.

"Sec. 2. The surveyor shall, at his earliest convenience, set a time when he will make such survey, and at the appointed time he, or one of his deputies, shall appear and proceed to make such survey, according to the laws now made and provided for the subdivision of sections, provided that all the section corners of said section can be proven."

"Sec. 7. The cost of the survey shall be divided and paid in the following manner: The surveyor shall keep a careful account of the work done on the several parts of the section, and of the help furnished, and at the conclusion of the work apportion the costs in as equitable a manner as possible, for the relocation of a section corner to the four (4) sections adjacent and for the subdivision of the section to each subdivision, according to the costs and the benefits received.

"Sec. 8. The surveyor shall file with the county auditor a certificate of the costs of making such survey and the apportionment to each section and subdivisional parts of the section, who shall assess the same against the property as other taxes, and a bill for the whole amount due the surveyor shall be audited and paid by the commissioners out of the general funds of the county."

It is manifest that the purpose of this statute is to enable a resident of any portion of a section of land to secure the location and marking of the section corners, and to compel all other owners of the four sections adjacent to contribute equitably to the expenses thereof, by apportioning the amount of them to, and assessing it upon the land of, each. This is the single purpose of the act, and if its provisions to secure such result are unconstitutional the whole statute fails; for, clearly, the legislature would not have provided for the ³¹² advancement of such expenses from the county treasury if it had understood that the provisions for the apportionment of the expenses to the land benefited, and for indemnity to the county for such advancement, were void: *O'Brien v. Krenz*, 36 Minn. 136; *Meyer v. Berlandi*, 39 Minn. 438; 12 Am. St. Rep. 663.

1. It is claimed by the plaintiff that the validity of the statute may be sustained on the ground that it is an exercise of the power of taxation. Clearly, the claim is untenable. The exhaustive brief of counsel for the plaintiff in support of his proposition seems to be based upon a misconception of the provisions of the statute.

The purpose of the statute is, as we have suggested, private; that is, to provide the legal machinery whereby the majority of the owners of a section of land may compel, at their pleasure, other owners in the same and adjacent sections to contribute to the expenses of locating the section corners. This is a purpose for which taxes cannot be levied. The act does not, as claimed by plaintiff, provide for taxing districts, and for a uniform tax based on a cash valuation of the land in each section. The expense of locating the corners is to be apportioned to the adjacent sections, not on the basis of their value, but on the basis of benefits received. This, if anything, is an attempted local assessment for a local improvement. That this is so, in its last analysis, no matter on what basis the county auditor divides and assigns the total burden resting on a section to the several subdivisions thereof, becomes apparent in cases where one man owns the whole of one of the adjacent sections which is assessed as one parcel. This statute does not provide for a local assessment. Only municipal corporations can be authorized to levy assessments for local improvements: Const., art. 9, sec. 1; *State v. District Court*, 33 Minn. 235. But, as was incisively said by the learned trial judges: "In the act in question, the power to levy the tax or assessment is not delegated to any municipal corporation. Neither county, city, nor town has any duty or power in determining the necessity of the tax, or that it is for a public purpose. The legislature does not determine that a public purpose or necessity demands such tax. . . . The power to tax a man's land rests upon the mere wish of two or more resident landowners, who need not even be citizens of the state. No necessity need exist for the action. None need be pretended."

318 2. The main reliance of the plaintiff in support of his claim that this act is constitutional is, that it is within the police power of the state, and a proper exercise thereof by the legislature. We are of the opinion that laws regulating the locating of the boundaries, and fixing permanent monuments to mark them, between landowners, and providing for some public officer or special tribunal to ascertain the cost of the work, and apportion the amount thereof to the respective owners benefited thereby, and for collecting the same, are in the nature of police regulations. And if the procedure provided for determining the liability of such landowners, and enforcing the same, constitutes due process of law, such laws are unquestionably a valid exercise of legislative power: *Coster v. Tide Water Co.*, 18 N. J. Eq. 54. Such laws, in principle, are similar to laws regulating partition

fences, the constitutionality of which cannot be questioned, where provision is made for notice to the landowners, and opportunity to be heard. Such notice is essential to the validity of the proceedings: *McClay v. Clark*, 42 Minn. 363; *Myers v. Dodd*, 9 Ind. 290; 68 Am. Dec. 624, note 626-633; 7 Am. & Eng. Ency. of Law, 896. But the vice in the statute in question is, that the procedure for locating the boundary lines, marking them by monuments, apportioning the cost to the property benefited, and enforcing payment thereof, is not "due process of law."

The proceedings authorized by the statute are not simply administrative, like tax proceedings to secure a proper revenue for the support of the government, but they are judicial in their nature; hence decisions of this and other courts as to what constitutes "due process of law" in tax proceedings are not in point. It is not practicable to define the term "due process of law." The general principles for determining in particular cases whether the procedure provided by the statute is or is not due process of law are stated in the case of *Bardwell v. Collins*, 44 Minn. 97; 20 Am. St. Rep. 547, 554, notes. It is only necessary here to repeat that in proceedings of a judicial nature affecting the property rights of the citizen, due process of law requires notice to him and an opportunity to be heard; and a statute affecting such rights, which is not enforceable in the usual modes established with respect to kindred matters according to the course of the common law, is open to the charge of depriving a party of his property without due process of law.

314 The statute in question does not provide for notice, actual or constructive, to any of the landowners, of the time when the work is to be done, and the cost apportioned to the several parcels of land benefited. It does provide that the parties shall, after giving at least ten days' notice to resident landowners of an intention to have the section corners located and marked, notify the county surveyor of their wish in the premises, who thereafter sets a time for the making of the survey. Notice of this time is not required to be given to anyone. So far as nonresident landowners are concerned, there is no provision for notice to them of any kind. Again, the mode of enforcing the obligation of a landowner to contribute his share of the cost of the work is not the usual one established with respect to kindred matters according to the course of the common law. Under the provisions of this statute, the obligation of the landowner, whether a resident or nonresident, to contribute to the expense of the work, may be established, apportioned, and enforced by an arbitrary sale of his land without any notice or hearing whatever.

As already suggested, the statute is not the exercise of the taxing power of the state, and the usual methods of enforcing taxes are not the established modes of enforcing the obligation of the several landowners to contribute to the cost of the work in proportion to benefits received, according to the course of the common law. The statute undertakes to relieve private parties from the burden of enforcing the obligations by ordinary judicial procedure, by requiring the auditor to enforce it by the legal machinery for the collection of taxes, and the county commissioners to anticipate the collection by advancing the cost of the work out of the general funds of the county.

A comparison of the provisions of this statute with those of the kindred statute relating to line fences will set the arbitrary provisions of the former in a clearer light. In the case of partition fences, one party cannot arbitrarily determine for himself the necessity of repairing or rebuilding the fence, but, after notice to each party, the supervisors determine the question, and, if they direct it to be done, they fix the time for performance, and, if the party neglects to build or repair his part of the fence within the time limited, the opposite party may do so. The supervisors then judge as to its sufficiency, ascertain the value thereof, and give a certificate therefor, including their fees. Provision is made for enforcing payment of double the ³¹⁵ amount of the certificate by civil actions: Gen. Stats. 1894, secs. 2057, 2058. If we eliminate from this partition fence statute all provisions for notice to the parties, and for hearing and deciding the question of the necessity for the work by a disinterested tribunal, and add to it a provision that the party building the fence may present his certificate to the county auditor, who must assess the amount thereof as a tax on the land of the opposite party, and that the county commissioners must pay the amount of the certificate to the holder thereof, we should have substantially the arbitrary provisions of the statute in question.

We hold the statute to be unconstitutional, for the reason that it deprives the landowners of their property without due process of law.

3. The plaintiff further claims that he is entitled to his pay for his work from the county, even if the statute is void. Our opinion is otherwise. The work was not done for the county, or pursuant to any contract, express or implied, with it. The case of Raymond v. County Commrs., 18 Minn. 40 (60), relied on by the plaintiff, is not in point; for in that case the legislature, by a valid statute, authorized and directed the plaintiff to locate

and survey a state road through the county at the expense of the county. There is no element of estoppel in the case at bar, as against the county.

Order sustaining demurrer affirmed.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—TAXES.—

A law for a private purpose is unconstitutional. It is not due process of law: Attorney General v. Jochim, 99 Mich. 358; 41 Am. St. Rep. 606; Braceville Coal Co. v. People, 147 Ill. 66; 37 Am. St. Rep. 206. Taxes for private purposes are not allowed: See monographic note to Zigler v. Menges, 16 Am. St. Rep. 366, 370, on what purposes justify the imposition of taxes or assessments.

HOLLAND v. DULUTH IRON MINING AND DEVELOPMENT COMPANY.

[65 MINNESOTA, 324.]

CORPORATIONS—CONCLUSIVENESS OF JUDGMENT AS AGAINST STOCKHOLDERS.—A judgment against a corporation is conclusive against the stockholders in any action or proceeding to enforce their individual liability and there is no legitimate distinction between cases in which actions are brought against stockholders on account of unpaid subscriptions and those wherein the object is to enforce the statutory or constitutional liability.

CORPORATIONS—CONCLUSIVENESS OF JUDGMENT AS AGAINST STOCKHOLDERS—CORPORATE INDEBTEDNESS.—A judgment, in an action by a judgment creditor of a corporation to enforce the constitutional or statutory liability of its stockholders, is conclusive against them on the question of corporate indebtedness and liability, although such judgment was taken by default.

CORPORATIONS—EVIDENCE AS TO OWNERSHIP OF STOCK.—If the name of a person appears on the stock-book of a corporation as a stockholder, this is prima facie evidence that he is the owner of stock.

CORPORATIONS—EVIDENCE—ADMISSIBILITY OF ENTRIES IN STOCK-BOOK.—To make entries in the stock-book of a corporation admissible in evidence for the purpose of showing who are stockholders it is not necessary that the stock-book should have been kept in any particular manner or that it contain the entries prescribed by statute. It is enough that it is the stock-book of the corporation.

CORPORATIONS—EVIDENCE THAT ONE IS A STOCKHOLDER.—The entry of a person's name in the stock-book of a corporation, as a stockholder, supplemented by identifying testimony, will, in the absence of rebutting testimony, support a finding that he is a stockholder.

CORPORATIONS — STOCKHOLDERS — NECESSITY OF CERTIFICATE.—In order to constitute one a stockholder in a corporation, it is not necessary that a certificate of stock be issued. The certificate is merely evidence of his title to shares of stock.

CORPORATIONS — WHEN PERSONS BECOME STOCKHOLDERS.—If persons buy and pay for stock in a corporation, but the certificates are not issued or delivered for reasons personal to

themselves, they are, nevertheless, stockholders, even when no formal action has been taken whereby they become stockholders.

CORPORATIONS — ORGANIZATION — “MANUFACTURING OR MECHANICAL BUSINESS.”—A corporation organized, not only for the purposes of mining, but also for the business of “buying and selling and dealing in mineral lands,” is not within the terms of a constitutional provision respecting corporations organized for “manufacturing or mechanical business.”

MAXIMS.—A party cannot take advantage of his own wrong.

MAXIMS.—IN EQUITY that will be considered done which ought to be done.

Action by a judgment creditor of a corporation to enforce the liability of its stockholders. The plaintiff's judgment had been entered against the corporation by default. There was a judgment in favor of the plaintiff against the stockholders. The defendants Wilson, Chapman, Sheridan, and other stockholders appealed from an order denying a motion for a new trial.

Handlan & McGregor, for the appellant, Wilson.

C. d'Antremont, Jr., and Cash, Williams & Chester, for the appellant, Sheridan.

Mann & Corcoran, for the appellant, Chapman.

Jaques & Hudson, for the appellant, Brown.

Billson, Congdon & Dickinson, for the respondent.

329 COLLINS, J. This was an action brought by a judgment creditor of a corporation to enforce against the stockholders individually their double liability for the corporate debts.

At the trial, the court held that the judgment previously obtained against the corporation was conclusive evidence of its indebtedness and liability, and would not permit the stockholders to litigate the merits of the claim upon which it was based. The correctness of this position is directly attacked upon an appeal from an order denying defendant stockholders' motion for a new trial.

The practical effect of the decision in *Dodge v. Minnesota etc. Roofing Co.*, 16 Minn. 327 (368), was to hold that a judgment against a corporation was conclusive against the stockholders in any action or proceeding to enforce their individual liability, although the exact question was not before the court. And in the case of *Frost v. St. Paul etc. Co.*, 57 Minn. 325, which was an action upon judgments against a corporation for the recovery of money to enforce the liability of stockholders for unpaid subscriptions, and their statutory liability, it was held that the judgments were evidence of the indebtedness of the corporation; the court saying that a judgment for the recovery of money is, as

against everybody, evidence of a debt from and after its rendition, as fully as could be any other transaction between the parties.

The force of these decisions seems to be admitted by counsel for the defendants here, but they insist that there is a distinction in principle, as to the effect or conclusiveness of judgments against corporations, between the cases in which actions are brought against stockholders on account of unpaid subscriptions and those wherein the object is to enforce the statutory or constitutional liability, the ground for distinguishing being that anything due for unpaid subscriptions ³³⁰ is an indebtedness to and an asset of the corporation, while the statutory or constitutional liability is not. Because this liability is to the creditors only, and is not a corporative asset, nor can the corporation enforce it, counsel urge that when the action is based upon it there is no privity of interest between the corporation and its stockholders by reason of which the latter are concluded by a judgment against the former, or which can even make the judgment *prima facie* evidence of a corporate indebtedness. It seems to be conceded by counsel that, to the full extent of the corporate property, and whenever its assets are to be reached, there is this privity of interest, and the stockholders are bound by the judgment. Reduced to a simple proposition, the position of counsel is, that when the purpose of the action is to enforce a direct liability to the corporation, the stockholders cannot question the judgment, but, if the liability is indirect, arises only when the corporation assets are insufficient to satisfy the debts, and can only be enforced by the creditors, the judgment is ineffectual for any purpose.

When we consider the character of stock corporations, and the powers and duties of the officers selected and authorized to manage them, it is not an easy task to demonstrate upon principle why a judgment against the body corporate should sometimes and under some circumstances bind the stockholders, and not at all times and under all circumstances; or why stockholders are privies in interest, and therefore concluded by the judgment, when their liability to respond to the full extent of amounts due on unpaid subscriptions is involved and not privies in interest, and not bound by the judgment, when the same creditor undertakes to compel response to statutory or constitutional liability to pay the same judgment. Both liabilities are incurred at the same time, and by the same act, namely, by the act of subscribing for stock. The subscriber then becomes obligated to pay for his shares, and also to pay an amount equal to their face value, if

necessary, and his liability is as definitely fixed in the one case as in the other. The difficulty we have referred to is apparent from an examination of the cases cited by counsel in their briefs, in which the courts have attempted to give reasons for restricting the effect of judgments against corporations, and limiting their binding force to cases in which corporate assets only were involved; and of those cited by counsel, *Miller v. White*, 50 N. Y. 137, and *Stephens* ³³¹ *v. Fox*, 83 N. Y. 313, lead. But there is great uncertainty as to the exact position of the courts of New York on this question, as has been well shown by Mr. J. C. Harper in his note to *Bissit v. Kentucky River Nav. Co.*, 15 Fed. Rep. 353. To the cases commented upon by him as tending to the existing confusion in that state we will add *Allen v. Clark*, 108 N. Y. 269, in which *Miller v. White*, 50 N. Y. 137, is alluded to.

Certainly, the rule in New York is not settled, and, in our judgment, the logic of the reasoning adopted in some of their cases, in support of a conclusion that to the extent of the corporate property or assets the shareholders are bound by the judgment, tends thoroughly to establish the doctrine which seems to prevail in this country, that as the statutory or constitutional liability is an obligation voluntarily assumed by the stockholder when he subscribes for his shares, the officers of the corporation represent him as to that liability to the same extent as they do when his ordinary liability assumed by the same act of subscription is involved. The officers of the corporation, in the absence of fraud and collusion, can bind the stockholders, and fasten upon them obligations which cannot be questioned by the latter. The officers can not only make the corporation liable to the full extent of the corporate assets, but they can also fasten the statutory or constitutional liability upon the stockholders. This liability is incident to taking stock, and is incurred by the subscriber. When subscribing for his shares and entering into the organization, he undertakes the responsibility for the result of litigation in which the corporation becomes involved, to which he is not a party, and has not been given an opportunity to defend personally. He is then represented by officers who are not only authorized to take charge of all litigation, but whose duty it is so to do; and why should not those whom the officers represent be held privies in interest, and concluded by the result, in the absence of fraud and collusion? There would seem to be no middle ground on which to place a judgment against a corporation, and, if the stockholders are bound under any circumstances, they must be under all. This is the common conclusion of

nearly all of the courts, although their reasons are not always the same. See cases cited in the following text-books: 3 Thompson on Corporations, sec. 3392; 2 Black on Judgments, sec. 583; 2 Morawetz on Corporations, sec. 619; ³³² also 12 Am. & Eng. Ency. of Law, 97, note 1; also Oswald v. Minneapolis Times Co., 65 Minn. 249.

At the trial, an objection was made by defendants' counsel to the introduction in evidence of the judgment-roll, upon the ground that the complaint on which the judgment was rendered failed to state a cause of action against the corporation. What has been said hereinbefore covers the claim that the objection should have been sustained: See, also, Lane v. Innes, 43 Minn. 137, and cases cited.

Taken as a whole, the evidence was sufficient to support the finding that defendant Wilson was a stockholder. The rule is, that where the name of an individual appears on the stock-books of a corporation as a stockholder, the prima facie presumption is that he is the owner of the stock; and in an action against him as a stockholder the burden of proving that he is not a stockholder, or of rebutting the presumption, is cast upon the defendant: 1 Cook on Stocks and Stockholders, sec. 55, and cases cited in notes. From some of these cases it will be seen that the rule has been laid down much more broadly than here stated. The reasons why, in opposition to the general rule, entries in the books of a corporation are admissible for the purpose of showing who are stockholders, are well stated in Glenn v. Orr, 96 N. C. 413, and Liggett v. Glenn, 2 Co. Ct. App. 286; 51 Fed. Rep. 381. The entries introduced here were found in a stock or share book kept by the corporation. It may not have been the book required by statute, for, although otherwise complete, it failed to show what amount of money had been paid on the shares issued to Wilson. But the rule above stated does not require that the entries introduced in evidence shall be found in a book kept in any particular manner, or that it contain the entries prescribed by statute. It is enough if it be the stock-book of the corporation. The book, which showed that a certificate for five hundred shares of stock had been issued to H. S. Wilson, supplemented by the identifying testimony of the witnesses Greenwood and James, taken in connection with the fact that defendant Henry S. Wilson offered no testimony tending to deny his membership in the corporation, but seems to have rested upon a belief that plaintiff would fail to connect him with it, made a case for the finding in question.

The claim is made in behalf of the defendants Chapman and

Sheridan that there was no sufficient evidence to warrant a finding that ³³³ they, or either one, were stockholders in the corporation. The entire stock consisted of one hundred thousand shares, of which not to exceed one-fourth was set aside as treasury stock, to be sold for cash, the money to be used in developing the property. The balance of the shares was to be divided equally between the four original incorporators, defendants above named and defendants James and Greenwood, in payment or in consideration of four mining leases which they had obtained for the corporation, and also in consideration of services rendered and moneys advanced. This statement of the facts is borne out by the evidence, although there was some dispute over it. These four gentlemen organized the corporation, and were its officers and directors for two years—so long as it seems to have been alive. They took part in stockholders' meetings, and also had numerous meetings as directors. They secured mining leases, supposed to be of value, and turned them over to the corporation with the understanding that, in consideration therefor, and as compensation for their personal services, they should have an equal division of all the shares, less about one-fourth, set apart as treasury stock, to be placed on the market. It was not shown that formal action as to the division of the stock was ever taken, and no certificates were formally issued to these gentlemen, the reason really being that it was generally understood what shares each was to have, and because they did not want shares held by either of their associates to be placed on the market, there to compete with the treasury stock; and depreciate its market price. It is also quite evident from the testimony that these gentlemen were disinclined unequivocally to place themselves in position as stockholders to whom shares had been actually issued, until the success of the corporation was assured, and the danger of incurring individual liability reasonably remote. In order to constitute one a stockholder in a corporation, it is not necessary that the certificate to which he is entitled be issued, for it is merely evidence of his title to the stock shares: 1 Cook on Stocks and Stockholders, sec. 192. See, also, Marson v. Deither, 49 Minn. 423, and cases.

It was established by the evidence here that these four original incorporators became stockholders in the corporation, unless it was absolutely necessary to show that formal action was taken by the corporation on their proposition. It had been carried out and executed. In consideration and as payment for the mining leases and for moneys ³³⁴ advanced and services rendered, these men had agreed to take all the shares, less those reserved. The

leases had been transferred, the moneys advanced, and the services rendered. No stock certificates had been issued for the reasons given, but this was not the test. We do not think that it was absolutely necessary to show that formal action had been taken at a stockholders' or a directors' meeting, whereby these men became stockholders. The testimony presents a case of a fully and mutually executed agreement for the sale of stock to the promoters and incorporators of the corporation, the same having been paid for by the leases, the moneys advanced, and the services rendered. The corporation had been paid for the stock, but the certificates had not been issued or delivered, for reasons personal to those to whom they of right belonged. In the absence of the books and records, all of which, except the stock-book before mentioned, had been destroyed by fire prior to the commencement of this action, it may well be inferred from the facts and circumstances that action sufficiently formal had been taken at some of these meetings to constitute these incorporators shareholders in the truest sense: *Moss v. Averell*, 10 N. Y. 449; *Bank of United States v. Dandridge*, 12 Wheat 70. Again, it is obvious that these men assumed to be shareholders, and acted as such, because they had really bought and paid for their stock. It is a case for the application of the principles that a party cannot take advantage of his own wrong, and that in equity that will be considered done which ought to be done: See *Basting v. Northern Trust Co.*, 61 Minn. 307.

The corporation was organized, not only for the purposes of mining, but also for the business of "buying and selling and dealing in mineral lands." It is not within the terms of the constitutional provision respecting corporations organized for manufacturing or mechanical business: *St. Paul Barrel Co. v. Minneapolis Distilling Co.*, 62 Minn. 448, and cases cited; *Anderson v. Anderson Iron Co.*, 65 Minn. 281.

Order affirmed.

CORPORATIONS -- JUDGMENTS AGAINST -- CONCLUSIVE-NESS AS TO STOCKHOLDERS.—A judgment establishing the liability of a corporation is conclusive, not only in an action against stockholders for unpaid subscriptions to the capital stock, but also in actions to enforce the statutory liability of stockholders: *Nichols v. Stevens*, 123 Mo. 96; 45 Am. St. Rep. 514; monographic note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 806, 858, on the liability of stockholders to creditors of corporations for corporate debts.

CORPORATIONS — STOCK AND STOCKHOLDERS — EVIDENCE.—The stock-books of a corporation are prima facie evidence of the ownership of stock in those whose names appear thereon as stockholders: Note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 832, 859, 866; but it is not necessary to the validity of a subscription for stock that it should be made in a book for that purpose: See

monographic note to *Parker v. Thomas*, 81 Am. Dec. 395, on subscriptions to corporate stock. A subscriber for shares is answerable as a stockholder, although no certificate has been issued to him. Note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 859, 860. Such a certificate is mere evidence of the ownership of shares: *Cartwright v. Dickinson*, 88 Tenn. 476; 17 Am. St. Rep. 910. One who has subscribed to the constitution and by-laws of a corporation, and thereby subjected himself to all the rights and penalties thereof, is a stockholder in such corporation: Note to *In re Argus Printing Co.*, 26 Am. St. Rep. 658. When the name of a party appears on the books of a corporation as a stockholder, the presumption is, that he is the owner of stock; and, in a suit against him as such stockholder, the burden of proof is on him to rebut the presumption, and to show that his name was placed there without his authority, express or implied, and that he had no notice that his name thus appeared: *Semple v. Glenn*, 91 Ala. 245; 24 Am. St. Rep. 894. It is competent evidence to show defendant to be a stockholder that he had subscribed for some shares; that his name was entered upon the records of the corporation; that he had stated that he had taken such shares; and that the corporation treasurer had offered him his certificate therefor: *New Hampshire Cent. R. R. v. Johnson*, 30 N. H. 390; 64 Am. Dec. 300.

CORPORATIONS—EXEMPTION OF STOCKHOLDERS FROM DOUBLE LIABILITY.—As to when a corporation is not prevented from becoming one exempt, under the constitution, from the stockholders' "double liability," see *Cowling v. Zenith Iron Co.*, ante, p. 471.

MAXIMS.—**EQUITY** considers that done which ought to have been done: *Beck v. Uhrich*, 13 Pa. St. 636; 53 Am. Dec. 507.

KIEWERT v. ANDERSON.

[65 MINNESOTA, 491.]

HOMESTEAD—EXTENSION OF CITY LIMITS.—A homestead, once acquired, is a valuable right, and an act of the legislature extending the limits of a city so as to include the homestead, while it retains all its characteristics as such, does not operate to reduce or diminish the right of the owner of the homestead, unless it becomes, in fact, urban property.

HOMESTEAD—LANDS, URBAN, RURAL, AND PLATTED. The fact that a homestead, situated within an incorporated city and used for agricultural purposes, is wholly or partly surrounded by laid-out and platted lands rural in character does not affect its homestead character so long as the homestead land itself is not laid out and platted, and is not urban, in its character.

HOMESTEAD INTERESTS ARE FAVORED by the constitution and statute, and the law applicable thereto should receive a liberal construction.

Appeal by the plaintiff, Kiewert, from an order denying a motion for a new trial.

William G. White, for the appellant.

John B. & E. P. Sanborn, for the respondents.

491 **BUCK, J.** This is an action in ejectment to recover possession of lots 6 and 11, and a portion of lot 5, of Smith's outlots

to West St. Paul. The plaintiff claims under an execution sale of these premises, from which no redemption was made. The judgment was recovered on February 16, 1894. and docketed on the same day; and the land was sold after due and proper notice, on April 16, 1894. No attack is made upon the regularity of the sale. The defendants, in their answer, claim that all the lots in question are their homestead, and, by reason of this fact, that they were exempt from sale under plaintiff's judgment and execution. The court so found, and ordered judgment for the defendants, and the only question presented here on this appeal is, whether the conclusions of law follow from the facts found.

⁴⁹² The further material facts are as follows: On June 26, 1874, Robert A. Smith was the owner of eighty acres of land in Dakota county, and he then caused the same to be laid out and platted into certain lots, known as "Smith's Outlots," and this plat was duly recorded July 24, 1874, in the office of the register of deeds of Dakota county. On November 21, 1876, Smith and wife conveyed to the defendant Peter Anderson lots 5, 6, 11, and 12 of these outlets, of which lots 5 and 6 contained about three and forty hundredths acres each, and lots 11 and 12 each contained a little over four acres each. On April 4, 1883, upon petition of Smith, proprietor of the plat, and Anderson, owner of said lots, said plat was, by a decree of the district court, vacated as to these four lots, and as to that portion of Mina street which is bounded on the north by said lots 5 and 6, and on the south by lots 11 and 12; but no evidence of said decree of vacation was ever recorded in the office of the register of deeds of Dakota county, and no evidence offered on the trial tending to show that plaintiff had any actual knowledge or notice thereof. When Anderson bought these lots, in 1876, of Smith and wife, he entered into possession of the same, including that portion of Mina street which was vacated, and in the year 1877 built a house, barn, and other buildings upon lot 5, near the southeast corner thereof, and built a fence around the whole four lots, including said street, inclosing the same in one inclosure; and he grubbed and broke all the land, and has ever since resided upon the same with his wife and children, and cultivated the same, and raised vegetables thereon for the St. Paul markets, each year since the year 1877, and has always maintained and kept up the fence inclosing this land. The defendants do not now own, and never have since 1876 owned, any other land except the tract above described, and have never had any other homestead. Said land so owned, inclosed, and occupied by the defendants comprises about fifteen acres in one body. That portion of said land

known as lots numbered 6 and 11 is situated in the township of Mendota. Prior to 1887 that part of this land which was known as lots 5 and 12 was situated in the township of West St. Paul, but in 1887, by an act of the legislature, the same was included in the corporate limits of the city of South St. Paul, and in 1889 the same was included in the corporate limits of the city of West St. Paul by an act of the legislature. Prior to 1887 no part of said land was within any incorporated town, city, or village. In 1887, ⁴⁹³ 1888, and 1889, the population of South St. Paul did not exceed two thousand. The population of the city of West St. Paul never at any time exceeded seventeen hundred. The dwelling-house and buildings so constructed as aforesaid by the defendants, and occupied by them as their residence, were so occupied by them on February 24, 1894, and are located upon that portion of what was known as lot 5, which the sheriff certified in his return upon the execution and in his certificate of sale that he sold to the plaintiff for five hundred dollars. The sheriff never demanded of the defendants, or made any request of them, that they select or designate the portion of these lands which they regarded as their homestead; and he never surveyed or set apart any portion of the same as the homestead of the defendants. The defendants have ever since they acquired title to the said lands, in 1876, used the same solely for agricultural purposes. On the north of the property herein described as being owned by the defendants, and north of Annapolis street, substantially all of the property between that point and the Mississippi river has for many years been laid out and platted into city lots, and since 1876 has been a portion of the city of St. Paul. All of the property herein referred to as having been laid out into city lots, and which is described as being on the north and on the east and on the south and on the west of defendants' lands, has for at least eight years been bought, sold, and used as city lots, and the size of said lots is the usual size in such cases, namely forty feet in width, and about one hundred and twenty feet in length.

The court found, as a conclusion of law, that the defendants were the owners of the land in controversy, and entitled to the possession of the same.

It is quite evident that these lots, containing between three and four acres each, were not laid out into "city lots," as the term is ordinarily used and properly understood, but for agricultural purposes, for which purpose they have always been used by the defendants, and neither said lots nor the land surrounding them are urban in their character. Some eleven years be-

fore the plaintiff obtained his judgment, the plat was duly vacated as to these lots, by decree and judgment of the district court; and the same became a matter of public record in the office of the clerk of the said court. It is true that section 2317 of the General Statutes of 1894 provides that the court may order that its proceedings to vacate a plat be recorded in the office of the register ⁴⁰⁴ of deeds, as well as in the office of the clerk of the court; but we think, when they are duly filed in the office of the clerk of the district court, and judgment entered thereon, it is a valid judgment, although the proceedings are not recorded in the office of the register of deeds, and that such judgment cannot be attacked collaterally. The defendants being in the actual possession of the premises, having them fenced, and using them continuously for agricultural purposes, constituted full notice to third persons of their rights in the premises. After the vacation, the land became an entire tract, and at that time it was not situated in any incorporated city, town, or village, nor was it so situated until the year 1887. When the plat was vacated as to these lots, the premises were in precisely the same condition as if the plat had never been made; hence the defendants' right to the premises as a homestead vested in them by virtue of their residence upon the same, and their use thereof for agricultural purposes. This right became fixed in the defendants many years before the plaintiff recovered his judgment.

The homestead, once acquired, is a valuable right, and an act of the legislature extending the limits of a city so as to include the homestead, while it retains all its characteristics as such, will not operate to reduce or diminish the right of the owner of the homestead unless it becomes in fact urban property: *Heidel v. Benedict*, 61 Minn. 170; 52 Am. St. Rep. 592.

Because the premises are wholly or partly surrounded by laid-out and platted lands does not affect its homestead character, so long as the land itself is not laid out and platted, and is not urban in its character: See, also, *In re Smith's Estate*, 51 Minn. 316.

The premises are not urban in the purpose for which they are used, nor in size, compared with other city lots laid out or platted in the city where these premises are situate. Homestead interests are favored by the constitution and statute, and the law applicable thereto should receive a liberal construction. In our opinion, the whole tract claimed by defendants is exempt as a homestead, and the plaintiff acquired no title by the sale of any part thereof under his execution.

Order affirmed.

HOMESTEADS—RURAL AND URBAN—EXTENSION OF TOWN LIMITS—CONSTRUCTION OF LAWS.—The character of a rural homestead is not changed by extending the limits of a town over it without some act on the part of the corporation; but where a rural homestead does become urban by being divided into lots, lots retained for purposes of sale and speculation form no part of the homestead: See monographic note to Pryor v. Stone, 70 Am. Dec. 353. As to what area of urban property in undivided blocks may be held as a homestead, see Heidel v. Benedict, 61 Minn. 170; 52 Am. St. Rep. 592. Homestead laws are liberally construed: Riggs v. Sterling, 60 Mich. 643; 1 Am. St. Rep. 554.

SWAN v. MUNCH.

[65 MINNESOTA, 500.]

ADVERSE POSSESSION—TITLE BY PRESCRIPTION.—A wrongful entry upon land, with continued possession, without any pretense of paper title, but under a claim of right inconsistent with the title of the true owner, and the exercise of acts of possession hostile to his rights in the land, may ripen into title by prescription, and this doctrine applies to an easement in real property.

EASEMENTS—WHAT CONTINUOUS USE BECOMES ADVERSE.—If the claimant of an easement in real property needs its use from time to time, and so uses it, there is a sufficiently continuous use to be adverse, although it is not constant.

EASEMENTS — PRESCRIPTION — FLOWING LAND — FLOATING LOGS.—If a person, for the purpose of sluicing logs, builds a dam across a river, whereby the water is obstructed and overflows another's land during the months of April, May, and June of each year, the continued adverse use of the dam during those months of each year for a period of fifteen years, is sufficient to create an easement by prescription in the landowner's premises during said three months of each year.

Five separate actions for damages were brought by different plaintiffs, viz., John A. Swan, John R. Johnson, John Hotin, Charles T. Carlson, and August C. Carlson, all against the same defendant, Munch. They were, by stipulation, tried together, and a separate verdict was rendered in each case in favor of the plaintiff. The defendant appealed from an order in each case denying a motion for a new trial.

Robertson Howard and S. G. L. Roberts, for the appellant.

L. H. McKusick and J. C. Nethaway, for the respondents.

501 BUCK, J. Five separate actions were brought by different plaintiffs, all against the same defendant, Munch, to recover damages caused by the overflowing of a portion of the lands owned by each of the respective plaintiffs by the operation of the Chengwatona sluicing dam on Snake river, which was originally built in 1849.

The material allegations in each complaint are as follows:

"That on or about the month of September, A. D. 1876, the defendant erected a dam to a great height across the Snake river, at the town of Chengwatona, in said county and state, and below the plaintiff's land above described, and ever since has kept the same up, and has thereby obstructed and stopped during all that time the natural flow of the water of said river, and raised it up in the bed of said river, and backed it up upon said land during the months of April, May, and June in each year, and at other times, injuring, destroying, and rendering said land unsuitable for agricultural purposes, for which said lands are chiefly adapted."

By reason of the facts alleged, each plaintiff claimed damages for the years 1891, 1892, 1893, 1894, and 1895. Defendant, in her answer, put in a general denial, and then alleged as follows: "That the dam mentioned in the complaint was erected in the year 1849, and has ever since been maintained and operated; that said dam, for more than twenty years prior to 1890, and up to the present time, has been owned by her, and has been so maintained and operated by her; that during all of said time the waters of said Snake river have been raised by said dam and set back so as to cause that portion of the land described in the complaint which it is alleged therein has been injured by the operation of said dam to be continuously, uninterruptedly, adversely to the owners thereof, and under claim of right on part of defendant so to do, submerged and overflowed."

By stipulation the five cases were tried together, and a separate verdict was rendered in each case in favor of the plaintiff.

In the months of October and November, 1877, the dam had become rotten and was rebuilt, and substantial repairs were made upon it in 1887, considerable improvements made upon it in 1889, and the north wing rebuilt about the winter of 1894. More or less repairs were made upon the dam annually. The testimony on the part of the defendant showed quite conclusively that she or her predecessors have been in the open, visible, hostile, notorious, and continuous possession of the dam for more than fifteen years prior to the commencement of this action, and that this condition applied to the ⁵⁰² portion of the premises of the different plaintiffs in controversy during the months of April, May, and June of each year during that period of time by reason of the natural flow of water in Snake river having been obstructed and stopped by the dam, which caused the water to overflow the natural channel of the river, and flow back upon the plaintiffs' lands, destroying the grass thereon growing, and rendering the land unfit for raising crops.

In the case of *Dean v. Goddard*, 55 Minn. 290, 291, this court held: "The intent to claim by adverse possession may be inferred from the nature of the occupancy, and the possessory acts necessary to constitute adverse possession depend upon the character of the property, its location, and the purposes for which it is ordinarily fit or adapted. Actual residence upon the premises is not necessary, nor is it incumbent upon the adverse possessor to make oral declarations of his adverse claim. The mere fact that time may intervene between successive acts of occupancy while the party is temporarily absent engaged in business—as in cutting logs to be sawed into lumber to be piled and stored on the premises by such party—will not destroy his continuity of possession."

A wrongful entry upon land, with continued possession, without any pretense of paper title, but under a claim of right inconsistent with the title of the true owner, and the exercise of acts of possession hostile to his rights in the land, may ripen into title by prescription: *Glencoe v. Wadsworth*, 48 Minn. 402. Such use or adverse possession must be enjoyed by actual entry, and under such circumstances as will indicate that it is claimed as a matter of right. The true owner's rights must be invaded by such hostile acts as would constitute grounds for action against the adverse claimant or intruder, and under such circumstances as to make the possession appear to be for the benefit of the claimant. Is this doctrine applicable to an easement in real property, where the essential elements necessary to constitute adverse possession exist only three months in the year, and where during the other nine months of the year the premises are in the actual use and possession of the owner in fee? We answer this question in the affirmative.

During the months of April, May, and June in each recurring season there has been a continuous use of the premises by the defendant or her predecessors by overflowing them with water for the purpose ⁵⁰³ of floating logs down the Snake river to the sawmills and to the markets of the country. Where the claimant needs the use of the easement from time to time, and so uses it, there is a sufficiently continuous use to be adverse, although it is not constant: *Cornwell Mfg. Co. v. Swift*, 89 Mich. 503; *Hesperia etc. Co. v. Rogers*, 83 Cal. 10; 17 Am. St. Rep. 209. It is evident that the building of this dam in 1849, and its use since then for raising water three months in each year for sluicing logs, indicates that such purpose was intended not to be temporary, but permanent, and is greatly for the benefit of the public in assisting it thus to have their logs conveyed from the great pine regions of the state to the mills and markets of

the country. Its use for such purpose probably would not be either practicable or profitable more than the three months named, with each recurring year. It is a matter of public notoriety, as well as a matter of evidence in this case, that these great log drives are moved during the months named in each year, and to keep up this flow of water during this entire period would be useless to the public, and expensive to the defendant. Other than during the three months named, the plaintiffs have the use and benefit of the premises, and as the defendant uses it only when her needs and public necessity requires her to do so, this is a continuous use, and an omission to use it when not needed would not disprove a continuity of use, or defeat her right to an easement by prescription. The premises are situated several miles distant from the dam in question, and, notwithstanding their annual overflow by reason of the erection of the dam, none of the plaintiffs appear to have raised any objections thereto, but they seem to have acquiesced therein. They well knew of the hostile acts of the defendant, by thus overflowing their lands, who thus unmistakably indicated an assertion of right to enjoy the use of the premises, and the purpose for which it was so used. When defendant assumed possession and use of the premises the plaintiffs would stop using it, and only resume its use when defendant's occupancy again ceased. There was no trick or artifice on the part of the defendant, but an open and notorious taking possession of the premises by the defendant for her use and needs, and whereby the public were also benefited. These acts were notice to the owners that defendant was occupying the premises under a claim of right.

⁵⁰⁴ When there has been a continuous use of an easement for twenty years, unexplained, it will be presumed to have been under a claim of right, and adverse, and will be sufficient to establish a right by prescription, and authorize the presumption of a grant, unless contradicted or explained: Washburn on Easements, 4th ed., sec. 31, p. 156, and cases cited in note 5; Carmody v. Mulrooney, 87 Wis. 552. Under the laws of this state the twenty years' use has been changed to fifteen. There was no controversy as to the use of the premises by the defendant for the period of fifteen years, she using them when she saw fit during the three months named without asking leave of the plaintiffs, and without objection; and such uninterrupted enjoyment for that period gives a title or easement by adverse possession for the three months each year. If there was any serious question whether the claimant entered upon the property under claim of right or title with intent to oust the owner, that

question would doubtless have to be submitted to the jury. But the actual entry and continuous use of the premises by defendant for a period of fifteen years were admitted or conclusively proven. The plaintiffs contend that defendant's entry was tortious, and therefore could not be under claim of right; but, as we have already stated, this is immaterial. There was no evidence introduced which tended to rebut the presumption arising from the fifteen years' use of the premises by defendant that she was in possession and so using it under a claim of right and adversely; hence there was no controverted question of fact upon this point to be submitted to the jury.

Order reversed.

ADVERSE POSSESSION—TITLE BY PRESCRIPTION.—Title to real estate may be acquired by adverse possession for the length of time prescribed by the statute of limitations: *Myers v. McGavock*, 39 Neb. 843; 42 Am. St. Rep. 627; *Meyer v. Lincoln*, 33 Neb. 566; 29 Am. St. Rep. 500.

EASEMENTS—PRESCRIPTIVE RIGHT—FLOWING LAND.—An easement, by prescription, to flow the lands of another, by means of an embankment or dam may be acquired by adverse use and enjoyment for the period prescribed by the statute of limitations: *Alcorn v. Sadler*, 71 Miss. 634; 42 Am. St. Rep. 484, and note. The acquisition of an easement by adverse use follows the analogy of the acquisition of title by adverse possession: Note to *Pitzman v. Boyce*, 33 Am. St. Rep. 543. To establish a right by prescription, the acts relied upon to create such prescriptive right must have been an invasion of the rights of the party against whom it is set up of such a character as to afford him grounds of action: Note to *Willamette Real Estate Co. v. Hendrix*, 52 Am. St. Rep. 806. The continuity of an adverse user to give a presumptive right to an easement, and what shall constitute such continuity, can be stated only with reference to the nature and character of the right claimed. Thus, such a right to the use of a ditch to convey water for irrigation purposes is not abandoned because water does not flow in it every day in the year. If the claimant has used the ditch at such times as he needed it, it is regarded by the law as a continuous use: *Hesperia Land etc. Co. v. Rogers*, 83 Cal. 10; 17 Am. St. Rep. 209.

SECURITY BANK OF MINNESOTA v. HOLMES.

[65 MINNESOTA, 531.]

COVENANT AGAINST ENCUMBRANCES RUNNING WITH LAND—ACTION BY ASSIGNEE OF COVENANTEE.—A covenant against encumbrances which are a money charge on land runs with the land until they are discharged, and an action on such covenant can be maintained by an assignee of the covenantee.

COVENANT, IN MORTGAGE, AGAINST ENCUMBRANCES RUNNING WITH LAND—ACTION BY ASSIGNEE OF MORTGAGE.—A covenant against encumbrances, although contained in a mortgage, which are a money charge on the land, runs with the land; and an action may be maintained for its breach by an assignee of the mortgagee who has acquired title to the land by purchase at a foreclosure sale and who has paid the encumbrances.

Appeal by the plaintiff bank from an order sustaining a demurrer to the complaint.

Cobb & Wheelwright, for the appellant.

Washburn, Lewis & Judson, for the respondents.

533 START, C. J. The defendants, on August 31, 1889, executed and delivered to the W. B. Clark Investment Company a mortgage containing the usual covenants, including one against encumbrances, on certain real estate in the city of Fergus Falls, in this state. On March 19, 1890, this mortgage was duly assigned to the plaintiff, and was afterward foreclosed by action, and the premises sold to the plaintiff, and on January 31, 1893, a final decree was entered in the action vesting the title thereto in the plaintiff. At the time this mortgage was executed by the defendants, the premises therein described were encumbered by a prior mortgage in the sum of two thousand five hundred dollars, and further by a certain party-wall contract: See *First Nat. Bank v. Security Bank*, 61 Minn. 25. The plaintiff paid and discharged the prior encumbrances, and brings this action on such covenant against encumbrances to recover from the defendants the amount so paid. The complaint duly alleged in detail the foregoing facts, to which the defendants demurred on the ground that it did not state facts sufficient to constitute a cause of action. The plaintiff appeals from an order sustaining the demurrer.

1. The first question presented by the record for our decision is, Does a covenant against encumbrances run with the land? It is held by many of the courts in this country that of the five usual covenants in a deed of real estate, three of them—seisin, right to convey, and that the land is free from encumbrances—are personal covenants, and do not run with the land, for, if not true, there is a breach of them as soon as made, and they become choses in action, which are not technically assignable. After stating this rule, Chancellor Kent adds: "It is, however, to be regretted that the technical scruple that a chose in action was not assignable does necessarily prevent the assignee from availing himself of any or of all the covenants. He is the most interested and the most fit person to claim the indemnity secured by them, for the compensation belongs to him as the last purchaser and the first sufferer": 4 Kent's Commentaries, 472.

This "technical scruple" has no force in this state, where choses in action are assignable: hence, on principle, there is no reason why we should not hold that the last purchaser and the first sufferer—that is, he who pays the prior encumbrance—is

entitled to the benefit of ⁵³⁴ the covenant, and to the right of maintaining an action thereon in his own name.

Where the encumbrance, as in this case, can be discharged by the payment of a definite sum of money, there is only a technical breach of the covenant, and a right to only nominal damages therefor until the owner of the land pays the amount of the encumbrance, when the right to recover substantial damages first accrues for the first substantial breach of the covenant. Justice then requires that the owner of the land (whether he is the original covenantee or a remote grantee against whose land the encumbrance is first attempted to be enforced), who pays it, should have the benefit of the covenant which was made and taken for the protection and assurance of the title, which the covenantor assumed by his deed to pass to the covenantee.

It is immaterial whether we say that a covenant against an encumbrance which is a money charge on the land runs with the land, or that the cause of action for a breach of the covenant is assignable, and passes by deed to the grantee of the covenant, immediate or remote, who sustains injury by reason of the encumbrance; for in either case we reach the same result. The covenant, which is one of indemnity, in effect attaches itself to the title assumed to be conveyed by the deed, and accompanies it for the protection of the covenantee or any of his assigns who may finally be injured by the encumbrance. In short, for all practical purposes, a covenant against encumbrances which are a money charge on the land runs with the land until they are discharged: *Kimball v. Bryant*, 25 Minn. 496. In that case the covenant was one of seisin, but the reason upon which the decision was based applies with greater force to the covenant against encumbrances, and establishes for this state the rule that an action on such covenant can be maintained by an assignee of the covenantee: *Hawthorne v. City Bank*, 34 Minn. 382. See further, on this question, *Cole v. Kimball*, 52 Vt. 639; *Post v. Campau*, 42 Mich. 90; *Knadler v. Sharp*, 36 Iowa, 232.

2. It is, however, claimed in behalf of the defendants that, whatever the rule may be where the covenant is in a deed, and the title passes by deed to the remote grantee of the covenantee, no right of action upon the covenant contained in a mortgage passes at a foreclosure sale to the purchaser.

⁵³⁵ In support of this claim counsel for defendants rely on 1 *Jones on Mortgages*, sec. 68; *Corbin v. Reed*, 43 Iowa, 459; *Hitchcock v. Merrick*, 18 Wis. 357; *Todd v. Johnson*, 51 Iowa, 192. In the first case cited, the covenant in the mortgage was that the property should be kept in good condition, and it was

held that, after foreclosure and a sale of the mortgaged premises for the full amount of the debt and cost, an action could not be maintained by the mortgagee, who was the purchaser, for waste committed by the mortgagor before the foreclosure. This covenant did not relate to the title, but to the condition of the premises, which sold for enough in their then condition to pay all of the claims of the mortgagee against the land; and it necessarily followed that no cause of action on the covenant survived or passed by the sale, whether the purchaser was the mortgagee or a third party. In the second case, the covenant in the mortgage was that all taxes on the premises should be paid prior to the day for the sale of land for taxes. After a foreclosure sale of the premises to the mortgagee for the full amount of his debt and cost, he brought an action to recover the amount of taxes on the land at the date of the sale, which were assessed after the execution of the mortgage, and it was held that he could not recover. The case is not in point, for the reason that taxes assessed after the making of a covenant against encumbrances are not a breach of it: *Rawle on Covenants*, sec. 77. There is a statement in *Jones on Mortgages*, section 68, which supports defendants' claim, but it rests solely on the case of *Todd v. Johnson*, 51 Iowa, 192. This last case is in point, and is, so far as we are advised, the only case to be found that supports defendants' contention. In the case referred to, the covenant was one of warranty, contained in a mortgage which was foreclosed, and the mortgagee had judgment, and purchased the premises for the full amount of his debt; and it was held for this reason that he could not afterward maintain an action upon the covenants of the warranty in the mortgage, unless the sale and satisfaction of the judgment were first set aside. The opinion in this case indicates that the conclusion reached was based largely upon the effect of the statute of Iowa as to the foreclosure of mortgages.

However this may be, we are unable on principle to see any difference as to the rights of a grantee of a covenantee to maintain an action for a breach of a covenant against encumbrances, whether he ⁵³⁶ obtained his title through a deed containing the covenant or through a mortgage with a like covenant. In each case the covenant attaches itself to the title for the protection of the covenantee or his assigns whom the encumbrance may eventually damnify. The fact that the premises bring enough at the foreclosure sale to pay the mortgage debt does not affect the question, because, if no redemption is made, the mortgage remains, with all of its covenants, as a muniment of title, to the

same extent as if it was a deed. The purchaser at the foreclosure sale buys the title as warranted and guarded by the covenants in the mortgage. He buys, subject to the right of redemption, the title to the land as protected by the covenants in the mortgage: *Lawton v. St. Paul etc. Co.*, 56 Minn. 353; *Thomas on Mortgages*, sec. 27.

In those states where a mortgage conveys the fee, and can only be defeated by a performance of the conditions as to payment, and where there is no sale of the premises, but a strict foreclosure, it is clear that whoever becomes the owner of the land by virtue of his ownership and foreclosure of the mortgage is entitled to the benefit of the covenants therein which run with the land. The same conclusion as clearly follows in this state, where the mortgage is regarded as a lien to secure the debt, as in states where there is no sale of the premises, but a strict foreclosure. The mortgage and its covenants are the foundation of the title, which becomes absolute if the premises are not redeemed within the time limited. So, too, where, as in the case at bar, there is a sale of the premises by the judgment of the court, the benefit of the covenants passes to the purchaser at the sale for the protection of his title. This is the settled rule in cases of judicial and execution sales: *Rawle on Covenants*, sec. 213, note; *Rorer on Judicial Sales*, sec. 969. In all of these suggested cases, as well as in the case where the foreclosure is by advertisement by virtue of a power of sale in the mortgage, the principle is the same. It is the mortgage which ultimately vests the title to the premises in the purchaser, and the benefit of all covenants that run with the land pass with the title to the purchaser.

Our conclusion is, that the complaint states a cause of action, and that the order sustaining the demurrer must be reversed. So ordered.

A COVENANT AGAINST ENCUMBRANCES, in some cases, has been held to run with the land. In other cases, a different doctrine is announced: *Foote v. Burnet*, 10 Ohio, 317; 36 Am. Dec. 90; monographic notes to *Morse v. Garner*, 47 Am. Dec. 572, on the distinction between real and personal covenants, generally, and *Gibson v. Holden*, 56 Am. Rep. 165, on covenant running with the land. A covenant in a mortgage to pay the debt does not run with the land: *Gibson v. Holden*, 56 Am. Rep. 160. In an action on the covenant against encumbrances, the plaintiff, if he has paid off encumbrances, may recover the amount paid; but if he has not paid anything, he can recover only nominal damages: *Reed v. Pierce*, 36 Me. 455; 58 Am. Dec. 761; *Funk v. Voneida*, 11 Serg. & R. 110; 14 Am. Dec. 617; *Delavergne v. Norris*, 7 Johns. 358; 5 Am. Dec. 281. Thus damages on breach of covenant against encumbrances by outstanding mortgage is the sum paid, if the mortgage is discharged by the covenantee: *Reed v. Pierce*, 36 Me. 455; 58 Am. Dec. 761.

CASES
IN THE
SUPREME COURT
OF
MISSISSIPPI.

WEILLE *v.* LEVY.

[74 MISSISSIPPI, 34.]

LIMITATION OF ACTIONS—ABSENCE FROM STATE—TEMPORARY VISITS.—A debtor who has removed from the state and who occasionally returns and visits it as a travelling salesman, stopping only a day or two at each place, cannot include the time consumed by such visits in the time covered by his plea of the statute of limitations, although, in making each of such visits, he remains within the state continuously for several months.

LIMITATION OF ACTIONS—ABSENCE FROM STATE—TEMPORARY VISITS.—One who removes from the state and afterward visits it as a travelling salesman, stopping only a day or two in each place, is not within the state within the meaning of the statute of limitations although on each of such visits he remains within the state continuously for several months.

E. H. Ratcliff, for the appellant.

J. Truly, for the appellees.

³⁴ COOPER, C. J. The single question presented by this appeal is, whether the appellant was "absent from and resided out of this state" during such part of the time covered by his plea of the statute of ³⁵ limitations as will preclude him from the benefit of the statute. The statute pleaded is that of three years. The facts are that less than two years after the right to sue had arisen the defendant removed from this state to Paducah, Kentucky, where he has since resided, but has pursued the business of a traveling salesman in the states of Mississippi and Louisiana, and, while so engaged, has been, from time to time, in this state. The defendant, testifying, stated that "he was in the state of Mississippi, engaged in such business, in 1892, for

a continuous period of six months, but only about a day or two in a place, and in 1893 for a period of four months, and in 1894 for a period of five and one-half months, and in 1895 for one month and eleven days before the bringing of this suit, making in the aggregate a period of more than thirty-nine months in which he was in the state of Mississippi after the plaintiff's cause of action had accrued."

Under these facts, the court below properly held the claim of the plaintiff not barred by the statute of limitations, for the defendant has, at no time subsequent to his removal, been within this state within the reasonable construction of our statute. We can add nothing to the very lucid opinion of Judge Chalmers in the case of *Pindell v. Harris*, 57 Miss. 739, in which the true construction of the words "absent from the state," used in the statute, is given.

In that case, the defendant resided in this state four years and six months after the right of action had accrued. She then removed to the state of Tennessee, where she remained about a year and a half, and then returned to this state, where she resided for fifteen months, and then again removed to Tennessee. Subsequently, while confessedly a resident of that state, she visited her mother, with whom she had always resided while in this state, and remained from three to five months. On these facts this court held that the period of the visit to the mother should be computed as a part of the time during which the statute was running, and therefore that the bar was complete. In ³⁶ delivering the opinion of the court, Judge Chalmers said that "a furtive, clandestine, or transient presence here" would not avail the debtor, for the reason that "such presence would not afford the creditor an opportunity to sue, and would require calculations of time, with a view of determining the whole period spent here, so difficult as to be impracticable."

Counsel for appellant, from this language, argues thus: The court has said that a furtive and clandestine presence in the state will not avail the debtor. Therefore, a presence not furtive or clandestine will avail. The defendant's presence was not furtive or clandestine, wherefore he may compute the time of such presence as a part of the period of limitation.

But this process of reasoning is defective for two reasons: 1. Because it rests upon only a part of the opinion of the court; and 2. Because it disregards the reason upon which the observations rest. The court not only said that a furtive or clandestine presence would not avail, but also that the presence of the nonresident debtor which would avail "must not be secret or

evanescent"; that "his stay must be continuous, not fitful—an abiding, fixed though temporary in its character." But, at last, the substance of the thing required is such a presence in this state as would give to the creditor notice of the fact and a reasonable opportunity to institute his suit. Such was not the character of the defendant's presence on the facts as disclosed by him. He was in the state, it is true, but was engaged in an itinerant vocation. He flitted from place to place, and hovered here and there for a few hours or a day or two, and again took wing. The plaintiff was not required to fire judicial process at him as he flew, but was entitled to a fair and reasonable opportunity for a resting shot, and the judgment is affirmed.

LIMITATIONS OF ACTIONS—VISIT BY NONRESIDENT—ABSENCE FROM STATE.—If a nonresident person comes to this state for a temporary purpose only, after having taken adverse possession of land by tenant, and remains here but a short time upon business, his visit is not "a return to the state" within the meaning of a statute of limitations respecting absent defendants, and his absence after such visit does not suspend the running of the statute in his favor: *Wilson v. Daggett*, 88 Tex. 375; 53 Am. St. Rep. 766, and note.

McKEAN v. JOHN MATHEWS APPARATUS COMPANY.

[74 MISSISSIPPI, 119.]

CONDITIONAL SALES—FAILURE OF CONSIDERATION—EVIDENCE.—In replevin, the defendant, claiming as vendee under a conditional sale containing an express warranty against latent defects, may defend by proving a failure of consideration resulting from the fact that the property sold, by reason of latent defects, did not agree with representations made by the vendor at the time of the sale, and such proof is, in legal contemplation, the equivalent of payment.

Booth & Anderson, for the appellant.

Dabney & McCabe, for the appellee.

120 WHITFIELD, J. The record is exceedingly vague as to the character of sale made to Mrs. McKean. But interpreting the meager statement on this point, "admission of sale to Mrs. McKean by Hill & Loeshcher"—in itself ambiguous—in the light of other facts in the record, and the ground of objection made to the testimony offered by appellant to show failure of consideration, arising from fraud in concealing a latent defect in goods manufactured by appellee, and known to appellee, and to the manifest course of the trial in the court below, and to the argument of counsel here, it appears pretty clearly that Mrs. McKean was the assignee of such rights in the contract of sale to

Hill & Loeshcher as Hill & Loeshcher had, and hence succeeded to the exact rights they had. The written contract contained an ¹²¹ express warranty against latent defects. Mrs. McKean had notified appellee of the alleged latent defects, and that defense would be made against payment of the balance on that ground. The case, under our decisions, is one of conditional sale, the reservation of title in which is intended only as a security for the purchase price, and in which, if the property is recovered by the seller, "he must deal with the property sold as security, and with reference to the equitable rights of the purchaser": *Ross-Meehan etc. Foundry Co. v. Pascagoula Ice Co.*, 72 Miss. 615, and authorities cited.

On the trial in the court below, the appellant offered to prove "that the property described in the declarations did not come up to the representations made by plaintiff at the time it was purchased by Hill & Loeshcher; that there were latent defects in it which materially impaired its value, and were such as could not be discovered by defendant at all; that, about three and a half years after the purchase was made, these defects were developed by a proper use of the machinery; that, after the plaster of paris which had been put upon the generator wore down, it was discovered there were plugs in the casting of the generator, which were evidence of the fact either that the generator was a worn second-hand machine, or that there was a flaw in the generator material—the original material out of which it was made—and the result of which was to render the machine absolutely unfit for use, and that the true value of the generator, by reason of the defects, at the time of the purchase, was three hundred dollars less than the amount agreed to be paid therefor; that plaintiff was promptly notified of this condition of the generator, and that she would not make further payments on the purchase price." Defendant objected to this on the ground that it was not competent to make such defense in an action of replevin, which objection was sustained, and the testimony excluded, appellee excepting. And this ruling of the court is the controlling point presented here.

In *Bates v. Snider*, 59 Miss. 497, it was ruled that, under ¹²² our statute, the amount due is a proper subject of inquiry, and that the judgment should show the amount due, so that the defendant, by its payment, might free his property of the charge upon it: See, also, *Gabbert v. Wallace*, 66 Miss. 618; *Dreyfus v. Cage*, 62 Miss. 733. Our statute (Code 1892, sec. 3726) provides that the plaintiff's recovery is limited to his "interest" in the property. The principle is that the defend-

ant in an action of replevin, under our statute, may prove payment in part or whole, and so reduce or discharge the debt for which the property replevied is held, without the expense and delay of a cross-action. *Bloodworth v. Stevens*, 51 Miss. 475, very clearly sets forth the principle. If payment in whole or in part may be shown in one mode, as in cash, we can see no sound reason for holding that what amounts to payment—failure of consideration in whole or in part, which is merely payment in another mode—may not also be shown. There is no maintainable distinction between the cases. And the same reasons of convenience, avoiding multiplicity of suits, costs, etc., obtain in the one case as in the other. We think the testimony should have been received.

Reversed and remanded.

SALES—ACTIONS UPON—BREACH OF WARRANTY.—Partial failure of consideration, or breach of warranty, or deception in the quality or value of goods sold, may be shown in mitigation of damages, in an action to recover the purchase price: *Perley v. Balch*, 23 Pick. 283; 34 Am. Dec. 56, and note. See *Morse v. Moore*, 83 Me. 473; 23 Am. St. Rep. 783, and note. When personal property is sold under an executory contract with warranty, the purchaser may recoup damages for a breach of the warranty in an action for the price, although he retained the property after knowledge of the defect: *Underwood v. Wolf*, 131 Ill. 425; 19 Am. St. Rep. 40, and note. See *Ogden v. Beatty*, 137 Pa. St. 197; 21 Am. St. Rep. 862, and note.

MERIDIAN NATIONAL BANK v. HOYT.

[74 MISSISSIPPI, 221.]

FILING IMPORTS THAT THE PAPER shall remain with the clerk as a record, subject to be inspected by those who have an interest in it, like any other paper properly lodged in his office.

FILING A PAPER CONSISTS in placing it in the proper official custody by the party charged with the duty of filing it, and the receiving of it by the officer, to be kept on file.

FILING.—MARKING A PAPER “FILED” IS NOT FILING IT, and it can only be filed by delivering it to the proper officer, to be by him received and dealt with in the manner usual with that class of papers.

FILING.—BILLS IN CHANCERY, TO BE “FILED,” must be delivered to the clerk, to be by him received, indorsed, and dealt with in the manner usual with such bills. They must be delivered and recorded with the purpose of having process issue in due course of time in order to be legally “filed.”

FILING—WHAT DOES NOT CONSTITUTE.—Mere marking upon a bill in chancery the word “filed” and making a docket entry thereof, together with placing momentarily the bill in a court file without more, in a cover, when it is at once handed back and taken away, with direction not to issue process thereon, and kept away until another similar bill on behalf of another complainant has been filed, is not a legal filing so as to give the first bill priority over the second.

G. Q. Hall, for the appellants.

Witherspoon & Witherspoon and J. S. Ham, for the appellees.

225 WHITFIELD, J. The question which lies at the threshold in the decision of this case is, whether the bill of appellant was filed, within the contemplation of law, on May 5, 1892. The facts are these: On May 5, 1892, appellant's counsel took the bill and the exhibits in one cover to the chancery clerk, and had him indorse on the bill the word "filed," etc., and the clerk made a corresponding entry in the general docket, and prepared a regular court wrapper, and put it around the papers. But counsel immediately took the bill and exhibits back to his office, telling the clerk that he did not wish process issued then, but not giving him any reason for not issuing process. The clerk charged the counsel with the papers in his attorney's docket. The bill was kept by counsel in his office until the 9th of May, when he returned the bill, and process was issued and served on the 10th. In the mean time, on May 7, 1892, counsel for appellees took their bill to the clerk of the chancery court, and it was filed on that day, and process issued and served that day. Said counsel had, on the 5th of May, gone to the clerk's office, to see what bill, if any, had been filed, and was told a bill had been filed by counsel for appellant, and was shown the entry on the general docket, and informed that the papers were at the office of appellant's counsel. These are all the facts bearing on this question.

The code of 1892, section 463, provides that the clerk "shall not suffer any paper so filed to be withdrawn but by leave of the chancellor, and then only by retaining a copy, to be made **226** at the costs of the party obtaining the leave. All the papers and pleadings filed in a cause shall be kept in the same file, and all the files kept in numerical order." In *Cooper v. Frierson*, 48 Miss. 310, in construing the clause under the agricultural lien law of 1867, "he must file the contract, or a copy thereof, in the clerk's office," the court said: "The statute is not satisfied by the indorsement on the contract that it was filed, if the creditor withdraws it, and keeps it. . . . The term 'filing' imports that the paper shall remain with the clerk as a record, subject to be inspected by those who have an interest in it, and to be certified by him as any other paper properly lodged in his office and committed to his custody. It is admitted that Frierson's contract was not, in this sense, 'filed' in the clerk's office. It follows, then, that he has no lien."

Anderson's Law Dictionary defines the noun "file" as follows:

"At common law, a thread, string, or wire upon which writs or other exhibits are fastened for safekeeping and ready reference." And the definitions of Webster's International Dictionary and the Century Dictionary are to the same effect. The verb Anderson thus defines: "To leave a paper with an officer for action or preservation"; and he adds: "In modern practice, the file is the manner adopted for preserving papers. The mode is immaterial. Such papers as are not for transcription into records are folded similarly, indorsed with a note or index of their contents, and tied up in a bundle—a file." Webster quotes Burrill, as follows: "To file a paper on the part of a party is to place it in the official custody of the clerk. To file on the part of the clerk is to indorse upon the paper the date of its reception, and retain it in his office, subject to inspection by whomsoever it may concern." Mr. Freeman, in a learned note to *Beebe v. Morrell*, 15 Am. St. Rep. 295, thus sums up: "Filing consists simply in placing the paper in the hands of the clerk, to be preserved and kept by him in his official custody as an archive or record, of which his office becomes thenceforward the only proper repository; ²²⁷ and it is his duty, when the paper is thus placed in his custody, or filed with him, to indorse upon it the date of its reception, and retain it in his office, subject to inspection by whomsoever it may concern; and that is what is meant by filing the paper. But, when the law requires a party to file it, it simply means that he shall place it in the official custody of the clerk. This is all that is required of him; and, if the officer omits the duty of indorsing upon it the date of the filing, that will not prejudice the rights of the party. This seems to be universal in its application to all documents, of whatever nature, which the law requires to be filed": Citing many authorities, to the following among which we especially refer: *Holman v. Chevaillier*, 14 Tex. 339; *Bishop v. Cook*, 13 Barb. 329; *Phillips v. Beene*, 38 Ala. 251.

In *Pfirmann v. Henkel*, 1 Ill. App. 145, cited in 7 American and English Encyclopedia of Law, first series, 962, the case was this: "A certificate and affidavit required to be filed under a limited partnership act, were sent by a messenger to the clerk's office, and there presented for the purpose of being filed. The deputy clerk, to whom they were presented, instead of retaining them, by mistake added a certificate of the official character of the notary before whom they were acknowledged, and returned them to the messenger, by whom they were carried away. Several months afterward they were returned to the county clerk's office and properly filed. As against a creditor whose debt ac-

crued before the papers were returned to the clerk's office, it was held that the first presentation of them did not constitute a filing. "Filing a paper," said the court, "*ex vi termini*, means placing and leaving it among the files. The memorandum indorsed by the officer in whose custody it is placed is merely evidence of the filing, and not the filing itself."

We close the citation of authorities with the result in modern practice, as stated by Mr. Freeman in the note above referred to (*Beebe v. Morrell*, 15 Am. St. Rep. 294.): "The word 'file' is ²²⁸ derived from the Latin 'filum,' signifying a thread, and its present application is evidently drawn from the ancient practice of placing papers upon a thread or wire for safekeeping. The origin of the term clearly indicates that the filing of a paper can only be effected by bringing it to the notice of the officer, who anciently put it upon the thread or wire; and accordingly, under the modern practice, the filing of a document is now generally understood to consist in placing it in the proper official custody by the party charged with the duty of filing it, and the receiving of it by the officer, to be kept on file. The most accurate definition of filing a paper is, that it is its delivery to the proper officer, to be kept on file."

In *Christian v. O'Neal*, 46 Miss. 672 (a case of an attempt to enforce a mechanic's lien, in which, as in a chancery suit, the filing of the petition is the commencement of the suit), it was said: "If a petition was not on file when this or the writ of June, 1861, was issued, suit was not begun."

We have quoted thus largely from the authorities, because the determination of this point will be decisive of the case. It is clear that marking the paper "filed" is not filing it. A paper may be marked "filed," and yet not be in fact filed; and a paper may be in fact filed, though not marked "filed." And the entry on the general docket does not constitute filing. All these indorsements of the clerk are evidence, but not conclusive evidence, of a filing. Whatever the nature of the paper, it can only be filed by delivering it to the proper officer, to be by him received and dealt with in the manner usual with the particular character of paper. If a deed, for example, or other paper required to be recorded, it must be kept by the clerk until recorded; if any paper, in respect to which a statute requires the original of a copy to be filed, the original may not be withdrawn till a copy has been filed. If a bill in chancery, it must be delivered to the clerk, to be by him received, indorsed, and dealt with in the manner usual with such bills. It must be delivered and recorded with the purpose of having process issue in due

course. ²²⁹ Suits in chancery begin, of course, from the filing of the bill, and at law from the issuance of process, under the code of 1857 (for present practice, see Code 1892, sec. 670); but just as, under Code of 1857, at law, the suit is not begun, though process be issued, unless it is intended that it be served as in regular course (*Lamkin v. Nye*, 43 Miss. 252), so, in equity, the suit will not be begun unless the bill is delivered with the purpose that the usual steps shall be taken. In the one case, there is no issuance of process, and, in the other, no filing of the bill, within the meaning of the law. Clearly, there was no such filing here. The error of counsel for appellant was in supposing that merely having the bill marked "filed," and placed in a court wrapper, or docketed, without more, and with the declared purpose that the process should not issue, would constitute filing, because of the rule that in chancery the suit is begun by the filing of the bill. But the filing meant, as we have shown, must be a filing in the legal sense, with the purpose that process and all usual steps shall follow in due course. *Lamkin v. Nye*, 43 Miss. 252, explains the principle. It is not necessary to decide whether the provision in our statute against withdrawing papers (Code 1892, sec. 463) means to prohibit the taking out of a pleading by counsel for examination, except on the terms named in the statute, or whether withdrawal means permanent withdrawal from the files.

It is doubtless true, as suggested by learned counsel, that it is the custom for attorneys to take out pleadings, giving their receipt, and usually no question would arise, as the instances are rare in which the priority of a lien is determined by the filing of a particular pleading. But we desire to be understood as deciding nothing on this precise point, resting our decision in this case on its own facts. We cannot hold that what was done with this bill constituted a filing of it, under the general rule as to the filing of pleadings, nor under the terms of this statute, without deciding that the mere marking upon a pleading of the word "filed," etc., and a docket entry thereof, and ²³⁰ a placing momentarily of the bill in a court file, without more, in a cover, where it was at once handed back and taken away, and kept away until another bill had been filed regularly, with the direction not to issue process added, constitute filing; and this, manifestly, is in the face of all principle and of all the authorities. We have gone carefully through all the questions in the case, but it is unnecessary, in the view we have taken, to remark upon them.

Affirmed.

FILING OF A PAPER, WHAT CONSTITUTES.—When a paper is deposited with the clerk of a court for the purpose of making it a part of the record in a cause, it is filed, though the clerk being doubtful as to his power to then file it, enters upon it the fact and time of its receipt, but does not put his file marks thereon until the next day: *Hanover Fire Ins. Co. v. Shrader*, 89 Tex. 35; 59 Am. St. Rep. 25, and note. Filing a paper in court may be complete without the indorsement of such filing: *Hook v. Fenner*, 18 Colo. 283; 36 Am. St. Rep. 277, and note. See monographic note to *Beebe v. Morrell*, 15 Am. St. Rep. 294-298.

ANDREWS v. NEW ORLEANS BREWING ASSOCIATION.

[74 MISSISSIPPI, 362.]

CONTRACTS—ILLEGALITY—RIGHT TO RETAIN PROFITS.—One in possession of the gains and profits of an executed transaction cannot retain them as against another party thereto on the ground that the business which produced the fund was illegal.

Action for money had and received. The defendant introduced evidence to show that plaintiff, at the time of contracting the debt sued upon, was dealing in liquors, the subject of the indebtedness, without having paid a certain privilege tax required by statute. Judgment for plaintiff, and defendant appealed.

Miller, Smith & Hirsh, for the appellant.

A. M. Lea, for the appellee

364 WOODS, J. Without expressing any opinion as to the illegality of the business carried on in Vicksburg by the appellee, under its arrangement with the Vicksburg Liquor & Tobacco Company, it is clear that such illegality may be conceded, and yet the appellee's right to recovery is not affected thereby. For, conceding the illegality of the business, the question still remains whether the appellant company can be allowed to receive, for the appellee's use, money which arose out of an illegal transaction, then consummated and ended, and retain it as against the appellee, for and on whose account it was received.

It is unnecessary to discuss the question, for it was long ago carefully and elaborately examined and definitely settled in this state in *Gilliam v. Brown*, 43 Miss. 641. Said this court in that case: "The principle seems to be well established that after the illegal contract had been executed, one party in possession of all the gains and profits resulting from the illicit ³⁶⁵ traffic and transaction will not be tolerated to interpose the objection that the business which produced the fund was in violation of law, and, therefore, the plaintiff, jointly interested in its gains and

profits, cannot ground any claim to an account and share thereof." In *Howe v. Jolly*, 68 Miss. 323, *Gilliam v. Brown*, 43 Miss. 641, was cited and followed, and this question declared to be "completely settled by that case."

Affirmed.

CONTRACTS—ILLEGAL—ACTIONS UPON.—If two or more persons enter into a scheme or contract immoral or against public policy, and one gives to the other property to be used in the furtherance of their illegal plan and for the purpose of bribing persons in high official station, and the receiver does not use it for that purpose, but applies it to his own use, he is answerable therefor to the person of whom he thus obtained such property: *Wasserman v. Sloss*, 117 Cal. 425; 59 Am. St. Rep. 209, and note. But it is held in *Goodrich v. Tenney*, 144 Ill. 422, 36 Am. St. Rep. 459, that courts of justice will not enforce the execution of an illegal contract, nor aid in the division of the profits of an illegal transaction between associates: See *Kirkpatrick v. Clark*, 132 Ill. 342; 22 Am. St. Rep. 531, and note.

RIVES v. PATTY.

[74 MISSISSIPPI, 381.]

ATTORNEY AND CLIENT—FEES.—The relation of attorney and client is created by contract, and litigants who have not thus assumed liability for attorney's fees cannot be held liable therefor, although they have been benefited, directly or indirectly, by the attorney's services.

ATTORNEY AND CLIENT—FEES.—An attorney employed by a part of the creditors of an insolvent estate, who in his professional capacity realizes a fund for distribution among all of them, cannot charge the fund with his fees. He can recover compensation only from those who employed him.

Action to recover attorneys' fees. Certain of the creditors of the insolvent estate of R. C. Patty employed Rives & Rives, lawyers, to represent their interests. These attorneys, through their personal efforts, largely increased the assets of the estate and augmented the fund for distribution to all of the creditors. J. E. Rives, as survivor of the firm of Rives & Rives, sought to charge this fund with their attorney's fee, for the services performed. Petitioner's petition was denied, and he appealed.

J. E. Rives, *pro se*, for the appellant.

C. B. Ames, for the appellees.

³⁸⁴ **WOODS, J.** The effort of appellants to charge the fund in the hands of the administratrix with the attorneys' fees of Mr. J. E. Rives, in his own right, and as surviving partner of the firm of Rives & Rives, cannot be successfully maintained. That the services of the attorneys of the appellant creditors were valu-

able and important is clear, and that a reasonable fee should be paid them is not to be disputed. But shall this fee be paid out of the funds of Patty's estate, now ready for distribution to all the creditors, or shall it be paid by those creditors who employed the Messrs. Rives, and who have been greatly benefited by the services of their attorneys? The supposed right to charge the fund for distribution with the fees of the attorneys of a part of Patty's creditors rests upon the fact that this fund, and all the creditors to whom it is to be distributed, received, directly or incidentally, large benefits from the well-directed efforts of the attorneys employed by the appellant creditors, and that the fund itself should bear the expenses of the successful attorneys' fees, although Messrs. Rives & Rives were confessedly employed by the appellant creditors, and notwithstanding the fact that the effort of their attorneys was, in the main, directed to the securing of all the benefits flowing ³⁸⁵ from their services to their own clients, and to the exclusion of all other creditors of Patty.

The attorneys, in serving those who employed them, have incidentally served all the other creditors, but those others are not thereby brought under obligation as clients to the Messrs. Rives, nor made liable to compensate those gentlemen for services rendered by virtue of employment by the appellant creditors. The relation of attorney and client is created by contract, and we are not aware of any principle of law or equity which would justify the imposition of attorneys' fees upon litigants who have not assumed liability therefor, either because they have other counsel of their own selection, or because they have elected to employ no counsel, and take the chances of success in the courts without representation of lawyers. It appears to us that it would be a dangerous precedent for litigants, however advantageous to lawyers, if we should hold that counsel may intervene to protect the interests of persons who have not signified any desire for the services of counsel, and, upon success crowning the efforts of such counsel, impose liability upon the unwilling litigants to pay attorneys' fees. It would seem almost as dangerous to compel litigants in a common cause to bear the expenses of counsel fees incurred by their fellow litigants, though without their procurement or consent, because of incidental benefits resulting from the services of the attorneys of the fighting litigants.

In *Roselius v. Delachaise*, 5 La. Ann. 481, 52 Am. Dec. 597, a case whose essential facts bring it in the category of the case in hand, this language is employed: "However valuable the services of the plaintiff may have been, which do not appear to be under-

rated by the defendant herself, yet as she did not employ him, or authorize anyone else to employ him in her suit, the present action cannot be sustained."

The same view, in a similar case, was held in Chicago etc. R. R. Co. v. Larned, 26 Ill. 218. To the same effect is Turner v. Myers, 23 Iowa, 391. See, also, Attorney ³⁸⁰ General v. North American Life Ins. Co., 91 N. Y. 57; 43 Am. Rep. 648. See, too, Hand v. Savannah etc. R. R. Co., 21 S. C. 162, in which it is held, in this character of case, that "no one can legally claim compensation for voluntary services to another, however beneficial they may be, nor for incidental benefits and advantages to one, flowing to him on account of services rendered to another, by whom he may have been employed."

Affirmed.

ATTORNEY AND CLIENT-RELATION-LIEN FOR SERVICES.—As to the nature of the relation, see Darlington's Estate, 147 Pa. St. 624; 30 Am. St. Rep. 776; Eoff v. Irvine, 108 Mo. 378; 32 Am. St. Rep. 609; when it exists: Wittenbrock v. Parker, 102 Cal. 93; 41 Am. St. Rep. 172. See monographic note to Andrews v. Morse, 31 Am. Dec. 755-760, on attorney's liens for compensation and costs.

BARWICK v. MOYSE.

[74 MISSISSIPPI, 415.]

MORTGAGES—FORECLOSURE—FRAUD AS DEFENSE.—If, in an action for foreclosure, the mortgagee can show a prima facie right to recover on the face of the instrument without revealing fraud in the transaction, the mortgagor is not permitted to plead or show as a defense his own and the mortgagee's fraudulent intention, and that the mortgage was made without consideration and to defraud creditors.

FRAUDULENT CONVEYANCES. — **MORTGAGES** made with intent to defraud creditors are valid as between the parties thereto, although void as to creditors, and voidable as to all other parties.

T. McKnight, for the appellant.

C. E. Williams and W. A. Parsons, for the appellees.

418 STOCKDALE, J. Appellees filed their bill in the chancery court of Amite county to foreclose and enforce a deed of trust given by appellant, on December 5, 1891, to J. M. Ellzey, trustee, for appellees, to secure a note of that date, payable December 1, 1892, for \$1,220.52. Said note bore a credit of \$600 from date, and the bill sought to collect the balance, \$620.52, and interest. Appellant (defendant below) answered said bill at the July term, 1895, of said court, and set up as defense there-

to, after admitting that he executed the note and deed of trust described in the bill of complaint, that he owed appellees nothing, and the said note, and credit on it, and deed of trust, were fictitious and without consideration, and were both executed for the purpose of preventing Adler, Goldman & Co., of St. Louis, whom appellant owed a considerable sum, from seizing and selling his lands, and for no other purpose, and that the suggestion to do that came from Julius Moyse, one of complainants; that he has settled with Adler, Goldman & Co. satisfactorily; that he had been dealing with I. Moyse & Sons for several years, and no settlement was had between them on the 5th of December, 1891; that they had failed to give him credit for fourteen bales of cotton delivered November 2, 1889.

The answer was made a cross-bill, with a prayer that the deed of trust be removed, as a cloud upon his title, and the note canceled. Appellees answered the cross-bill, denying every allegation thereof as to fraud, and asserting that they had a full settlement with appellant on December 5, 1891, upon which he owed them \$620.52, and that he agreed to give his note for that amount, and secure it on lands, in consideration of extension; that when appellees were having the deed of trust drawn up, appellant asked them to add \$600 and make ⁴¹⁹ the note \$1,220.52, and make the deed to correspond, and then give him credit on the note for \$600, which they did, to accommodate him, not knowing why he asked it, nor what was his object, and had no intimation of anything like fraud, or delay or hindrance of other creditors. Denied receiving the fourteen bales of cotton. They denied that the suggestion came from them about making the note \$1,220.52 instead of \$620.52. The bill and answer and cross-bill, and complainants' answer to defendant's cross-bill, are all sworn to. At the January term, 1896, the cause was set down for final hearing, and tried on May 7, 1896. The depositions of Julius Moyse were suppressed because he failed to appear and testify in open court upon notice to do so, and the chancellor heard the testimony on both sides in open court, and went into a full investigation of the accounts and transactions between the parties, and took the matter under advisement, decree to be entered in vacation. The final decree was entered August 27, 1896. By this final decree the cross-bill of defendant was denied and dismissed, and a decree rendered on the bill and answer and proofs, awarding relief to complainants, and that the sum of \$882.84 is due them from defendant, and that the land described in the deed be sold if the debt be not paid; and from that decree this appeal comes.

In view of the fact that the chancellor heard the witnesses testify, and considered the case deliberately, under advisement, we do not feel warranted in disturbing his findings on the facts, after a careful examination of the evidence. But counsel for appellant claims and urges that, even if the facts as to the indebtedness would justify a decree in favor of appellees, they were not entitled to a decree in equity, but their bill should have been dismissed; for it is apparent, he insists, that appellant and appellees were both intent upon delaying the collection of their debt by Adler, Goldman & Co. That proposition involves the correctness of the decree of the chancellor in dismissing the cross-bill; for by the dismissal of the cross-bill the allegations ⁴²⁰ in reference to Adler, Goldman & Co. were eliminated from the controversy. And we will inquire into that action first, and then determine whether the authorities cited by counsel for appellant have a bearing on this case.

The contention of appellees' counsel is, that complainants below having been able to make out a prima facie case without discovering any fraud, if there were any, and, the allegations of fraud being first brought into court by defendant, he cannot be heard to set it up in defense of complainants' prima facie case. That must have been the ground upon which the court below dismissed the cross-bill, and proceeded to try the case as to the indebtedness between the parties. It is laid down (Bigelow on Frauds, 200 et seq.) as a general rule "that a party cannot set up his own fraud as a ground upon which to rest his action or defense." It is laid down as the law in Wiltsie on Mortgage Foreclosures, 429, that "in an action for foreclosure, where the mortgagee can show a prima facie right to recover on the face of the instrument, without revealing the fraud in the transaction, the defendant will not be permitted to plead as a defense his own and the plaintiff's fraudulent intention, and that the mortgage was without consideration."

In *Harvey v. Varney*, 98 Mass. 118, it is held that in that commonwealth "a long series of cases has established the rule that a transfer of either real or personal property, made with a view to defraud the creditors of the grantor, although the grantee has participated in this intent, is good between the parties, and void as against creditors only, or, to speak accurately, is voidable by creditors at their election." And this doctrine prevails as to executory contracts as well as to executed contracts, although entered into to prevent the creditors of the vendor from attaching the property: *Harvey v. Varney*, 98 Mass. 118, and cases referred to. A mortgage for more than the amount due, and a mortgage

in fraud of creditors, are not regarded as *turpis causa*, which renders all contracts void. They are merely voidable in favor ⁴²¹ of creditors, leaving them, in all other respects, and as between the parties, valid: 1 Beach on Modern Equity Jurisprudence, 470, 471.

In *Bonesteel v. Sullivan*, 104 Pa. St. 9, the court said: "Sullivan could not set up his own fraud to defeat the mortgage. If it was given to hinder, delay, or defraud creditors, as seems to have been the fact, Bonesteel, whose case rested upon this mortgage, *prima facie* executed in good faith and for value, could recover." Though a participant in the fraud, he apparently stands on a *bona fide* transaction, while the latter, as the very first step in his defense, is obliged to exhibit his own fraud; hence he cannot gain the ear of the court. It follows that the mortgage in the case in hand is good between the parties. The same doctrine is announced in *Williams v. Williams*, 34 Pa. St. 312, and in *Walker v. Brungard*, 13 Smedes & M. 723. The appellees' case here described no fraud, and they were *prima facie* entitled to relief; and the court will not allow the defendant to introduce his own fraud into court, as his first step, and present it in a court of equity as an instrument to be used by a court of conscience to defeat a cause apparently without fraud. He cannot infuse his own fraud into a *prima facie* just cause, with his own hands, and then invoke the maxim of "clean hands" for his antagonist. The court will not lend its ear to the cry.

From the doctrines laid down in these cases above cited, and many others, it seems clear that the court below rightfully dismissed the cross-bill, and denied the ear of the court to a defendant for the purpose of setting up his own fraud in his own defense, and tried the issue between the parties as to the indebtedness put in issue by the pleadings, and that even if the deed of trust was given by appellant to defraud his creditors, and appellees were aware of it and consented to it, the deed was good, as between the parties, for the amount due appellees, and could only be set aside at the instance of the defrauded creditors, if at all.

Appellant's counsel cites *Walton v. Tusten*, 49 Miss. 576, ⁴²² and 8 American and English Encyclopedia of Law, 771, but it is held in both that a fraudulent conveyance is good between the parties. The cases cited by him in proof that fraud will avoid every contract were prosecuted by injured creditors, and do not apply in this case. Counsel for appellant refers us to Chitty on Contracts, second edition, page 1035, to show that fraud ren-

ders a contract voidable ab initio, both at law and equity—a principle that is not disputed; but the contract is voidable at the instance of an innocent party not a participant. In the same book, two pages further on, page 1037, it is laid down as follows: "It is not competent to the person who was guilty of the fraud, to avoid the contract on the ground thereof. So that where a contract is fraudulent, it may be valid as between the parties thereto, although void so far as it affects the rights of others." The authorities are abundant and uniform on the line of those cited in this opinion.

The court below heard and saw the witnesses testify, and, upon full investigation and deliberation, found that the note secured by the deed of trust was a valid debt, and so decreed that it should be paid. We do not find in the record in this case sufficient grounds to induce this court to disturb the final decree. The decree of the court below is therefore affirmed.

FRAUDULENT CONVEYANCES—MORTGAGES—RIGHTS OF PARTIES.—A conveyance made to hinder, delay, or defraud the grantor's creditors is valid between the parties thereto when there is a consideration to support it: *Bradtfeldt v. Cooke*, 27 Or. 194; 50 Am. St. Rep. 701, and note. Strangers have no interest, and therefore no right to question the validity of fraudulent conveyances; and, between the parties and their privies, they are valid: *Yeend v. Weeks*, 104 Ala. 331; 53 Am. St. Rep. 50, and note. In an action by a mortgagee to enforce a mortgage, the mortgagor may successfully dispute its validity by showing that it was given without any consideration, and for the purpose of defrauding his creditors: *Williams v. Clink*, 90 Mich. 297; 30 Am. St. Rep. 443, and note.

JEFFERSON COUNTY v. GRAFTON.

[74 MISSISSIPPI, 435.]

COUNTIES — PURCHASERS FROM — RIGHT TO QUESTION POWER OF.—A purchaser claiming title to land under a conveyance from a county cannot in an action by it to cancel the deed, defend by denying that the county had power to acquire and dispose of the land. That is a matter of which the state alone can complain.

COUNTIES—POWER TO SELL LAND.—A county is not a municipal corporation proper, but only a quasi corporation; and as such has no power to sell land not applied to a public use, unless such power has been expressly conferred upon it by statute.

COUNTIES. — ONE BOARD OF SUPERVISORS IS NOT BOUND by the acts of its predecessors not within the scope of their authority.

W. N. Nash, attorney general, and J. Truly, for the appellant.
S. C. Coffey, for the appellees.

439 WHITFIELD, J. The averments of the bill, so far as material to the solution of this case, may be thus condensed: That the county of Jefferson bought, for four thousand dollars, on November 17, 1874, of Gilchrist, administrator, under a decree of the chancery court, a tract of land on which were the buildings constituting the Fayette Female Academy; that on September 4, 1883, the board of supervisors undertook to sell and convey said land to certain parties, purporting to be the trustees of the Presbytery of Mississippi, for one hundred dollars, upon the express condition, set out in the order of the board and the deed, that the presbytery should "establish and maintain a first-class white female school on said premises, within ten years from the date of confirmation of said sale," and that, if said presbytery should fail so to do, then "all of said property should revert to Jefferson county"; that on May 25, 1885, a new board of supervisors recited that the conditions had been complied with, in an order on their minutes, and directed an unconditional deed to be made to said 440 board of trustees of said presbytery, which was made on May 28, 1885, said deed further reciting that it was given in "full confirmation of the deed of September 4, 1883"; that on April 5, 1884, said presbytery passed an order providing that, in the event the board of supervisors failed to secure the State Industrial School, the board of trustees of the Fayette Female Academy should convey the land to Rev. D. A. Planck, upon his assuming all the obligations imposed by the original contract, and promising the "support and encouragement of said presbytery" when the school "should" become worthy of their interest; that on August 29, 1885, Rev. P. S. Shaw, president of the board of trustees of the Fayette Female Academy, executed a deed of the land for one hundred dollars, to said D. A. Planck, said deed reciting that it was executed in pursuance of the "authorization and qualification" set forth in the aforesaid order of presbytery of April 5, 1884; that afterward said D. A. Planck and wife conveyed said land to appellee, Miss Kate Wharton (now Grafton), for one thousand dollars cash; that Miss Kate Wharton (now Grafton) afterward conveyed one acre of the land to Mrs. Catherine Doyle, and the balance to Mrs. Bell B. Harper, for the considerations therein named, that the consideration of one hundred dollars in the deed from the board of supervisors to said presbytery was so grossly inadequate as to make the deed amount to a pure donation of public property to private individuals; and, finally, that the conditions set out in said deed were never complied with, but violated; that there was not established and maintained on said premises, "within ten

years of the date of the attempted confirmation of said pretended sale, a first-class white female school"; and that, hence, all said property had reverted to Jefferson county. And, with the bill, complainant tendered the one hundred dollars received by the county on the alleged sale to said presbytery. Respondent's demurrer admitted all the facts well pleaded in these averments, and the demurrer was sustained.

It is first insisted by appellees that the county had no power ⁴⁴¹ to buy this land. Appellees went in under the county's title, and it is not for them to say the county had no power to buy. That is a matter of which the state alone could complain: *Quitman Co. v. Stritze*, 70 Miss. 320; *Hough v. Cook County Land Co.*, 73 Ill. 28; 24 Am. Rep. 230; *Natoma etc. Min. Co. v. Clarkin*, 14 Cal. 544; *Cowell v. Springs Co.*, 100 U. S. 60; 15 Am. & Eng. Ency. of Law, 1062.

Appellees next insist that municipal corporations have, generally, the power to dispose of property not held for public use, as an inherent power belonging to such corporations (citing 15 Am. & Eng. Ency. of Law, 1063); but, as stated expressly therein, even municipal corporations proper have no such power when it is withheld by the law under which they are organized, and a county is not a municipal corporation proper.

It is next insisted by appellees that sales made by municipal corporations cannot be annulled because improvidently made, citing the same authority. But it is expressly therein stated that this is true only where the corporation has the power to sell, and the question here presented is one of power to sell at all this property.

It is next urged by appellees that one board of supervisors is bound by the acts of its predecessors. But the authority cited correctly shows that this is true only where the acts of "their predecessors were within the scope of their authority": 4 Am. & Eng. Ency. of Law, 375.

This brings us to the vital question in the case. Did the board of supervisors have, under the law as it then stood (Code 1880, sec. 2141), the power to make the sale to the presbytery of this property? That section, after enumerating various powers, provides that the board "shall have such further powers as are, or shall be, conferred upon them by law." It is of significant aid in determining this question that not until section 304 of the code of 1892 was adopted was there any provision made, as is therein made, that "in case any of the real estate belonging to the county shall cease to be used for county purposes, the board of supervisors may sell and convey the same, ⁴⁴² on such

terms as the board may elect." Counsel for appellees contend that this section is merely declaratory of what the law was without it. But it is well said, in 4 American and English Encyclopedia of Law, page 375, that, "being creatures of statute, endowed only with special powers, and created for special purposes, they can exercise only such powers as are expressly conferred by statute, or which are necessarily implied." And, again, at page 379, that their powers will, of course, vary in different states, according to the differing grants of powers to them in such states. And the course of judicial decision in this state holds them to the strictest limitations of their powers. As clearly put in *Howe v. State*, 53 Miss. 69: "It matters not whether its action . . . be regarded as judicial, legislative, or ministerial. Excess of authority in either capacity is simply void. . . . They can do valid acts only as empowered by law." It was held in *West Carroll v. Gaddis*, 34 La. Ann 928, that "property donated to a parish, in fee simple, for its use and benefit, and upon which a courthouse was built and used, cannot be legally sold under a police jury ordinance, although, the parish seat being changed, the building was abandoned, and threatened going to ruin; that such sale, having been made without legislative authority, is a nullity, and conveyed no title; and that, in such case, the defendants are entitled to reimbursement of the purchase money, as a condition precedent to the recovery of possession of the land by the plaintiff." This case is directly in point, and decisive of this controversy. The opinion of the court, by Bermudez, C. J., is so felicitously clear and accurate that we quote—to adopt—the following, as applicable to our boards of supervisors: "Parishes, like counties in other states, are involuntary political or civil divisions of the state, designed to aid in the administration of government, as state auxiliaries or functionaries, possessing no other powers than those delegated, ranking low down in the scale of corporate existence, and well distinguishable from municipal corporations proper, which are invested with more extensive 443 powers, and endowed with more important functions, and a larger measure of corporate life. As a rule, they cannot acquire real estate unless for public utility, and cannot dispose of the same after it has been acquired and devoted to public service without legislative authority. They may, however, be objects of public or private bounty, in the absence of disabling or restraining statutes. They do not acquire for themselves as a political organization. They acquire for the benefit of the public—the people—particularly the local community, which is represented primarily by the state and secondarily by them, but so far only

as the state has delegated to them the power to do so. As state auxiliaries, they cannot dispose of public property, unless with formal sanction of the state, and even then in those cases only in which the state, violating no trust and no contract, and infringing the rights of no one, could herself legally act. Creatures they are wholly dependent upon and controlled by their creator. They have no life, no attribute, no power, no rights, no obligation, but such as have been conferred or imposed on them."

The court clearly shows (at page 933) the distinction between the powers of quasi corporations, like boards of supervisors and municipal corporations proper, in the disposition of property. To the same effect, strongly emphasizing the doctrine, are *Commonwealth v. Rush*, 14 Pa. St. 186; *Alton v. Illinois Transp. Co.*, 12 Ill. 38; 52 Am. Dec. 479, and notes 486, 487.

We are clearly of the opinion, therefore, that the deed of the board of supervisors to the board of trustees of the presbytery, of date September 4, 1883, and the similar deed, between same parties, of date May 28, 1885, and all the other deeds set out in the bill of complaint, are null and void, and, as such, should be canceled as clouds upon the title of the county; and, the complainants having tendered with their bill the one hundred dollars purchase money received by the county, the decree is reversed, the demurrer overruled, and the cause remanded.

COUNTIES—NATURE OF.—Counties are municipal corporations created for the purpose of convenient local government, and possess only such powers as are conferred upon them by law. They may be called quasi municipal corporations and their corporate powers are more limited than those of incorporated cities and towns: *Stevens v. St. Mary's Training School*, 144 Ill. 336; 36 Am. St. Rep. 438, and note. See monographic note to *Leake v. Lacy*, 51 Am. St. Rep. 119.

MUNICIPAL CORPORATIONS—LIMITATION OF RIGHT TO ALIENATE PROPERTY.—A municipal corporation possesses implied power to alienate or dispose of its property, real or personal, of a private nature, unless restrained by charter or statute, but it cannot dispose of property of a public nature in violation of the trusts upon which it is held: *Fort Wayne v. Railway Co.*, 132 Ind. 558; 32 Am. St. Rep. 277, and note. See *State v. Laclede etc. Co.*, 102 Mo. 472; 22 Am. St. Rep. 789.

MUNICIPAL CORPORATIONS—COMMON COUNCIL—POWER TO BIND SUCCESSORS.—One common council of a city cannot bind its subsequent officials to build a hall upon a particular lot, if the latter believe such lot is not an advantageous and suitable site for such building: *Kendall v. Frey*, 74 Wis. 26; 17 Am. St. Rep. 118. See monographic note to *Gilman v. County of Contra Costa*, 68 Am. Dec. 291-300, on the liability of counties and mode of its enforcement.

CLAYTON v. CLARK.

[74 MISSISSIPPI, 499.]

PAYMENT—ACCEPTANCE OF A SUM LESS THAN THAT DUE.—The acceptance from the maker by the payee of a note of a sum less than that actually due, with a distinct agreement that such payment is made in full satisfaction of the debt, accompanied by a surrender of the note, extinguishes the entire debt.

Action to recover on a promissory note for two thousand seven hundred and eighty-nine dollars, less a credit of one thousand dollars paid by R. C. Clark, one of the makers, to whom the note was surrendered by the payee. The makers of the note filed pleas, in which they contended that such payment of one thousand dollars was received, and the note surrendered under agreement that such payment was in satisfaction of the whole debt, which was extinguished thereby. Plaintiff demurred to such pleas on the ground that the payment mentioned amounted only to part payment of a much greater sum, and that credit was given for such payment by the declaration. The demurrer was overruled. Judgment for defendants, and plaintiff appealed.

W. L. Clayton, for the appellant.

Blair & Anderson, for the appellee.

⁵⁰¹ WOODS, C. J. 'The single assignment of error is as to the action of the trial court in overruling the demurrer interposed by plaintiff below to the pleas of the defendant. If the pleas had distinctly set up a payment of the note sued on by the tender of one thousand dollars—a lesser sum than that named in the note—by the debtor, and the acceptance of this lesser sum by the creditor as full payment of the note, in pursuance of an agreement of both parties to that effect, before the day of the maturity of the note, then by all the authorities the pleas would have been good. For the reason, to quote Coke's quaint language in Pinnel's case, 3 Coke, 117, that "peradventure parcel of it before the day would be more beneficial to him than the whole at the day," ⁵⁰² as multitudes of creditors who have been in sore straits can bear witness to from happy experience. But the pleas do not aver with sufficient distinctness any payment before the day of the note's maturity; they only aver that about the 30th of July payment was made, when the copy of the note sued on shows on its face that the note was due August 1st. It is to be observed, however, that the declaration on the note does not profess to give an exact copy of the note, but only a substantial copy, because, as is alleged, the note itself was not in

the possession of the plaintiff, but was then held by the defendants. Now, to this declaration, the pleas only answered that about two days before the date of the note's maturity, as shown by the copy sued on, and not made from the original then in the defendant's possession, payment was made by tender and acceptance of the lesser sum for the greater. But the plea is to be taken most strongly against the pleader, and about a certain time may mean a day or a week or a month after the time, as well as a day or a week or a month before the time.

We are unable to adopt as sound the argument of counsel for appellees that these pleas are pleas not of satisfaction and payment, but only pleas denying title in appellant to the note, because of the pleas averring that the note had been transferred and assigned by the payee to the payor. Whenever there is shown a legal assignment and transfer of an obligation to pay money by the obligee to the obligor, necessarily there is an extinguishment of the debt, and in such case the debt may be properly said to be satisfied, to be paid. And, as perfectly appears, not only from the transcript before us, but as is substantially agreed by the counsel of the respective parties, the pleas interposed all set up one and the same matters of defense, so it, also, perfectly appears that this defense was a new contract entered into by the parties, whereby it was agreed that the payor of the note should pay to its holder and owner, and the latter should accept from the former a lesser stipulated sum for the greater sum named in the note, in full satisfaction ⁵⁰³ of the debt, and as a full discharge of the payor from further liability, and that this new contract, with the concurrence of both parties thereto, has been completely executed by payment and acceptance of the agreed lesser sum, and the evidence of the indebtedness surrendered and delivered up to its maker by its holder.

With the case viewed in the light of the foregoing elucidation of the purpose and effect of the pleadings, this question—not a new one in our jurisprudence—squarely confronts us, viz: Will the acceptance of a lesser sum, in money, by the payee of a note, than the greater sum actually due from the debtor, on the distinct agreement that such payment and acceptance of the lesser sum shall extinguish the whole debt evidenced by the note, operate to satisfy the note and discharge the debtor, unless the lesser sum of money is paid before the maturity of the note for the greater sum, or unless the lesser sum of money is paid at another place than that named in the note itself as the place of payment? This question has, in two cases, been remarked upon by this court, and, though not necessary to the determination of

the question presented in either case, was, in both instances, affirmatively answered, though in both the affirmative answer was given with evident reluctance and with doubt as to its soundness. We refer to the cases of *Jones v. Perkins*, 29 Miss. 139, 64 Am. Dec. 136, and *Pulliam v. Taylor*, 50 Miss. 251. In the former case, the defense was that the parties had contracted to pay and to accept fifteen hundred dollars in New York in discharge of a debt for two thousand dollars, payable by its terms in Mississippi; and the court held, as is universally held elsewhere, that this was a good defense. But that defense is not the one now before us. In the other case of *Pulliam v. Taylor*, 50 Miss. 251, the defense was, that the debtor had compounded with his creditor, and the creditor had contracted and agreed to accept less than the whole amount of the debt, and had actually accepted the notes of the debtor for the smaller sum, to be paid in installments in equal annual payments thereafter, the notes being secured by mortgage, and ⁵⁰⁴ that one of the notes had actually been paid to the creditor; and this was held to be a good defense to a suit brought by the creditor on the original debt, in disregard of the new agreement to accept notes for a lesser sum. But neither is this the defense before us in the present case.

In the case of *Burrus v. Gordon*, 57 Miss. 93, in which this question was directly presented for determination, it was held that the plea of payment of a less sum for an original greater sum was bad; but the court contented itself with the bare statement of the holding, without reference to authorities, and without argument.

It has been held in England, though not unbrokenly, nor without now and then hostile criticism from bench and bar, that an agreement by a creditor with his debtor to accept a smaller sum of money in satisfaction of an ascertained debt of a greater sum is without consideration, and is not binding upon the creditor, even though he has received the smaller sum agreed upon in the new contract. And in the United States, blindly following what was supposed to be settled law in England for nearly three hundred years, our courts have uniformly announced adherence to this rule, though, in most of the cases examined by us, no such announcement was necessary to their determination. The rule is, in nearly all the cases, declared to have been first announced in *Pinnel's case*, 3 Coke, 117, whereas, an examination of that mischievous and misleading reported case will make it appear at once that the question before us was not in any way involved. *Pinnel's* plea was, that before the maturity of his bond

for the larger sum, plaintiff had accepted a lesser sum agreed upon between the parties, in full satisfaction of the original debt. Now, all the authorities, American and English, including Coke himself, agree that this was a good defense, and that the plaintiff was bound by it, if defendant should properly plead it to a suit for the entire original debt. But the hapless Pinnel, in that remote period when courts were almost as jealous for the observance of technical ⁵⁰⁵ rules of special pleading as for the execution of justice according to right, was adjudged to pay the whole debt, the plaintiff having judgment against him because of his "insufficient pleading, for," says Coke, "he did not plead that he had paid the five pounds, two shillings, and twopence in full satisfaction (as by law he ought), but pleaded the payment of part generally, and that the plaintiff accepted it in full satisfaction."

However amusing and absurd this may appear to us, it was the point decided in Pinnel's case, and the question before us was not only not decided, but it was impossible that it should have been. There Pinnel pleaded payment of the lesser sum before the date of the maturity of the greater sum named in the bond, and its acceptance by his creditor in full satisfaction, and he lost, unhappy wretch that he was—born two or three centuries too soon, and not knowing the difference betwixt legal tweedledum and legal tweedledee—because he pleaded that he paid a part of the greater original sum and that the plaintiff accepted it in full satisfaction, and did not plead that he paid it in full satisfaction. The rule is found in Pinnel's case, but it is bald dictum, and, as stated by Lord Blackburn, in *Foakes v. Beet*, L. R. 9 App. Cas. 605, before the house of lords, for the long period of one hundred and fifteen years after Pinnel's case was decided no case is to be found "in which the question was raised whether payment of a lesser sum could be satisfaction of a liquidated demand." And even after the lapse of more than a century, when the hoary dictum in 3 Coke, Pinnel's case, had by some of the English courts been thought to have ripened into authority, the authority of the dictum was doubted in other tribunals, and its correctness more than once denied, as Lord Blackburn vividly and overwhelmingly demonstrates. Before turning to the American courts, we quote with distinct approbation the observations following, with which Lord Blackburn concludes his opinion, intended to show that Coke was mistaken as to fact, as well as law, in endeavoring to uphold the rule announced by the dictum in Pinnel's case, that ⁵⁰⁶ the new agreement to pay a lesser sum is void because unsupported by any consideration—that is,

that no benefit, in such case, inured to the creditor, viz: "What principally weighs with me in thinking that Lord Coke made a mistake of fact is my conviction that all men of business, whether merchants or tradesmen, do every day recognize and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this often is so. Where the credit of the debtor is doubtful it must be more so."

Turning now to the holdings of the American courts on this question, we are profoundly and painfully impressed with the slavish adherence of the legal and judicial mind to precedent, or, in many cases, to what seems to be precedent only. We have seen already that in neither of our own two reported cases, to which we first referred, was there any question of the effect of a payment in money of a smaller sum in full satisfaction of a larger sum, after maturity of this larger sum, and at the place of payment named in the original contract, and yet in both instances the law is stated to be as laid down in the dictum in Pinnel's case, though in one of our cases (*Jones v. Perkins*, 29 Miss. 139, 64 Am. Dec. 136) it is declared that the rule is entirely technical, and not very well supported by reasons (as a New York court had before then remarked), and "that it requires but very slight consideration to support such contracts"—that is, contracts to pay a lesser sum for and in full satisfaction of a greater original debt. In the other case in our reports (*Pulliam v. Taylor*, 50 Miss. 251) the court said: "The reason given by Lord Ellenborough, in *Fitch v. Sutton*, 5 East, 232" (the first case, in Lord Blackburn's opinion, in which the dictum in Pinnel's case is acted upon as authority, unmistakably), "why the acceptance of a less sum in money than is actually due will not extinguish the whole debt, though received by the creditor upon that condition, is that there must be some consideration for the relinquishment ⁵⁰⁷ beyond the amount paid—something to show the possibility of benefit to the creditor. It is well settled on authority that if the creditor accept some other thing—as a chattel of much less value—it could be pleaded in satisfaction. There is no sound, rational distinction between the acceptance of an article of property, worth just half the amount of the debt, especially such commodities as cotton or iron, that have a definite market value, and the acceptance of half the amount of the debt in money." And yet, although in both our cases the rule under consideration is denounced in the opinions as entirely technical, "not well supported by reasons," not sound, and irrational, it is

nevertheless, seemingly agreed in both that the acceptance of a less sum in money than is actually due will not extinguish the debt, though in neither case was any such point before the court for adjudication.

In New York, where the dictum in Pinnel's case has been received as authority, the highest court has said: "It is true there does not seem to be much, if any, ground for distinction between such a case [one where the debtor offers additional security for a smaller sum and the creditor accepts such security for the smaller sum as satisfaction for the whole debt] and one where a less sum of money is paid and agreed to be accepted in full, which would not be a good plea. But the distinction is as sound as that which exists between the cases of receiving a less sum of money and an article of property just half the value, which would constitute a perfect defense. The rule that the payment of a less sum of money, though agreed by the plaintiff to be received in full satisfaction of a debt exceeding that amount, shall not be so considered in contemplation of law, is technical, and not very well supported by reason. Courts, therefore, have departed from it upon slight consideration": *Kellogg v. Richards*, 14 Wend. 116. It is worthy of curious note that neither in this case, nor in that of *Boyd v. Hitchcock*, 20 Johns. 76, 11 Am. Dec. 247, on which this case rests, was there any plea of ⁵⁰⁸ payment of a lesser sum of money in satisfaction of a greater sum in an original debt, but in one case the point involved was whether a creditor, on a compromise with his debtor, who accepts the note of a third party for a less sum than the original debt due him, in full payment of his debt, may recover any part of his original debt beyond that secured by the note of the third person; and, in the other case, the point was whether a debtor, who gives his note indorsed by a third party as further security for a part of a larger original debt, which is accepted by the creditor in full satisfaction of the whole debt, may plead this in bar of a recovery on the original demand. And, in both cases, the debtor was held discharged from the original debt beyond the sum secured by the note of the third person, or that secured by the note of the debtor for the smaller sum, and indorsed by a third party.

In *Harper v. Graham*, 20 Ohio, 105, the general rule was announced in about the terms employed in the other cases cited by us, and its utter absurdity exposed in vigorous phrase. Says the opinion: "The history of judicial decisions upon the subject has shown a constant effort to escape from its absurdity and injustice. . . . We see, then, that the payment of a less sum than is due, the day before the debt falls due, will discharge it;

payment at another place than is stipulated will do so; the delivery of a collateral article of any value will do so; the acceptance of the debtor's note with security, the note of a third person, or even the negotiable note of the debtor himself, will do so. And yet the payment of as much money in hand as is called for by such note will have no such effect, although it is demonstrable that the utmost that the creditor can get from such note cannot exceed in amount that which he gets in hand in the other case, without trouble, delay, or expense. It may seem to some persons not having a great veneration for these institutions of antiquity, for which no reason can be given, that a rule so effectually undermined, and having neither rhyme nor reason to support it, ought to be at once ⁵⁰⁹ overruled and the whole matter placed upon the footing of reason and common sense, especially as the exigencies of modern commerce frequently compel the most deserving men, with the aid of friends, to compromise their debts for less than the amount due—an operation mutually beneficial to both debtor and creditor, as the creditor gets a part, where otherwise he would lose the whole, and the debtor is left free to commence again with the hope of better success. These considerations will necessarily arise whenever it becomes necessary to decide the general question. In this case we aspire to nothing higher than to follow in the footsteps of the sages of the law, and hold this one of the cases 'taken out' of the rule, because the money, by the original obligation, was payable in Ohio, whereas the lesser sum of money was paid at another place, to wit, in Arkansas."

The absurdity and unreasonableness of the rule seem to be generally conceded, but there also seems to remain a wavering, shadowy belief in the fact, falsely so called, that the agreement to accept, and the actual acceptance of, a lesser sum in the full satisfaction of a larger sum, is without any consideration to support it—that is, that the new agreement confers no benefit upon the creditor. However it may have seemed three hundred years ago in England, when trade and commerce had not yet burst their swaddling bands, at this day and in this country, where almost every man is in some way or other engaged in trade or commerce, it is as ridiculous as it is untrue to say that the payment of a lesser part of an originally greater debt, cash in hand, without vexation, cost, and delay, or the hazards of litigation in an effort to collect all, is not often—nay, generally—greatly to the benefit of the creditor. Why shall not money—the thing sought to be secured by new notes of third parties, notes whose payment in money is designed to be secured by

mortgage and even negotiable notes of the debtor himself—why shall not the actual payment of money, cash in hand, be held to be as good consideration for a new agreement, as beneficial ⁵¹⁰ to the creditor, as any mere promises to pay the same amount, by whomsoever made and howsoever secured? And why may not men make and substitute a new contract and agreement for an old one, even if the old contract calls for a money payment? And why may one accept a horse worth one hundred dollars in full satisfaction of a promissory note for one thousand dollars, and be bound thereby, and yet not be legally bound by his agreement to accept nine hundred and ninety-nine dollars, and his actual acceptance of it, in full satisfaction of the one thousand dollar note? No reason can be assigned, except that just adverted to, and this rests upon a mistake in fact. And a rule of law which declares that, under no circumstances, however favorable and beneficial to the creditor, or however hard and full of sacrifice to the debtor, can the payment of a less sum of money at the time and place stipulated in the original obligation, or afterward, for a greater sum, though accepted by the creditor in full satisfaction of the whole debt, ever amount in law to satisfaction of the original debt, is absurd, irrational, unsupported by reason, and not founded in authority, as has been declared by courts of the highest respectability, and of last resort, even when yielding reluctant assent to it. We decline to adopt or to follow it, and if there is anything in the cases of *Jones v. Perkins*, 29 Miss. 139, 64 Am. Dec. 136, or *Pulliam v. Taylor*, 50 Miss. 251, which may be regarded as sanctioning the rule that the payment of a less sum of money, though agreed to be received in full satisfaction of a debt greater in amount than such agreed payment, shall not be so considered in legal contemplation, then, to that extent, those cases are hereby overruled; and the case of *Burrus v. Gordon*, 57 Miss. 93, in so far as it sanctions the rule we are combating, is hereby overruled.

Affirmed.

PAYMENT—ACCEPTANCE OF LESS THAN SUM DUE.—A debtor may agree to receive anything in payment: *Dunham v. Peterson*, 5 N. Dak. 414; 57 Am. St. Rep. 556. Whether the payment of a less sum will operate as a discharge of the entire debt when the parties agree that it shall be in full satisfaction depends entirely upon whether there is any consideration existing to support such agreement. The slightest consideration will suffice to answer the requirements of this rule and make the agreement binding: *Monographic note to Jones v. Perkins*, 64 Am. Dec. 139; *Spann v. Baltzell*, 1 Fla. 301; 46 Am. Dec. 346. An agreement by the holder of a single bill to relinquish claim to interest which had accrued thereon, and to accept the payment of the principal in full satisfaction of the debt, is without consideration, and the debt is not discharged: *Emmittsburg R. R. Co. v. Donoghue*, 67 Md. 383; 1 Am. St. Rep. 396, and note.

ZACHERY v. MOBILE & OHIO RAILROAD COMPANY

[74 MISSISSIPPI, 520.]

CARRIERS OF PASSENGERS—REFUSAL TO CARRY BLIND PERSON.—A common carrier of passengers cannot refuse to carry a person, otherwise qualified, upon the sole ground that he is blind.

J. L. Buckley and D. W. Heidelberg, for the appellant.

C. M. Wright and A. J. Russell, for the appellee.

523 STOCKDALE, J. On the 13th of March, 1896, appellant exhibited his declaration in the circuit court of Clarke county, alleging that, for several years, he had been traveling on appellee's road, and had business at various stations, and had never given cause of complaint to appellee's servants, and no objection had been made to his riding on appellee's trains until January 25, 1896, and February 23, 1896, at which times appellee refused to sell him tickets from Chickora to Vinegar Bend, and from Vinegar Bend to Buckatunna, which was humiliating and annoying, he being away from home; that, on March 13, 1896, he was again denied a ticket to ride on defendant's road, at Stonewall station, and that, on all these occasions, he offered to the agents of said road the price of the fare, and had engagements that he was deprived of filling on account of the willful refusal of appellee's agents to sell him tickets; that appellee had no other reason for refusing him passage than that appellant was blind, which is true.

To this declaration appellee (defendant below) interposed a demurrer, upon the ground that the declaration shows that the plaintiff was blind, and was not a fit person to travel by himself, and that, as a matter of law, defendant had a right to **524** decline to sell plaintiff a ticket unless accompanied by an attendant. The court below sustained the demurrer, and plaintiff appealed.

The demurrer admitting the truth of the allegations of the complaint, one of which is to the effect that the appellant had been riding on appellee's road for several years, pursuing his occupation, and had given no cause of complaint, and none had ever been made until January 25, 1896, and that the sole reason for rejecting him as a passenger was his blindness, it follows that the naked question, detached from any attending circumstances, is whether a person, otherwise qualified, may be rejected as a passenger for the sole reason that he is blind, and this court is asked to announce that to be the law. There seems to be a scarcity of decisions on the precise point.

In Rorer on Railroads, volume 2, page 957, it is laid down as the law that, "as common carriers of persons, railroad companies are ordinarily bound to carry, according to their reasonable rules and regulations, and in accordance with their regular time cards, all persons who apply to be carried, and are ready to pay, and do pay, the usual fare when required, except unsuitable persons, hereinafter mentioned." These exceptions are those who desire to injure the company, notoriously bad or justly suspicious persons, gross or immoral persons, drunken persons, and those who refuse to obey the rules.

It is laid down in Angell on Carriers, section 524, to be the common law that "it is the duty of public or common carriers of persons *to receive all persons who apply for a passage*" (these words italicized). In section 525 it is said: "It is, in fact, beyond all doubt that the first and most general obligations on the part of public carriers of passengers, whether by land or water, is to carry persons who apply for a passage."

These are the general rules, subject always to the exceptions enumerated; but we have not found any decision holding that, as a matter of law, a person can be rejected because he is blind. It is urged by counsel for appellee that a rule of a railroad ⁵²⁵ company authorizing the refusal, by its agents, of an infirm passenger, unless provided with an assistant, is reasonable and demanded by the convenience of the traveling public. A proposition we do not controvert, but in this case there is nothing in the record to show that appellee had made or promulgated such a rule. On the contrary, it is alleged in the complaint and admitted by the demurrer that appellant was not infirm but robust, able to take care of himself, and to comply with the rules applying to passengers generally; that he had been traveling on appellee's road for several years, and given no cause of complaint to appellee's servants, and none was ever made. All this being admitted by the demurrer, the doctrines laid down in *Sevier v. Vicksburg etc. R. R. Co.*, 61 Miss. 10, 48 Am. Rep. 74, relied on by appellee, do not apply to this case. There is nothing to show that appellant was informed that the absence of an attendant was the cause of his rejection, and nothing to show that he needed one. Appellee's counsel contends that infirm passengers require more and extra care, and for that reason railroad companies have the right to reject them. But appellee admits, by its demurrer, that appellant was not such a passenger, and had never required extra care.

We do not desire to intimate any opinion as to what regulations and rules railroad companies may make as to passengers,

but we decline to hold that, as a proposition of law, stripped of all attending circumstances, public carriers of passengers can reject a person otherwise qualified, upon the sole ground that he is blind.

The judgment of the court below is, therefore, reversed, the demurrer overruled and the cause remanded.

CARRIERS—RIGHT TO MAKE RULES AS TO PASSENGERS. A railroad has a right to make and enforce rules and regulations in regard to the admission of passengers to its trains provided such rules are reasonable: *Northern Cent. Ry. Co. v. O'Conner*, 76 Md. 207; 35 Am. St. Rep. 422. But a common carrier cannot reject or receive a customer at pleasure: *Hollister v. Nowlen*, 19 Wend. 234; 32 Am. Dec. 455. He is bound to receive passengers and goods if he have room and transport them for a reasonable compensation: *Cole v. Goodwin*, 10 Wend. 251; 32 Am. Dec. 470. See extended note to *Commonwealth v. Power*, 41 Am. Dec. 484. But it is proper to refuse to carry one whose person or clothing is filthy or disgusting, or who is affected with a contagious disease, or is infested with vermin: Note to *Vinton v. Middlesex R. R. Co.*, 87 Am. Dec. 716, 717. See *Illinois Cent. R. R. Co. v. Whittemore*, 92 Am. Dec. 138.

ALLIANCE TRUST COMPANY v. NETTLETON HARD- WARE COMPANY.

[74 MISSISSIPPI, 585.]

NOTICE—DEED AS—PURCHASER OF TIMBER.—A recorded deed is notice of the title of the owner of land to one who buys timber standing thereon from another, although the latter is in possession.

NOTICE.—LIS PENDENS is notice to one who buys timber standing on land from a party to a suit of the rights and interest of the complainant therein.

TROVER OR TRESPASS FOR REMOVING TIMBER.—The owner of land who has been disseised may, after re-entry, maintain trover or trespass de bonis asportatis against the dissessor, his vendee, or strangers for timber cut from his land while he was out of possession.

PLEADING.—THE HILARY RULES of pleading are not in force in Mississippi.

TRESPASS.—PLEA OF NOT GUILTY DOES NOT ADMIT the possession in trespass, nor does it admit plaintiff's title in trespass de bonis asportatis or in trover.

Action to recover the value of timber cut and removed from land. S. H. Taylor and wife executed a deed of trust on said land to secure a debt, which was afterward foreclosed and the land purchased by the plaintiff. The land, however, was sold under an execution after the making but before the foreclosure of such deed of trust, and purchased by E. B. K. Taylor. This execution sale was vacated by suit between the plaintiff and

said Taylor, and the report of that action appears in *Taylor v. Alliance Trust Co.*, 71 Miss. 694. Pending said suit the trees were cut, to recover for which the present suit was instituted. Plaintiff's evidence showed that defendant cut the timber after plaintiff's deed and deed of trust were recorded. Defendant did not deny this, but claimed to have purchased the timber from Taylor then in possession of the land, and denied actual notice of such deeds or such suit. Plaintiff was in possession of the land when this suit was brought. Judgment for defendant, and plaintiff appealed.

W. D. Anderson and Gilleylen & Leftwich, for the appellant.

W. R. Harper, for the appellee.

587 WHITFIELD, J. That the appellant is the real owner of the land from which the trees were cut, whose actual value is sought in this suit to be recovered, and had title, was settled in *Taylor v. Alliance Trust Co.*, 71 Miss. 694. The declaration in this case contains three counts—trespass quare clausum fregit, trespass de bonis asportatis, and trover. The plea of not guilty was interposed to all these counts, as was also the plea nil debet. It is not disputed that the appellee got the timber from Taylor, who had no title, and has converted it to its own use. The trees were cut by employes of the appellee, acting, as appellee claimed, as Taylor's agents. It is shown, also, that, when cut, the deed of appellant was of record, and the former chancery suit in which appellant's title was established, begun before the code of 1892 went into effect, was pending, and that the appellee was not in possession of the land. It is manifest from the **588** record that the case was made to turn in the court below on the fact that appellee bought from Taylor, as is alleged, in good faith, without actual notice of appellant's title; and although appellant's deed was duly recorded, and its bill pending—governed, as to the *lis pendens* notice, by the law prior to the code of 1892—the court modified instructions 3, 4, and 5, asked by plaintiff so as to hinge plaintiff's right to recover on the want of such actual notice. These modifications were all erroneous. No notice was necessary, and, if any had been, the appellee was charged with knowledge of the true state of the title by the record of the deed of appellant, and was bound also by the *lis pendens* notice: *Evans v. Miller*, 58 Miss. 120; 38 Am. Rep. 313; *Allen v. Poole*, 54 Miss. 323. The charges should have been given as asked, as should also charges 6, 7, 8, and 9. As to the ninth, plaintiff only asked for the value of the trees standing in the woods, which, as shown by the evidence, was several hundred dollars less than their value

at the mill. If appellant was willing to take less than it was entitled to (as to which see *Skinner v. Pinney*, 19 Fla. 42, 45 Am. Rep. 1), appellee would be benefited, not harmed, thereby. And the charge No. 1, given for appellee, was erroneous for reasons above stated.

But it is insisted with great ingenuity and earnestness that neither trespass *de bonis asportatis* nor trover will lie to recover of a purchaser from a disseisor, or from the disseisor himself, the value of trees cut from the land of the true owner, during possession by such disseisor. It is said that the doctrine of *Emrich v. Ireland*, 55 Miss. 390, goes to the extent of holding only that trespass *quare clausum fregit* may be brought against the disseisor to recover damages to the close intermediate the disseisin and re-entry by the true owner after re-entry; that case being a suit to recover the damages to the freehold occasioned by the removal of a log house and fence. The reason assigned for the distinction is, that the possession of the true owner, by a legal fiction, relates back for this particular purpose of bringing *quare clausum fregit* for such damages to ⁵⁸⁹ the freehold, and for that purpose only, and that it does not so relate back to enable the true owner, after re-entry, to recover the value of trees severed from the freehold intermediate the disseisin and the re-entry from a disseisor who has so cut them while in possession, or any purchaser from him, or any second disseisor; and *Brothers v. Hurdle*, 10 Ired. 490, 51 Am. Dec. 400, is cited in support of, and does squarely maintain, the contention.

But the precisely opposite doctrine is announced in an opinion of great force by Savage, C. J., in *Morgan v. Varick*, 8 Wend. 587, in the course of which it is said with great power: "If that be law, any irresponsible person may turn the owner forcibly out of possession of his real estate, sell the buildings and the timber, and thereby destroy the value of the property; he may sell it, too, under ever so suspicious circumstances, . . . and according to the doctrine quoted [the identical doctrine of *Brothers v. Hurdle*, 10 Ired. 490, 51 Am. Dec. 400], the purchaser is safe, and the owner has no remedy." And the law, as thus announced, is also emphatically approved in *Trubel v. Miller*, 48 Conn. 347, 40 Am. Rep. 177, and *Green v. Biddle*, 8 Wheat. 75, and by Mr. Freeman in a note of great clearness and learning to *Anderson v. Hapler*, 85 Am. Dec. 318, where he distinctly shows that the possession relates back to enable the owner, after re-entry, to bring trespass *de bonis* or trover for timber, etc., cut and carried away by the disseisor, while in possession, against such disseisor, and then, after adverting to the authorities holding that such suit

could not be brought against strangers or anyone other than the disseisor, he says: "On the other hand, there is weighty authority to the contrary, and to the effect that, after re-entry, the disseisee may have his action of trespass, either against the disseisor, his lessee, donee, or feoffee, or against a stranger, for mesne profits and trespass done during the disseisin, on the ground, of course, that by relation the possession is regarded as having been continuously in the plaintiff since the disseisin": Citing, with approval, *Morgan v. Varick*, 8 Wend. 587 ⁵⁹⁰ (so unsatisfactory to Pearson, J., in *Brothers v. Hurdle*, 10 Ired. 490, 51 Am. Dec. 400) and many others. And Mr. Freeman then adds that "strangers against whom the doctrine of relation is not effectual, should be strangers who enter under a title upon which they are justified in relying. The doctrine of relation regards the disseisee as having been in possession during the whole period of disseisin, and, therefore, after re-entry, the law cannot regard the disseisor as having been in possession at all, since one or the other must have the possession. Therefore, after ouster, the disseisor has no action against the trespasser during his possession, and consequently the true owner will have the remedy, there being no wrong without a remedy but against the trespasser only. It is worthy of special observation that in this case of *Brothers v. Hurdle*, 10 Ired. 490, 51 Am. Dec. 400, it is held that such trees severed, as described above, become chattels, but do not become the property of the owner of the land, because it is said "he is out of possession, and has no right to the immediate possession of the thing," etc. It is true that the property whose value was there sued for in trover was some fodder raised by the disseisor while in possession, and stacked, but the court properly repudiated any distinction, as to the proposition under consideration, between severed fodder and severed trees—*fructus industriales* and *fructus naturales*.

But the very opposite of this doctrine is held in *Harris v. Newman*, 5 How. (Miss.) 654-658, and in *Evans v. Miller*, 58 Miss. 120; 38 Am. Rep. 313. In the first-named case, *Harris v. Newman*, 5 How. (Miss.) 654, Sharkey, C. J., declared that if Harris, the defendant in trover, had really had title and right of possession, trover could not have been maintained, "because, being owner of the timber before it was cut into wood, he would own the wood also," and (page 658) that, "when trees are severed from the soil, . . . the right of the owner of the trees is not divested," etc. It was an action of trover by Newman, the true owner, for the value of cord wood cut by Harris, the disseisor, while in possession, Newman having re-entered.

⁵⁹¹ It is further to be noted that *Brothers v. Hurdle*, 10 Ired. 490, 51 Am. Dec. 400, is a North Carolina case, and that it is shown by Mr. Proffatt, in the note to *Hostler v. Skull*, 1 Am. Dec. 585, that the "courts of North Carolina have gone further than any of our courts in requiring both title and possession to maintain trover," and that *Brothers v. Hurdle*, 10 Ired. 490, 51 Am. Dec. 400, though adhered to in *Branch v. Morrison*, 5 Jones, 17, 69 Am. Dec. 770, was criticised therein by counsel. The reasoning in the case is wholly unsatisfactory to us. But the view we take is supported, also, by *Liford's case*, found in 6 Coke, 46 b (not 11 Coke, 51, as erroneously cited in *Emrich v. Ireland*, 55 Miss. 390), which we have carefully examined. The singular thing about this case is, that it was misconceived both in *Brothers v. Hurdle*, 10 Ired. 490, 51 Am. Dec. 400, and *Morgan v. Varick*, 8 Wend. 587. In the former, Pearson, J., said that Lord Coke suggested a distinction between such things as corn, etc., which come by the act of the party, and such things as trees, which come by the act of God. Lord Coke simply said that distinction was suggested by certain year books, but himself repudiated the distinction.

So, in *Morgan v. Varick*, 8 Wend. 587, Savage, C. J., wrestles with *Liford's case* as contrary to his view, when it directly supports him. What he quotes is merely Coke's statement of what the year books have held. What Coke himself says on page 51 b is as follows: "But, upon consideration of all the books, it has been resolved and adjudged that it is all one [as to *fructus industriales* and *naturales*], and there is no diversity betwixt them; for the rule and reason of the law is, as has been said, that, after the regress of the disseisee, the law adjudges, as to the disseisor himself, that the freehold has continued in the disseisee, which rule and reason doth extend as well to corn as to trees or grass, etc; the same law if the feoffee or lessee or the second disseisor sows the land, or cuts down trees or grass, and severs or carries away or sells them to another; yet, after the regress of the disseisee, he may take as well the corn as ⁵⁹² the trees and grass, to what place soever they are carried, for the regress of the disseisee has relation as to the property to continue the freehold, against them all, in the disseisee *ab initio*, for the taking them out of the land cannot alter the property, and, if the disseisee takes them, they shall be recouped in damages against the disseisor," which case is, therefore, in perfect harmony with our decisions, *Harris v. Newman*, 5 How. (Miss.) 654, and *Evans v. Miller*, 58 Miss. 120, 38 Am. Rep. 313, and the other authorities collated by Mr. Freeman in note *supra*. Trover or trespass de

bonis asportatis can be maintained by the disseisee, the true owner, after his re-entry, for the value of trees cut by the first or second disseisor or their grantees intermediate the disseisin and such re-entry.

As to trover—and one of these counts is in trover—it is expressly so held in *Heath v. Ross*, 12 Johns. 140; *Anderson v. Hapler*, 85 Am. Dec. 325, note. See, particularly, the whole of this masterly note, to which we make special reference. And see, also, 26 Am. & Eng. Ency. of Law, 774-778. *Miller v. Wesson*, 58 Miss. 831, does not militate against this doctrine. The cases cited there (*Mather v. Trinity Church*, 3 Serg. & R. 509; 8 Am. Dec. 663, and others) merely hold that the true owner, while out of possession, cannot maintain trover for the value of things severed from the freehold, and converted, as against one in actual adverse possession, claiming title, on the ground that it would necessitate a trial of the title to the land in an action of trover which would be greatly inconvenient. We say nothing as to this last point, though this very case (*Miller v. Wesson*, 58 Miss. 831) held that such title was triable in an action of debt to recover the statutory penalty for cutting trees. But the general proposition that the disseisee, while disseised, cannot maintain trover, against one in actual adverse possession for trees cut by him while in possession (see *Anderson v. Hapler*, 85 Am. Dec. 322, note), provided the possession is “adverse, so as to amount to a disseisin,” affords appellee no comfort; for it was not in adverse possession, but simply bought the trees, as counsel well says, “miles away, at its mill.”

⁵⁹³ But it is next contended that the general issue (not guilty) put in issue the possession on these counts. It is conceded that, under the rules as to pleading in force in England (Hilary Term, 4 William IV, Stephen's Pleading, appendix, note 44, rule 5), the general issue (not guilty) is narrowed in its scope so that in trespass quare clausum fregit it admits the possession and the right of possession, and in trespass de bonis asportatis it admits the plaintiff's property in the goods, and in both puts in issue only the commission of the trespasses, as stated by Stephen's Pleading; sections 159, 160. But it is said that these rules are not in force in this country (Stephen's Pleading, note 20, p. 162), nor in this state. It is said in the case of *Tittle v. Bonner*, 53 Miss. 585: “Our statutes [on pleading] intended to correct the evil which resulted from the general form of pleading before prevalent, and to require every affirmative matter to be pleaded specially or given notice of, so as distinctly to inform the opposite party of the precise ground of contest on which he is to be

met by his adversary. . . . The framers of our present law of pleading, as regulated by statute, had in view the valuable improvements introduced by the courts of England by the *Regulae Generales* Hilary term, 4 William IV, and the statutes on the subject should be so applied as to effectuate the object in view." This was said, however, with reference to affirmative matter, which should be pleaded specially, or notice given of it under the general issue. Under the Hilary rules (rule 1, in Stephen's Pleading, appendix, note 44), nonassumpsit is not admissible at all in an action upon a bill of exchange; but *Tittle v. Bonner*, 53 Miss 585, was such an action, and the plea of nonassumpsit was not condemned.

The effect of not guilty in trover, under the Hilary rules, is clearly pointed out in 26 American and English Encyclopedia of Law, 809, 810, where it is said: "The general issue in trover is not guilty. There is some conflict of authority as to the right of the defendant to show, under such plea, that the plaintiff had no such interest in the property as would authorize him to sue in trover. It is generally held in the United States that he can, and this ⁵⁹⁴ was formerly the rule in England; but, since the adoption of the pleading rules of Hilary term, the general issue of not guilty is there held to operate only as a denial of the conversion, and not of the plaintiff's title to the goods, and this is the rule adopted in some states. Under these rules, if the defendant wishes to put in issue the plaintiff's right to the possession of the goods, he should traverse that he was possessed of them as of his own property in manner and form as alleged in the declaration": Citing, in note 2, many authorities, and, in note 1, page 811, cases from Massachusetts, New York, and Florida. But *Alexander v. Eastland*, 37 Miss. 558, holds expressly that not guilty in trespass does not admit the possession. It is not very clear from the report whether this case arose before or after the code of 1857, wherein was first set forth the statute law of pleading declared in *Tittle v. Bonner*, 53 Miss. 585, to have been adopted in view of the valuable improvements made by the Hilary rules. Logically, of course, if these rules are meant to be enforced here, not guilty in trespass *quare clausum* admits plaintiff's possession and right of possession, and in trespass *de bonis* his property in the goods, and in trover that he has such interest in the property as entitles him to maintain trover; and there may be much to commend this practice. But these rules have never been adopted by statute here. An inspection of them (*Stephen's Pleading*, appendix, note 44) will show that they are not in force here as to the effect of the general issue in several

forms of action; and while, as to affirmative matters, as held in *Tittle v. Bonner*, 53 Miss. 585, they must be specially pleaded, or notice of them given under the general issue, we do not think the Hilary rules are themselves in force with us. Not guilty with us, as at common law, does not admit in trespass the possession, or in trespass de bonis or trover the property in plaintiff. But it is settled with us that all that is necessary to maintain trover is the right to immediate possession: *Dejarnett v. Haynes*, 23 Miss. 600; *Harris v. Newman*, 5 How. (Miss.) 654; *Ware v. Collins*, 35 Miss. 230, 231; 72 Am. Dec. 122. Indeed, under our statute ⁵⁹⁵ (Code 1892, sec. 671) abolishing forms of action—a most wholesome statute—as construed in *Evans v. Miller*, 58 Miss. 120, 38 Am. Rep. 313, the form of action seems clearly immaterial. What we have said sufficiently indicates the course the case should take on the new trial.

Reversed and remanded.

LIS PENDENS.—The office of the filing of notice of lis pendens is merely to charge subsequent purchasers with notice of the pendency of the action: *Jewett v. Iowa Land Co.*, 64 Minn. 531; 58 Am. St. Rep. 555. See monographic note to *Stout v. Phillippi Mfg. etc. Co.*, 56 Am. St. Rep. 853-878.

DEEDS—RECORD OF, AS NOTICE.—The doctrine that the record of a deed is constructive notice applies only against subsequent purchasers: *Karns v. Olney*, 80 Cal. 90; 13 Am. St. Rep. 101. It imparts notice to all persons who subsequently become interested in the title either as purchasers or mortgagees: *Davis v. Ownsby*, 14 Mo. 170; 55 Am. Dec. 105, and note. It is notice to those only who claim through or under the grantor by whom the deed was executed: *Blake v. Graham*, 6 Ohio St. 580; 67 Am. Dec. 360.

TROVER—WHO MAY MAINTAIN.—Actual possession of land on the part of its owner is not essential to support an action by him for timber severed therefrom in the absence of adverse possession in another: *White v. Yawkey*, 108 Ala. 270; 54 Am. St. Rep. 159, and note. See note to *Wilson v. Hoffman*, 32 Am. St. Rep. 487, 488; monographic note to *Hostler v. Skull*, 1 Am. Dec. 585-589. If the plaintiff, in an action of trover, show a right to possession either at the time of the taking or at the time of conversion, it will be sufficient: *Jones v. Sinclair*, 2 N. H. 319; 9 Am. Dec. 75.

TRESPASS—WHO MAY MAINTAIN.—Trespass de bonis asportatis may be maintained by the owner of the land for the removal of wood cut and severed from the freehold, although such owner was not in actual possession: *McClain v. Todd*, 5 J. J. Marsh. 335; 22 Am. Dec. 37, and note. See monographic note to *Orser v. Storms*, 18 Am. Dec. 547-560, on the possession necessary to maintain trespass de bonis asportatis: See *McFeters v. Pierson*, 15 Col. 201; 22 Am. St. Rep. 388.

CARROLL v. STATE.

[74 MISSISSIPPI, 688.]

SEDUCTION — PROSECUTING WITNESS — CONTRADICTION OF.—The prosecuting witness in an action for seduction, who upon being asked if she made a certain declaration, and after an objection to such question has been sustained, answers, denying having made such declaration, may be contradicted by another witness, if such answer has not been excluded from consideration by the jury.

SEDUCTION—CHASTITY.—The thing essential to constitute a woman the subject of seduction is actual chastity, and not reputation for chastity.

SEDUCTION—PROOF OF CHASTITY.—It is competent, in an action for seduction, as one of the elements of proof of actual chastity, to show that the prosecutrix had the reputation of being chaste prior to the alleged seduction.

Trial and conviction of Chester Carroll for the seduction of Agnes Boucher. Carroll appealed.

Critz & Beckett and Leverett, for the appellant.

W. N. Nash, attorney general, for the appellee.

690 **WHITFIELD, J.** Without now passing upon any other assignments of error than those specially noted, we deem it enough to say that the witness, Miss Ida Carroll, should have been permitted to testify in contradiction of Miss Boucher. The last-named witness' testimony on this point was objected to (as to medicine to prevent pregnancy, etc., and its being a girl's own fault if she became pregnant from sexual intercourse), and the objection was sustained, but she answered anyway, denying in the most positive terms that she had made the statement; and the record does not show that this was excluded from the jury, and yet, Miss Ida Carroll was not allowed to testify to the same matter in contradiction. We think this testimony was competent, but we do not think its exclusion reversible error.

But we think the court should have granted the sixteenth instruction asked by the defendant. The charge was eminently proper, in view of the very full testimony as to the reputation for chastity of the woman in the case. It was intended to save the jury from misconception by declaring that the thing which is essential to constitute the woman the subject of seduction is not reputation for chastity, but the fact of actual chastity. It was perfectly competent, as one of the elements of proof of actual chastity, to show that the woman had the reputation of being chaste. We prefer the view that this evidence is competent: *State v. Lockerby*, 50 Minn. 363; 36 Am. St. Rep. 656. "From the nature of the case," says the court in that case, "gen-

eral reputation must be regarded as having some relation to actual character, and goes directly to the question of the ⁶⁹¹ probability of her being chaste." But it remains true that it is actual chastity which is the sine qua non, and the charge properly told the jury that proof of reputation only did not, of itself alone, require them to believe actual chastity was established, if, from all the circumstances and evidence in the case, they had a reasonable doubt of her actual chastity. Looking to the whole record, we cannot confidently say that the refusal of this instruction did not work harm to the appellant, and hence, for this error, the judgment must be reversed and the cause remanded: *Powell v. State* (Miss., May 11, 1896), 20 So. Rep. 4.

SEDUCTION—ESSENTIALS OF OFFENSE—PROOF OF CHASTITY.—"Character," in the statute prescribing that a woman be "of previously chaste character," signifies that which the person really is in distinction from that which she may be reputed to be: *Andre v. State*, 5 Iowa, 389; 68 Am. Dec. 708, and note; *Kenyon v. People*, 26 N. Y. 203; 84 Am. Dec. 177, and note. See *People v. Nelson*, 153 N. Y. 90; post, p. 592, and note. As to the admissibility of evidence as to the reputation of the prosecutrix, see extended note to *People v. De Fore*, 8 Am. St. Rep. 871, 872. Evidence of her good reputation for chastity is admissible, notwithstanding evidence of reputation is inadmissible to show her character for unchastity: Monographic note to *State v. Carron*, 87 Am. Dec. 407, on seduction as a criminal offense.

FIRST NATIONAL BANK v. CAPERTON.

[74 MISSISSIPPI, 857.]

CHATTEL MORTGAGES—POWER OF SALE—FRAUD ON CREDITORS.—A mortgage executed by a manufacturing corporation on its products, reserving to the mortgagor the right to keep, use, and sell such property in the usual course of business, is fraudulent as to its creditors, and is not rendered valid by a provision that if the mortgagor shall sell the property, or any interest therein, otherwise than at retail, the mortgagee shall take immediate possession of, and sell the property to satisfy the mortgage debt.

PLEDGE—ESSENTIALS OF—POSSESSION.—Possession of property and good faith on the part of the pledgee are both essential and necessary to constitute a valid pledge as against the creditors of the pledgor.

Action to foreclose a chattel mortgage. The American Coöperage Company, a corporation, borrowed ten thousand dollars from C. H. McCormack, and among other securities for the loan included certain personal property, agreed between the parties to be held as a pawn or pledge. Afterward said corporation executed to the First National Bank two mortgages, constituting but one transaction, including substantially all the property and

products of the mortgagor, to secure the payment of thirty-five thousand dollars and further advances. These mortgages, executed October 25, 1894, first provided that the mortgagor might "keep and use" the mortgaged property, and a subsequent clause provided that, if the mortgagor should "sell or assign said property or any interest therein," the mortgagee might take immediate possession of and sell such property to satisfy the mortgage debt. After these transactions E. M. Caperton and other creditors of the cooperage company brought suits and obtained judgments for their claims, and levied executions on part of the property embraced in the mortgages to the bank. Said First National Bank then began this action to foreclose its mortgages, and to restrain levies on the property, and obtained the appointment of a receiver to take charge of all the property and business of the cooperage company. C. H. McCormack was, pending the action, admitted as a party complainant, and asserted, by amended bill, a prior claim to that part of the property of the cooperage company covered by his pledge. Caperton and others answered by cross-bill, insisting that the said mortgages were executed in fraud of creditors of the cooperage company, and that McCormack never took possession of the property held by him as a pledge, and that he had no superior right thereto, and prayed that the receiver be required to first pay them out of the proceeds of the property. The court below adjudged the mortgages void, and McCormack's pledge valid. Plaintiff, Caperton, and other creditors and original defendants appealed.

D. A. Scott and J. W. Cutrer, for the appellants.

S. C. Cook, Cook & Yerger, J. W. Cutrer, E. O. Brown, and D. A. Scott, for the appellees.

868 WHITFIELD, J. The mortgage of October 25, 1894, to the First National Bank, on its face reserves the right to the mortgagor to "keep and use" the property. This avoided the instruments, both constituting one transaction: *Acme Lumber Co. v. Hoyt*, 71 Miss. 106. The property was largely consumable in its use. It is said that the subsequent provision that in case the mortgagor should sell or assign said property, or any interest therein, that the mortgagee should take immediate possession, etc., saves the instrument. But the "use" first referred to clearly is the usual use in the ordinary course of business, and the latter provision relates to a selling out of the business, otherwise than at retail, in such ordinary course of business; and a clause providing for such selling out at retail, as usual (*Jones on Chattel Mortgages*, sec. 458, note 1), cannot be permitted. It would oper-

ate a fraud on those who gave credit to the mortgagor on the faith of apparent ownership, serving the purpose of continuous cover. The provisions invoked in *Hitchler v. Bank*, 63 Miss. 403, in *Britton v. Criswell*, 63 Miss. 394, and in *Baldwin v. Little*, 64 Miss. 126, were all in the granting clause of the instruments in those cases, and not, as here and in *Acme Lumber Co. v. Hoyt*, 71 Miss. 106, in the clause reserving control to the grantor. The decree on the appeal of National Bank of Chicago against Caperton et al. is therefore affirmed, as the right result was reached. As to the evidence, it is only necessary to say Charnley, the president of the American Cooperage Company, ⁸⁶⁹ said he expected to continue the business as usual, and that it very clearly shows that the grantor was selling out in the usual course of business, certainly up to October 30th, though Gage says he did not know anything as to this, admitting, however, that the forbearance of the mortgagee doubtless permitted this to be done.

On the appeal of E. M. Caperton et al. against Cyrus H. McCormick we find ourselves, after repeated examinations of the record and of the many authorities cited, unable to concur with the learned chancellor. The possession was too equivocal, looking to the constant substitutions and the whole evidence touching the character of the possession: *Jones on Pledges*, sec. 40, et seq; 18 Am. & Eng. Ency. of Law, 597, note 4; *Nisbit v. Macon Trust Co.*, 4 Woods, 470; 12 Fed. Rep. 686; *Union Trust Co. v. Trumbull*, 137 Ill. 146; *Casey v. Cavaroc*, 96 U. S. 467. In this last case, as here, all the money arising from the sale of the originally deposited securities went to the bank, and not to the pledgee. It may be conceded that McCormick acted in perfect good faith. But the presence of good faith cannot supply the lack of the character of possession essential to the existence of a pledge. As well said by Mr. Justice Bradley in the case last cited: "Bad faith would defeat the pledge, though the creditor had possession. But want of possession is equally fatal, though the parties may have acted in good faith. Both are necessary to constitute a good pledge, so as to raise a privilege against third persons. The requirement of possession is an inexorable rule of law, adopted to prevent fraud and deception; for, if the debtor remains in possession, the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods." The case of the Champagne Wines, cited by Justice Bradley (page 484), is squarely in point here. There was no substitution in the case of *First Nat. Bank v. Harkness*, 42 W. Va. 156. The case of *Abbott v. Goodwin*, 20 Me. 411, is in conflict with our decisions, unless the distinction that the proceeds

of the ⁸⁷⁰ goods sold were to be paid to the mortgagee, and were so paid, distinguishes it; and that distinction cannot aid appellees, because here the proceeds went to the pledgor. In *Sumner v. Hamlet*, 12 Pick. 76, the strongest case learned counsel for the appellees has cited, it seems there was a new and independent arrangement and contract, both as to the debt and the pledge, made in October, 1829, and the forty-five pieces of flannel selected under the new contract were never substituted. In *Combs v. Tuchelt*, 24 Minn. 423, all the unstamped cigars which the pledgor got from Mann, the agent of the pledgee, were paid for, and the money paid to the pledgee, so that the lien of the pledge attached only to the unsold part, which was never substituted. In *Allen v. Smith*, 10 Mass. 308, the possession, designated by stakes and marks, was visible and notorious, and there was no substitution; and *Hilliker v. Kuhn*, 71 Cal. 214, merely holds that a mere temporary charge of the pledge by the pledgor, after delivery to the pledgee, to assist the pledgeholder, does not invalidate the pledge. Of course, delivery may be according to the nature of the thing delivered—as, of the contents of a warehouse by delivery of the key or of a warehouse receipt, or as by delivery of bill of lading, or as by pointing out logs in a boom, etc. We are not speaking specially here of the mere delivery of the original material; but, on the whole evidence, it seems to us clear that the claim of Mr. McCormick cannot, under “the inexorable rule of law” as to the character of the possession, be upheld.

The decree on the appeal of Caperton et al. against McCormick is therefore reversed, and the cause remanded for a decree below in accordance with this opinion.

CHATTEL MORTGAGE—RIGHT OF MORTGAGOR TO MAKE SALES.—A mortgage of a stock of goods under which the mortgagor is permitted by agreement, in or out of the mortgage, but executed at the same time, to sell the goods at discretion, or in the usual course of trade, without any agreement to account for the proceeds, is fraudulent and void as to the existing creditors of the mortgagor without regard to the intent of the parties to the mortgage: *Eckman v. Munnerlyn*, 32 Fla. 367; 37 Am. St. Rep. 109, and note; note to *Richardson v. Jones*, 54 Am. St. Rep. 597. See, also, *Francisco v. Ryan*, 54 Ohio St. 307; 56 Am. St. Rep. 711, and note; and monographic note to *Peabody v. Landon*, 15 Am. St. Rep. 912-917.

PLEDGE—ESSENTIALS OF—POSSESSION.—A pledgee's title must fail unless the pledged property is delivered to, and retained by, him: *Moors v. Reading*, 167 Mass. 322; 57 Am. St. Rep. 460, and note. See note to *Cooley v. Minnesota etc. Ry. Co.*, 39 Am. St. Rep. 614. It is of the very essence of the contract that there should be a delivery or transfer of custody of the pledge to the pledgee, coupled with a continuous retention of possession by him: Monographic note to *Lucketts v. Townsend*, 49 Am. Dec. 731.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

MITCHELL PLANING MILL COMPANY v. ALLISON.

[138 MISSOURI, 50.]

MECHANICS' LIENS—"ACCOUNT"—WHAT MUST CONTAIN—EVIDENCE.—The account which the Missouri mechanic's lien law requires to be filed to obtain a lien is such a statement of the claim as fairly apprises the landowner and the public of the nature and amount of the demand asserted as a lien; and it may consist of one or more items. It may be all on one side or mutual, but it must disclose on its face that the demand is within the terms of the lien law and the affidavit required to verify the account may be considered to ascertain the sufficiency of the latter.

MECHANICS' LIENS—DATE OF ITEMS.—A mechanic's lien account is good and valid, although no date is set opposite each item therein, if it appears therefrom that all of the items were furnished within the time required by law and between named dates.

MECHANICS' LIENS—ACCOUNT.—A just and true account of a mechanic's lien demand is required whether filed by an original or a subcontractor, but it need not have the definiteness of a pleading to be valid.

MECHANICS' LIENS.—PLEADINGS in mechanic's lien cases are governed by the general code of practice, except in those particulars covered by such lien law, and the landowner may require such definiteness of statement in such actions as the code demands in other actions to collect accounts.

MECHANICS' LIENS—ACCOUNT—ONE CHARGE FOR GROUP OF ITEMS.—An account filed to obtain a mechanic's lien is not open to the objection that it contains a "lumping charge," although it contains but one charge for a group of items, provided such group consists of items which are proper subjects for a lien and the contract under which they were furnished named one price for the whole of such group.

MECHANICS' LIENS—PRICE OF MATERIALS.—The price agreed upon for materials furnished between a subcontractor and the contractor for a building is, *prima facie*, the reasonable value thereof.

C. T. Garner & Son, for the appellant.

Lavelock, Kirkpatrick & Divelbiss, for the respondents.

53 BARCLAY, P. J. The statement and opinion of the Kansas City court of appeals sufficiently disclose the decisive facts on which judgment must be pronounced on this appeal. Our learned brethren of that court sent the cause to the supreme court under the sixth section of the constitutional amendment of 1884, because they recognized that the result they had reached was contrary to the previous decision of the St. Louis court of appeals in *Hayden v. Wulfin* (1885), 19 Mo. App. 353. Other decisions of the latter court might be mentioned which accord with the *Hayden* case on the point of present difference between the appellate courts, for instance, *Kearney v. Wurdeman* (1889), 33 Mo. App. 447; *Bruns v. Braun* (1889), 35 Mo. App. 337; *Mesker v. Cutler* (1892), 51 Mo. App. 341; *Bambrick v. Church Assn.* (1893), 53 Mo. App. 225.

54 The substance of the controversy is within a narrow field. The action is to enforce a mechanics' lien. The learned trial court excluded the paper that had been filed for the purpose of securing a lien. In so doing the court doubtless intended to follow the ruling of the Kansas City court of appeals in *Curless v. Lewis* (1891), 46 Mo. App. 278. One objection (which the learned judges of the Kansas City court of appeals found to be fatal) was that the itemized statement fails to mention any dates. At the close of the items is this language: "Delivered and used in the building above described between April 20, 1893, and July 19, 1893."

The affidavit accompanying the claim of lien also recites (among other things) "that said demand accrued within four months prior to the filing of this lien."

The judgment of the Kansas City appellate court was rendered in this cause in 1895, after the opinion of the second division of the supreme court in *McDermott v. Claas* (1891), 104 Mo. 14, but prior to the decision of the first division in *Ittner v. Hughes* (1896), 133 Mo. 679, both of which cases dealt with the subject now presented. The former case, however, seems not to have been called to the notice of the court of appeals in the proceedings there. We might, perhaps, properly dispose of the first objection by a reference to the rulings cited. But the respect we entertain for the views of our learned brethren of the courts whose opinions are now brought under review moves us to add a few observations.

It is argued that, in the absence of dates, a list of items of

materials, used in the erection of a building, is not "a just and true account," as intended by the mechanic's lien act. A just and true account of the demand, claimed as a lien, is positively required, subject to some qualifications (section 6715) not material ⁵⁵ to this case: Rev. Stats. 1889, sec. 6709. The same language (as to the sort of account to be filed to obtain a lien) applies, however, equally to original contractors, subcontractors, and all other persons authorized to file lien claims.

In *McWilliams v. Allan* (1870), 45 Mo. 573, an account was defined to be a "detailed statement of mutual demands in the matter of debt and credit between parties, arising out of contract, or some fiduciary relation." It was held then that a mere statement of a balance due was not good as a lien account, even between the first contractor and owner. But that case must be considered greatly limited, if not in effect overruled, by *Hilliker v. Francisco* (1877), 65 Mo. 598, in which the statement of a single charge of seven thousand seven hundred and ninety dollars, based on the contract of a subcontractor (who furnished stone, together with the labor of setting the same) was held valid, as a lien claim against the landowner. The definition of an account in the *McWilliams* case is certainly incorrect if it implies that every statement outside the terms of that definition is not an account. Though, no doubt, any statement within those terms would be an account, in the sense of the law now before us.

In *Coe v. Ritter* (1885), 86 Mo. 286, it was said that a just and true account is expected to contain "all the various items and dates that go to make it up, for this is the accustomed meaning of the words." But in that case the paper before the court did contain dates "ranging from September 2 to September 16, 1873." So the question now before us was not then involved, and was not decided.

We find the following among recognized definitions of an account: "A reckoning of money or business; a statement or record of financial or pecuniary transactions, with ⁵⁶ their debts and credits, or of money received and paid and the balance on hand or due": *Century Dictionary* (1889). "A registry of pecuniary transactions; a written or printed statement of business dealings or debts and credits, and also of other things subjected to a reckoning or review": *Webster's International Dictionary* (1892).

Some law dictionaries sustain those general definitions: *Anderson's Law Dictionary* (1889), "Account"; *Abbott's Law Dictionary* (1879), "Account." But the meaning of the word is quite varied, according to the shading indicated by the context.

In *Rensselaer Glass Factory v. Reid* (1825), 5 Cow. 593, it was said: "An account is no more than a list or catalogue of items, whether of debts or credits." But even that remark may not be broad enough to include every statement entitled to be viewed as an account, since one item has been held in this state to be a sufficient "account" within the meaning of the lien law: *Hilliker v. Francisco* (1877), 65 Mo. 598.

The account which this law contemplates is such a statement of the claim as fairly apprises the owner and the public of the nature and amount of the demand asserted as a lien. The account may consist of one or more items. It may be all on one side, or mutual in its showing. To be valid, however, it must disclose on its face that the demand is of a sort within the terms of the lien law. The affidavit required to verify the account may be considered along with the account itself in ascertaining the sufficiency of the latter.

In the case at bar, it is stated affirmatively in the lien paper that the account accrued within four months before the lien was filed, and that the items of material were supplied between named dates. The lien was filed November 18, 1893. It is fairly to be inferred, ⁵⁷ from those facts, that the last item of account must have been furnished at least as late as July 18th of that year. That excludes the inference that the account closed at a date too early to give a lien. The showing of time is thus clear enough for the purpose of a lien claim: *Seaman v. Paddock* (1892), 51 Mo. App. 465.

But it does not necessarily follow that such an account would be held sufficient as a pleading, when it comes to enforcing the lien by an action, if any of the defendants demand a more specific statement. Though we do not say it would be bad in a pleading, for that point is not before us on this appeal.

The pleadings in such cases are governed by the general code of practice, except in those particulars covered by the lien law. And the owner or contractor, as defendants, may require such definiteness of statement in an action of this kind as the code demands in other actions to collect accounts: Rev. Stats. 1889, secs. 2057, 2075.

The lien claim is not itself a pleading, under our law: *McMurray v. Taylor* (1860), 30 Mo. 263; 77 Am. Dec. 611. All that is required therein is a substantial compliance with the statute declaring what that claim shall contain: *Grace v. Nesbitt* (1892), 109 Mo. 9. The law intended to extend its benefits to laborers and all sorts of mechanics and materialmen who came within its protecting language. Of such it would be unreasonable to

expect such an accurate and careful statement of account as might be required of an attorney in bringing an action: *Bayer v. Reeside* (1850), 14 Pa. St. 167. If the claim comes into court, it is then time enough to require all the particulars that may be necessary to maintain or defend the action.

The source of the word "account," as well as its popular import and the construction heretofore put ⁵⁸ upon it by courts in Missouri, all indicate that a statement such as is here in question should be accepted as within the legal meaning of that term.

We regard sections 6707 and 6711 of the Revised Statutes of 1889 as containing no more emphatic demands for dates, applicable to items of a lien statement, than does the requirement in section 6709 of a "just and true account."

Viewing the law as a whole, we think the lien claim filed in this case should have been held sufficient, and should have been admitted in evidence. It was error, therefore, to exclude it.

2. There was an objection in the trial court to the lien paper on the ground that there is a so-called "lumping charge" in it. That objection is not well founded. It does not appear that any item included in that charge represents anything that may not properly be made the subject of a lien under our law. If the contract of the subcontractor was to supply for the building a certain group of articles, for a certain price, there is no valid objection to his reciting those articles and then stating that one price in his claim, as was done in the case at bar: *Grace v. Nesbitt* (1892), 109 Mo. 9; *Deardorff v. Roy* (1892), 50 Mo. App. 70; *Sosman v. Conlon* (1894), 57 Mo. App. 25. That price is *prima facie* the reasonable value of the articles: *Hilliker v. Francisco* (1877), 65 Mo. 598. But if that value be challenged as unreasonable, in an action to enforce the lien, the subcontractor can maintain his lien (under section 6705) only for the fair and reasonable value of the labor or materials actually furnished to the building.

The judgment is reversed and the cause remanded to the Kansas City court of appeals with directions to reverse and remand for a new trial.

Macfarlane, Robinson, and Brace, JJ., concur.

MECHANIC'S LIEN—CLAIM—SUFFICIENCY OF.—A mechanic's lien claim which shows upon its face by apt and sufficient words that it is for work or materials furnished to a new building, indicates its class, although it does not use the statutory phrase "erection and construction," and is sufficient: *Wharton v. Real Estate Inv. Co.*, 180 Pa. St. 168; 57 Am. St. Rep. 629, and note. See note to *Hill v. Alliance Bldg. Co.*, 55 Am. St. Rep. 833. Such claim is not suscepti-

ble of reformation: *Fernandez v. Burleson*, 110 Cal. 164; 52 Am. St. Rep. 75. It must describe the premises upon which the lien is claimed: *Lindley v. Cross*, 31 Ind. 106; 99 Am. Dec. 610; and give a general statement of the demand, showing its nature and character: *Breunan v. Swasey*, 16 Cal. 140; 76 Am. Dec. 507.

MECHANIC'S LIEN—CLAIM—LUMPING CHARGE.—A claim for a mechanic's lien is insufficient if it contains only a lumping charge: *Wharton v. Real Estate Inv. Co.*, 180 Pa. St. 168; 57 Am. St. Rep. 629, and note. A claim for mechanic's lien containing a lumping charge, in which are mingled items for which no lien is given, is insufficient to support the lien: *Williams v. Toledo Coal Co.*, 25 Or. 426; 42 Am. St. Rep. 799; *Badger Lumber Co. v. Holmes*, 44 Neb. 244; 48 Am. St. Rep. 726.

STATE v. EVANS.

[138 MISSOURI, 116.]

WITNESSES—WIFE AGAINST HUSBAND—RAPE.—A wife is not a competent witness against her husband in a prosecution against him for a rape committed on her prior to their marriage.

RAPE—EXPERT EVIDENCE—REMOTENESS.—On a trial for rape, the evidence of a physician that he examined the prosecutrix four months after she arrived at the age of consent, and found her hymen destroyed, is incompetent to prove the crime charged, because too remote.

RAPE—AGE OF CONSENT—INSTRUCTION.—On the trial of a defendant charged with the rape of the prosecutrix while she was under the age of consent, the court should limit the inquiry of the jury to the time at which she arrived at the age of consent, and an instruction to find the defendant guilty if he had intercourse with the prosecutrix at any time prior to the finding of the indictment is erroneous, when the accused had been married to the prosecutrix for more than three months prior to the finding of such indictment.

ARREST IN ANOTHER STATE.—The fact that a person accused of crime was arrested in another state does not raise a presumption of guilt from flight.

W. Henry & Son, for the appellant.

E. C. Crow, attorney general, and S. B. Jeffries, assistant attorney general, for the state.

120 GANTT, P. J. The appellant was indicted and convicted in the circuit court of Clinton county of rape and sentenced to eight years' imprisonment in the penitentiary. The indictment charges that Othello M. Evans, on or about August 3, 1894, in and upon one Aggie De La Verne, a female child under the age of fourteen years, to wit, of the age of thirteen years, unlawfully and feloniously did make an assault and her the said Aggie De La Verne then and there unlawfully and feloniously did carnally know and abuse, against the peace and dignity of the state.

The evidence tended to show that on July 13, 1894, the defendant and Aggie De La Verne were at a picnic in Clinton county; that defendant accompanied her to her home that night, and induced her by his solicitations to have sexual intercourse with him in her father's house.

It was shown that she was born May 29, 1881, and consequently was under fourteen years of age when the cohabitation occurred. There was evidence that defendant admitted to Dr. Sharp and to the girl's mother that he had had sexual intercourse with the girl. It was shown, indeed admitted, by both sides, that defendant and the said Aggie De La Verne, were afterward, to wit, on January 21, 1896, and prior to the finding of the indictment, lawfully married. The said Aggie ¹²¹ De La Verne was permitted to testify at the trial and was introduced as a witness in the case by the state in the name of Aggie Evans, and the examination proceeded as follows:

"Q. What is your name? A. Aggie Evans.

"Q. Where do you live? A. In Cameron.

"Q. Are you acquainted with the defendant, Mr. Evans?"

This question and the answer thereto, and all testimony of the witness, was objected to by defendant, for the reason that the witness is the lawful wife of defendant, and as such incompetent as a witness to testify against him against his consent or otherwise, and for the further reason that the indictment charges a rape upon Aggie De La Verne and the witness says her name is Aggie Evans. And thereupon the state, by the prosecuting attorney, admitted that the said witness is the lawful wife of the defendant, and that she was lawfully married to defendant on January 21, 1896, and that the state expects to make out its case by proving that the rape charged in the indictment was committed upon her, the said witness, prior to said marriage, and at the time of the commission of said rape the witness' name was Aggie De La Verne.

And thereupon the court held and ruled that said witness, although the lawful wife of defendant, was a competent witness to prove the fact of carnal knowledge as charged in the indictment, and overruled said objections of defendant; to which action and ruling of the court the defendant then and there at the time excepted.

And under said ruling of the court said witness testified, in substance, that defendant had sexual intercourse with her on the thirteenth day of July, 1894; that she was thirteen years old the May before, and that she was born May 29, 1881; and also that

this occurred ¹²² in Clinton county, Missouri, and that the sexual act was repeated on August 3, 1894, in said county.

Outside of the testimony of this witness there was no evidence of the venue of the crime or of the corpus delicti. The declarations testified to by the mother of the witness, and Dr. Sharp and E. L. Moorman, which might be taken as admissions of defendant that he had sexual intercourse with said Aggie, had no tendency to show when or where it happened, and certainly not to show that it occurred before she was fourteen years of age, so as to constitute rape, as charged in the indictment.

Dr. Sharp, a witness for the state, in his direct examination, was asked the question: "I will get you to state whether or not you ever made an examination of Miss Aggie De La Verne, and, if so, when?"

Which was objected to by defendant's counsel as incompetent, irrelevant, and immaterial. But which objection was overruled, and to which ruling of the court defendant duly excepted.

The witness answered, "In September, 1895."

Then further objection was made by defendant on the ground that it was too remote, which objection was overruled, and to which ruling defendant duly excepted.

The witness in answer said: "In September, 1895—I don't know the day—I was called upon to see her. She was sick. . . . I examined her, and found the hymen entirely destroyed and broken down and as having taken its place as part of the vagina. The hymen is the lower extremity of the vagina. It is easily destroyed in the first copulation."

At the close of the evidence on the part of the state the defendant prayed the court to instruct the jury as follows: "Under the indictment and evidence in this case, the jury will not find the defendant guilty, ¹²³ but must find him not guilty." But the court refused said instruction, to which defendant duly excepted.

And the defendant declining to offer any evidence, the court, at the request of the prosecuting attorney, and against the objections of defendant, gave to the jury six instructions, to which defendant duly excepted; and two of said instructions, numbered 1 and 3, are now complained of, and are as follows:

"1. The court instructs the jury that if they find and believe from the evidence, beyond a reasonable doubt, that the defendant, at any time prior to the filing of the indictment, to wit, the eighth day of May, 1896, did ravish and carnally know the prosecutrix, Aggie De La Verne, either with or without her consent, and that the said Aggie De La Verne was at the time under the

age of fourteen years, then the jury will find the defendant guilty and assess his punishment at death by hanging, or by imprisonment in the penitentiary for a term of not less than five years."

"3. The court instructs the jury that flight raises a presumption of guilt, and if the jury find and believe from the evidence that the defendant, when accused of the alleged crime in the indictment, fled from the state of Missouri, and tried to avoid arrest and trial for said offense, they may take this fact into consideration in determining his guilt or innocence."

There was no evidence that defendant fled from this state when accused of this crime, or at any time, or that he tried to avoid arrest.

On January 17 and 20, 1896, there was a question as to whether or not Aggie was pregnant, and the matter was then discussed between defendant and her mother and Dr. Sharp, but whether she was in fact pregnant at that time, or at any time, the evidence fails to show.

Under the instructions of the court, the jury found ¹²⁴ the defendant guilty. Afterward, on the same day, defendant filed his motion for a new trial, complaining, among other things, of the action of the court in the foregoing particulars, which being overruled, he again excepted.

The foregoing is deemed a sufficient statement of all the material facts necessary to an understanding of the opinion of this court.

1. It is at once evident that the controlling question on this appeal is the alleged error in permitting the wife of the defendant to testify against him. By the common law, the general rule was that a husband or wife could not testify for or against each other in any legal proceeding to which the other was a party or which involved the interests of the other: 1 Greenleaf on Evidence, 14th ed., sec. 343; State v. Ulrich, 110 Mo. 350; State v. Berlin, 42 Mo. 572; State v. Willis, 119 Mo. 485.

To this general rule there are well-defined exceptions. Thus in State v. Arnold, 55 Mo. 89, it is said: "Nothing is clearer than that it is incompetent for the wife to give evidence against the husband, except in the case where she is the immediate prosecutrix for some injury threatened or done to her person." In State v. Willis, 119 Mo. 485, the exceptions are thus stated: "Except in the prosecution of the one for criminal injury to the other, as for assault and battery, rape by some other person assisted by the husband, shooting and forcible abduction": Citing Whipp v. State, 34 Ohio St. 87; 32 Am. Rep. 359.

It will be observed that the rule excludes the husband or wife when he or she is called to testify. If at that time they are lawfully married, neither can testify for or against the other, and it makes no difference at what time the relation of husband and wife commenced: 1 Greenleaf on Evidence, 14th ed., sec. 336. Thus in *Pedley v. Wellesley*, 3 Car. & P. 558, where defendant ¹²⁵ married one of plaintiff's witnesses after she was actually summoned to testify in the suit, she was held incompetent to testify; that case forming an exception to the general rule that neither a witness nor a party can by his own act deprive his adversary of the right to the testimony of a witness.

It is urged by the attorney general that this case falls within the exceptions to the general rule; that it is a criminal injury to the wife. This contention ignores the limitation of the exception itself. *Ex vi termini* a wife is only admitted to testify concerning criminal injuries to herself as a wife, not to a woman who was not at the time of the injury the wife of the defendant.

We agree with counsel that both the rule and its exceptions are founded in public policy, but the legislature of this state has announced the public policy of this state. With this subject before it for its consideration, it has declined to relax or change the common law so as to render the wife a competent witness against her husband in a criminal prosecution of this kind. It permits her to testify for him at his option, but not against him: Rev. Stats. 1889, sec. 4218. And they may testify against each other in suits for divorce: Rev. Stats. 1889, sec. 8918.

The careful expression of these two cases in which a wife may testify excludes all other exceptions save those already enumerated and which descended to us with the rule itself.

The court clearly erred in admitting the wife as a witness over and against the defendant's objections and exceptions.

2. It will be remembered that, according to the evidence for the state, Aggie De La Verne was fourteen years old on the twenty-ninth day of May, 1895. The circuit court, over the objection of defendant, permitted ¹²⁶ Dr. Sharp to testify that, by an examination made by him of the said Aggie in September, 1895, he found her hymen destroyed. This examination, made four months after she was fourteen years old, it seems to us, is too remote. This is not a case of forcible ravishment in which recent injury to the party obviously inflicted at the time of the assault would be competent and persuasive evidence that force had been used to accomplish the copulation, but it is a prosecution based upon the incapacity of the woman to consent by reason of non-age. If the evidence had shown that no other man

than defendant could have had access to this girl, and that the hymen could only disappear from copulation, still, as four months had elapsed since she had become fourteen or arrived at the age of consent, there was ample time in which he could have destroyed the hymen, and yet not have been guilty of the crime as charged. Absence of the hymen under such circumstances would not tend to prove copulation while she was under fourteen years of age, any more than after fourteen.

This evidence could only have been admitted on the theory that the absence of the hymen in September tended to prove its absence prior to May 29, 1895, and from that fact permit the jury to infer sexual intercourse prior to that date also, but as it is a recognized fact that the hymen may be destroyed from causes other than sexual intercourse, and its absence was not inconsistent with chastity and virginity at a time four months prior to the discovery of its absence, we think, standing alone, it was not criminating evidence, without evidence that he alone had the exclusive opportunity of destroying the hymen.

In the state of the evidence, we think this evidence was too remote, was incompetent and prejudicial, and hence it was reversible error to admit it.

127 3. The criticism upon the second instruction for the state is well taken. The instruction should have confined the jury to the inquiry as to sexual intercourse up to the time Aggie De La Verne was fourteen years old, as charged in the indictment. By permitting the jury to make inquiry as to the carnal knowledge of the girl by defendant up to May 8, 1896, it allowed them to convict him of intercourse during a time he was married to her, as he had been married for three months and eighteen days prior to May 8, 1896. The instruction is misleading, and cannot be approved in a case where time and age are such important features in the crime charged.

4. The instruction on the presumption of guilt from flight ought not to have been given without more evidence of flight. The mere fact that defendant was arrested in Arizona was not sufficient of itself to be the basis of the instruction.

For the foregoing errors the judgment is reversed and the cause remanded.

Sherwood and Burgess, JJ., concur.

WITNESSES—COMPETENCY OF—HUSBAND AND WIFE.—A wife is competent to testify against her husband in a criminal action whenever she is the individual particularly and directly injured or affected by the crime for which he is being prosecuted: *Dill v. People*, 19 Colo. 469; 41 Am. St. Rep. 254; *Commonwealth v. Sapp*, 90

Ky. 580; 29 Am. St. Rep. 405. See extended note to *State v. Boyd*, 27 Am. Dec. 377-381. The wife is a competent witness in a criminal proceeding against her husband for incest: *State v. Chambers*, 87 Iowa, 1; 43 Am. St. Rep. 349.

RAPE.—On the general subject see the monographic note to *Smith v. State*, 80 Am. Dec. 361-374.

GEARY v. KANSAS CITY, OSCEOLA, AND SOUTHERN RAILWAY COMPANY.

[138 MISSOURI, 251.]

TRIAL—CONTINUANCE—CONSTITUTIONAL LAW.—If an application for a continuance of a civil case, made by the defendant on the ground of the absence of a witness, is denied under authority of a statute, because plaintiff admits that such witness if present would testify to the facts set out in the application, such action of the court is proper, but the question of the constitutionality of such statute is properly raised by an exception to the action of the court in denying the application for a continuance upon the authority of the statute.

TRIAL—CONTINUANCE—CONSTITUTIONAL LAW.—There is no constitutional objection to a statute which permits a party in a civil suit to defeat his adversary's motion for a continuance on account of an absent witness by admitting that such witness will testify as stated. Such statute deprives no person of life, liberty, or property without due process of law.

DAMAGES—VERDICT, WHEN NOT EXCESSIVE.—A verdict for four thousand five hundred dollars for personal injury received through negligence is not excessive, nor does it indicate that it is the result of passion or prejudice, when the evidence shows that the plaintiff, prior to the accident which rendered him a permanent invalid, was a healthy man thirty-seven years of age, earning seventy-five dollars per month, and that he has expended seven hundred and fifty dollars for medical aid and attendance without permanent relief.

Johnson & Lucas, for the appellant.

Warner, Dean, Gibson & McLeod, for the respondent.

256 BRACE, J. This is an appeal from a judgment of the circuit court of Clay county in favor of the plaintiff for the sum of four thousand five hundred dollars in an action for damages for personal injuries received by him while acting as conductor of one of defendant's construction trains, the locomotive of which it is alleged in the petition "was derailed by reason of the breaking of the flange of the wheel of the front truck thereof, which said wheel was, and for many days prior thereto had been, in a cracked, defective, and dangerous condition." The answer was a general denial and a plea of contributory negligence, upon which issue was joined by reply.

The suit was instituted in the Jackson circuit court October

9, 1893, taken thence on application of the defendant by change of venue to the circuit court of Clay county, where the same coming on for trial on the 16th of November, 1894, the defendant made application for a continuance on account of the absence of one Owen Brady. The plaintiff admitted that the said absent witness would, if present, swear to the facts set out in the application. The court thereupon overruled the same, and the action of the court in so doing was excepted to, and is here assigned as error. The trial of the case then proceeded, and at the close of all the evidence was submitted to the jury on instructions. Of those given for the plaintiff number 2 was excepted to, and the giving of the same is here assigned as error. That instruction is as follows:

"2. If the jury believe from the evidence that on or about December 12, 1892, between Sheffield and Grand View, on defendant's line of railroad, the plaintiff was conductor upon the defendant's construction train then and there drawn by one of defendant's ²⁵⁷ engines, then on defendant's road between said points, defendant's said engine was derailed by reason of the cracked, defective, and dangerous condition of the wheel of the front truck thereof, causing the flange of said wheel to break; that defendant knew, or by the exercise of reasonable care and caution might have known, of such cracked, defective, and dangerous condition of said wheel in a sufficient time to have made the same reasonably safe for the purpose for which it was used, but failed to do so; that plaintiff did not know of such cracked, defective and dangerous condition of said wheel; that by reason of said derailment of said engine plaintiff was thrown with great force and violence against the boiler head of said engine and was thereby injured, then plaintiff is entitled to recover, and your verdict must be for plaintiff, provided you further believe from the evidence that plaintiff was not guilty of contributory negligence as stated and defined in the instructions given you at the instance of the defendant."

The refusal of the court to give defendant's instructions 1, 9, and 12 is also complained of as error. Those instructions are as follows:

"1. On the pleadings and the evidence the plaintiff cannot recover."

"9. There is no evidence before the jury that any notice of the defective condition of the truck wheel was ever brought to the notice of the defendant's master mechanic, or foreman of the roundhouse, and defendant cannot be affected by the knowledge of any of its employes except those above named."

"12. If you believe from the evidence that the position of the plaintiff on the locomotive contributed to his injury, and that plaintiff had no business engagements thereon connected with his duty as conductor of said train, your finding will be for the defendant."

²⁵⁸ The other errors assigned are, that the verdict is contrary to the law as declared by the court, and that the damages are excessive.

1. The application and affidavit for a continuance was made in conformity to the requirements of the statute, and was overruled by the court solely on the ground of the admission by the plaintiff that the witness, if present, would swear to the facts set out in the affidavit, as authorized by section 2127 of the Revised Statutes of 1889, and the sole ground of the complaint against that ruling is, that said section is obnoxious to the provisions of section 30, article 2, of the constitution, which provides that "no person shall be deprived of life, liberty, or property without due process of law," and in support of this contention we are cited to *State v. Berkley*, 92 Mo. 41, and *Elsner v. Supreme Lodge*, 98 Mo. 646. Although the defendant did not avail itself of the privilege of reading the evidence of the absent witness contained in the affidavit for a continuance, we think the question of the constitutionality of this section of the statute is properly raised by the exception to the action of the court in overruling the application upon the authority thereof.

The section of the statute that was held to be invalid in *State v. Berkley*, 92 Mo. 41, was section 1886 of the Revised Statutes of 1879, which contained similar provisions to the section now in question in regard to applications for a continuance in criminal cases, but it was so held because obnoxious to the provisions of section 22, article 2, of the constitution, which provides that: "In criminal prosecutions, the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury ²⁵⁹ of the county." This section of the constitution has no application whatever to the trial of civil actions, and the case of *State v. Berkley*, 92 Mo. 41, is no authority for defendant's contention. Counsel for defendant argue, however, that by a parity of reasoning, section 2127 of the Revised Statutes of 1889, might be held obnoxious to the provisions of section 30 of the constitution, and to be consistent this court ought to so hold. Such, however, is not the opinion of this court, as shown

by the case of *Elsner v. Supreme Lodge*, 98 Mo. 640, in which the constitutionality of this section was upheld, and by *Wilson v. Purl*, 133 Mo. 367, in which its validity was assumed. Nor of either of the courts of appeals in both of which its constitutionality has been assumed or expressly recognized: *Richey v. Branson*, 33 Mo. App. 418; *Woolwine v. Bicks*, 39 Mo. App. 495. That "there is no constitutional objection to a statute which permits a party in a civil suit to defeat his adversary's motion for a continuance on account of an absent witness by admitting that the witness will testify as stated," is a general rule deduced from the rulings of the courts of last resort in the states which have statutes similar to the one under consideration: 4 Ency. of Pl. & Pr. 869 b and note 1. The supreme court of Arkansas, in *Graham v. State*, 50 Ark. 161, in following our ruling in *State v. Berkley*, 92 Mo. 41, declared that "no constitutional objection to such legislation is apparent when applied to civil cases." Without pursuing the argument upon this question, we think that the constitutionality of section 2127 may well be considered settled upon authority, and this point will be ruled against the defendant.

2. The objection urged to instruction number 2 given for the plaintiff is, that "it assumes that the wheel of the locomotive was cracked, dangerous, and defective." We do not so understand this instruction. What the court told the jury in this regard by the instruction ²⁶⁰ was, that "if the jury find from the evidence that the defendant's engine was derailed by reason of the cracked, defective, and dangerous condition of said wheel," etc. How the jury was to find that the engine was derailed by reason of the cracked, defective, and dangerous condition of the wheel, without finding that the wheel was in a cracked, defective, and dangerous condition, we think would be past the understanding of the ordinary jurymen, and would perhaps suggest itself only to the verbal critic who found it necessary to find some fault in the instruction, which in this instance was evidently not found by the learned counsel for the defendant until after the trial, for their own instructions contain a like assumption, if this be an assumption.

3. The objection urged to the action of the court in refusing to give defendant's instruction 1 and 9 is, that the evidence wholly failed to show that defendant knew, or by the use of reasonable care could have known, that "the flange of the wheel on the front truck" had been in a cracked, defective, and dangerous condition, in that the evidence tended to prove a defect in the flange on the forward tank truck, and not in the

flange of the wheel of the front truck, as charged in the petition, and that no notice was shown to defendant's master mechanic or its foreman of such condition.

We, perhaps, have not sufficient technical mechanical knowledge to appreciate the force of the first ground of this objection, but there is no doubt in our mind, after a careful examination of this record, that the same defect, in the same flange, of the same wheel, was in the mind of the pleader when he drew the petition; in the mind of all the witnesses when they were testifying on the subject; of the court in the instructions; and of the jury in making their verdict, and ²⁶¹ there is no possibility of prejudicial error in this matter. As to the second ground, it is only necessary to say the engineer in charge of this locomotive made a written report of the defective condition of the wheels of this engine in the particulars charged, and, in addition, testified that he called the attention of the foreman of the roundhouse having the engine in charge for repairs, to the condition of the defective wheels two or three months before the accident, and another engineer testified that the wheels of the engine were in this condition a month before the accident. Here was evidence tending to prove actual notice to the company of the defect, and that the defective condition had existed for such a length of time as that the defendant, by the exercise of reasonable care, ought to have discovered and repaired it. In the face of this evidence, the court could not do otherwise than refuse these instructions.

4. Defendant's instruction number 12 was properly refused, because from the evidence it appears that the train consisted of the engine and one flat-car only; that at the time the engine went over and the plaintiff received the injuries of which he complains he was in the cab of the engine, which he testifies was his usual place when attending to the discharge of his duties with such a train, and there is no evidence tending to prove that that was not the proper place for him to be in the discharge of the business that he then had in hand for the defendant.

5. There is nothing in the contention that the verdict is against the law as declared in instruction 10, given for the defendant. Cook, the inspector, testified that he didn't examine the engine the night preceding the accident, and, even if he had testified to such an inspection, it would still have remained for the jury to determine whether he made a proper inspection.

²⁶² 6. There is nothing in the record to indicate that the verdict was the result of passion or prejudice. The amount of the damages assessed does not so indicate. The evidence tended

to prove that prior to the accident the plaintiff was a healthy man about thirty-seven years of age, earning seventy-five dollars per month; that since the accident he has been an invalid, unable to follow his occupation, and under the care of physicians, and has expended about seven hundred and fifty dollars for hospital, doctors', and nurses' bills; that this condition promises to be permanent, and is the result of the injuries he received. Such being the case, the amount of damages assessed cannot be said to indicate passion or prejudice. We find no prejudicial error in the trial of this case, and the judgment will be affirmed.

It is accordingly so ordered.

All concur, except Robinson, J., absent.

DAMAGES—WHEN EXCESSIVE, JUSTIFYING SETTING ASIDE VERDICT.—When the amount of damages awarded in an action for negligence is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury, the verdict will be set aside as excessive: *Morgan v. Southern Pac. Co.*, 95 Cal. 510; 29 Am. St. Rep. 143, and note. See, also, *Texas Ry. Co. v. Brick*, 83 Tex. 526; 29 Am. St. Rep. 675; *Standard Oil Co. v. Tierney*, 92 Ky. 367; 36 Am. St. Rep. 595.

TRIAL—STATUTE—AVOIDING CONTINUANCE BY ADMISSIONS.—A statute providing that on a criminal trial, when the defendant moves for an adjournment on the ground of the absence of a material witness, the trial may proceed on the public prosecutor's stipulating to admit that the witness, if present, would testify as set forth in the affidavits, and that such statements might be read as his evidence, is not unconstitutional: *State v. Jennings*, 81 Mo. 185; 51 Am. Rep. 236. Such action constitutes an admission not merely that the absent witnesses would have testified to the facts alleged, but also that the facts alleged are absolutely true: *Dominges v. State*, 7 Smedes & M. 475; 45 Am. Dec. 315. See, however, *United States v. Sacramento*, 2 Mont. 239; 25 Am. Rep. 742. Even under such stipulation, the court may grant the continuance, if there is a well-founded doubt of the truth of the affidavit: *Hyde v. State*, 16 Tex. 445; 67 Am. Dec. 630, and note.

GLENCOE LAND AND GRAVEL COMPANY v. HUDSON BROTHERS COMMISSION COMPANY.

[138 MISSOURI, 489.]

REAL PROPERTY.—SAND OR GRAVEL while in its original bed is real estate.

TROVER TO RECOVER REALTY.—An action of trover, or its equivalent under the statute, lies only for the conversion of personalty, and not for the conversion of sand or gravel while in its original bed, or, in other words, while it is part of the realty.

CONTRACT—BREACH OF INDUCED BY THIRD PARTY. Merely to induce or procure a free contracting party to break his contract, whether done maliciously or not, to the damage of the other contracting party, does not give a right of action against the

party holding out the inducement. The only remedy is an action upon the contract for its breach.

CONTRACTS—REMEDY FOR BREACH INDUCED BY THIRD PARTY—MASTER AND SERVANT.—An action cannot be maintained against a third person for inducing a party to break his contract with the complainant, when the relation of master and servant does not exist between the contracting parties, and a railroad company is not the servant of the shipper. The remedy is an action on the contract to recover for its breach.

R. M. Nichols, for the appellant.

J. W. Noble, G. H. Shields, W. G. Pettus, and J. R. Warfield, for the respondents.

⁴⁴¹ **MACFARLANE, J.** This was an action for damages instituted in the circuit court of the city of St. Louis on November 7, 1893, upon a petition as follows:

"For cause of action, plaintiff avers that the plaintiff is a corporation duly organized and doing business under the laws of the state of Illinois; that the defendants, the Hudson Brothers Commission Company, is a corporation duly organized under the laws of the state of Missouri, and that its codefendants are its chief and only stockholders and directors; that plaintiff is seised of, and at the present time and at the times hereinafter stated, was in possession of a piece of land located in St. Louis county, Missouri, aggregating two hundred and thirteen acres, more or less, "which is particularly described.

"Plaintiff further avers that at the present time and at the times hereinafter stated there was located ⁴⁴² upon said above-described property large and valuable deposits of sand and gravel and other materials; that long prior to the dates hereinafter stated plaintiff operated said sandbeds and gravel pits by excavating and selling therefrom large quantities of gravel and sand; that prior to the dates hereinafter referred to plaintiff had established a very valuable and lucrative business in the sale of the valuable deposits of sand and gravel upon its said premises as aforesaid.

"Plaintiff further avers that said above-described real estate and said sandbars and gravel pits as aforesaid are located adjacent to the Missouri Pacific railroad; that said Missouri Pacific Railroad Company is a common carrier of freight throughout the state of Missouri, and as such was, at the times hereinafter referred to, serving this plaintiff as such carrier in the transportation of plaintiff's sand and gravel from said sandbars and gravel pits, as aforesaid, to various markets; that there is no other common carrier or railroad, or means of hauling said gravel and

sand from said premises, saving and excepting said Missouri Pacific railroad; that said sand and gravel pits are connected with said Missouri Pacific Railroad Company by means of a switch built across and over the above-described real estate, and at the times hereinafter referred to, at the request and under contract with this plaintiff, the said Missouri Pacific Railroad Company was using said switch in hauling said plaintiff's sand and gravel from said pits aforesaid to the various markets at which it had vended and had contracted to sell said sand.

"Plaintiff further avers that prior to the first day of June, 1893, it entered into a contract with the Missouri Pacific Railroad Company whereby it, the said Missouri Pacific Railroad Company, agreed to transport large quantities of sand and gravel, to wit, twenty-five carloads per day, or more if so desired, ⁴⁴³ over its said roadbed to any and all points as might be directed by plaintiff; that on or about, to wit, June 1, 1895, the said defendants notified the said Missouri Pacific Railroad Company that they claimed said premises and sandbars and gravel pits located thereon, and that it, the said Missouri Pacific Railroad Company, should no longer serve the plaintiff in removing to market or moving from the premises over its said roadbed and over the switch built upon said premises from said sandbars and gravel pits to the main line of said Missouri Pacific Railroad Company, the said gravel and sand from said sandbars and gravel pits or the cars which said plaintiff loaded with gravel and sand from said sandbars and gravel pits; that said defendants claimed the same as aforesaid and would hold said Missouri Pacific Railroad Company liable as trespassers if they entered upon said premises or carried therefrom the said sand and gravel at the request of this plaintiff.

"Plaintiff further avers that at that time it had entered into divers and sundry contracts with parties for the sale and delivery of great quantities of sand and gravel aggregating many hundreds of carloads; that by reason of said notice given to said railroad company by the said defendants as aforesaid, the said railroad company refused to haul any gravel or sand from said premises; that in consequence of said refusal of said railroad company, plaintiff was wholly unable to sell said sand and gravel—that without a market for the said sand and gravel through said common carrier, as aforesaid, the same was wholly useless and worthless; that by reason of said notice and interference with plaintiff's business, as aforesaid, the same has been wholly lost and broken up and rendered worthless to plaintiff, and that

plaintiff has sustained a damage by reason of said unwarranted trespass and ⁴⁴⁴ interference against its rights by defendants in the sum of twenty-five thousand dollars.

"Wherefore and by reason of the premises plaintiff prays judgment against defendants for the sum of twenty-five thousand dollars together with interest and costs of this suit."

To which petition the defendants interposed a demurrer, assigning as a ground that the petition did not state facts sufficient to constitute a cause of action. The demurrer was sustained on March 20, 1895, and the cause is before this court by appeal from the judgment upon such demurrer.

1. Plaintiff insists that the petition states a cause of action which authorizes a recovery as for the conversion of the gravel and sand. That contention cannot be sustained, for the reason that an action of trover, or an equivalent action under the code, only lies for the conversion of personal property. The charge of the petition is, that on the land were "large and valuable deposits of sand and gravel," which, on account of the interference of defendant, plaintiff was unable to market. Sand and gravel, while in its original bed, is as much a part of the realty as the earth itself. After it has been mined or separated from the land it may become the subject of conversion, not before. The petition makes no charge of the conversion of sand or gravel after its separation from the land: 26 Am. & Eng. Ency. of Law, 774, par. 5, and cases cited.

2. It is insisted, in the next place, that defendant is answerable in damages to plaintiff for the injurious consequences of inducing the railway company to violate its contract to carry to market the gravel and sand taken from the land. This is really the ground relied upon for recovery.

When plaintiff and the carrier entered into the ⁴⁴⁵ contract each looked to the other for its faithful performance, and to no one else. We can see nothing more in this case, as stated, than a simple voluntary breach of contract by the railroad company. We are unable to see, in principle, that there is a difference between a breach induced by the advice, persuasion, or even threats, of a third party, and one caused by circumstances connected with the business or service the party contracted to do. In either case the breach of contract would be voluntary. There is no charge in the petition that the railroad company was caused to refuse to carry out its contract, or was rendered unable to do so, contrary to its will, by the fraud, deceit, or coercion of defendant. The direct and proximate cause of plaintiff's damage is the voluntary breach of contract on the part of the carrier,

and resort must be had to it for compensation for the injurious consequences.

We are also unable to see that defendant committed a legal wrong in giving notice to the railroad company of its claims to the sand and gravel. Indeed, circumstances may have existed which made it equitable and just that it should have done so. At least, it had the undoubted legal right to protect its property interests in that manner.

If defendant committed no legal wrong, though his act resulted in damage to plaintiff, the law affords no remedy. It is *damnum absque injuria*. The motive of defendant is immaterial: *Anderson v. Public Schools*, 122 Mo. 67.

Plaintiff relies altogether on the doctrine announced in *Lumley v. Gye*, 2 El. & B. 216, *Bowen v. Hall*, L. R. 6 Q. B. Div. 333, and *Walker v. Cronin*, 107 Mass. 555, and cases following them.

The question really decided in those cases is stated in the opinion in the case last cited as follows: "It ⁴⁴⁶ is a familiar and well-established doctrine of the law upon the relation of master and servant that one who entices away a servant, or induces him to leave his master, may be held liable in damages therefor, provided there exists a valid contract for continued service known to defendant."

In *Lumley v. Gye*, 2 El. & B. 216, the majority of the court held that the relation of master and servant existed between the parties to the contract, and defendant was answerable in damages for inducing one of the parties to break her contract. But *Cole-ridge, J.* (afterward lord chief justice), dissented, holding that the relation of master and servant did not exist within the meaning of the statute of laborers (23 Edward III) in which he said the law had its origin. After an able argument he reached this conclusion: "Merely to induce or procure a free contracting party to break his covenant, whether done maliciously or not, to the damage of another, for the reasons I have stated, is not actionable."

Judge Cooley states the same rule. He says: "An action cannot, in general, be maintained for inducing a third person to break his contract with the plaintiff; the consequence, after all, being only a broken contract, for which the party to the contract may have his remedy by suing upon it": *Cooley on Torts*, *497; *Chambers v. Baldwin*, 91 Ky. 121; 34 Am. St. Rep. 165; *Bourlier v. Macauley*, 91 Ky. 135; 34 Am. St. Rep. 171; *Boyson v. Thorn*, 98 Cal. 578; *McCann v. Wolff*, 28 Mo. App. 447.

An inquiry whether public policy requires a different rule to

govern contracts between master and servant, in respect to personal services to be rendered, is not in this case, for it cannot be said that the contract in question created the relation of master and servant between plaintiff and the railroad company. To hold that a carrier is the servant or employé of the shipper ⁴⁴⁷ would revolutionize the whole law relating to the duties, obligations, and liabilities of common carriers.

The judgment is affirmed.

All the judges of this division concur.

REAL PROPERTY.—What things may be considered as part of the realty see *Metcalf v. Nelson*, 8 S. Dak. 87; 59 Am. St. Rep. 746, where underground water is so considered; natural gas, in *People's Gas Co. v. Tyner*, 131 Ind. 277; 31 Am. St. Rep. 433; growing trees, in *McKenzie v. Shows*, 70 Miss. 388; 35 Am. St. Rep. 654, and note; an aerolite, in *Goddard v. Winchell*, 86 Iowa, 71; 41 Am. St. Rep. 481; fructus naturales, in *Sparrow v. Pond*, 49 Minn. 412; 32 Am. St. Rep. 571, and note.

TROVER—WHEN LIES.—One who has the right of possession of a certain tract cannot maintain trover for stone and gravel dug therefrom against one who has the actual adverse possession of the land, and sets up title thereto: *Mather v. Trinity Church*, 3 Serg. & R. 509; 8 Am. Dec. 663, and note. See, *Grub v. Gullford*, 4 Watts, 223; 28 Am. Dec. 700, and note.

DAMAGES FOR PROCURING PARTY TO VIOLATE HIS CONTRACT.—See *Perkins v. Pendleton*, 90 Me. 166; ante, p. 252, and note.

ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY v. LOWDER.

[138 MISSOURI, 583.]

JUDGMENTS, VOID—INJUNCTION AGAINST.—An injunction does not lie against an execution issued upon a void judgment rendered by a justice of the peace. The defendant has an ample and adequate remedy at law.

PROCESS—PROTECTION OF.—If a court has jurisdiction over the subject matter, but not over the person, an execution regular on its face and issued by such court, will protect the officer serving it, and he is not bound to examine into the validity of the judgment upon which such execution is issued.

JURISDICTION OF THE SUBJECT MATTER is the power, lawfully conferred, to deal with the general subject involved in the action.

JUDGMENTS VOID—SALES UNDER—REMEDY.—If a judgment and execution are void, no title passes to the purchaser thereunder, and the defendant therein may replevin the property from such purchaser.

PROCESS—PROTECTION OF.—Although a judgment and execution are void, such execution, if regular on its face, is a protection to the officer serving it against an action of trespass by the owner of the property levied upon.

E. D. Kenna and L. F. Parker, for the appellant.

H. C. Pepper, for the respondent.

535 BURGESS, J. This is a proceeding by bill in equity to restrain the collection of a judgment in favor of defendant Howell, and against plaintiff, rendered by J. L. Bedford, a justice of the peace of Barry county, upon the ground that the judgment is void, in that it was rendered without service of process on the plaintiff herein.

The petition alleges that J. F. Bedford, a justice of the peace of Barry county, rendered judgment against the plaintiff in favor of W. A. Howell, defendant; that the judgment was rendered without the service of process on the plaintiff; that an execution had been issued on the judgment, and that the defendant Lowder, who is constable of the township where the judgment was rendered, had seized under said execution, and was proceeding to sell, a car, the property of the plaintiff. A temporary injunction was granted.

At the return term of the summons issued in the cause, defendants interposed a general demurrer to the petition, alleging as ground therefor "that the petition does not state facts sufficient to constitute a cause of action." The demurrer was sustained, and, upon plaintiff's refusal to plead further, judgment was rendered for defendant dismissing the petition. Then followed an assessment of damages on motion of defendants.

From the judgment rendered plaintiff appealed to the St. Louis court of appeals, where the judgment was affirmed (St. Louis etc. Ry. Co. v. Lowder, 59 Mo. App. 3), but the case was certified to the supreme court upon the ground that the decision is in conflict with prior decisions of the supreme court.

The only question presented by this record is, Will a court of equity enjoin the collection of an execution **536** issued on a void judgment rendered by a justice of the peace?

There is some conflict in the adjudications of the appellate courts of this state upon this question. It has, however, always been held that, where the court or justice of the peace has jurisdiction of the subject matter, the ministerial officer is not bound to examine into the validity of the judgment, the proceedings, or the process. It is sufficient for his protection if the execution be regular upon its face and the court from which it was issued had jurisdiction of the subject matter: *Miller v. Brown*, 3 Mo. 128; 23 Am. Dec. 693; *Higdon v. Conway*, 12 Mo. 295; *Melcher v. Scruggs*, 72 Mo. 406. But "if the court has no jurisdiction over the subject matter, the officer is supposed to know it; and

an execution issued upon such judgment is no protection to him. It is his duty to refuse to serve it. But if the court has jurisdiction over the subject matter, and has only failed to obtain jurisdiction of the person, an execution will protect the officer, provided the failure does not appear upon the process in his hands": *Howard v. Clark*, 43 Mo. 348.

"Jurisdiction of the subject matter is power to adjudge concerning the general question involved, and is not dependent upon the state of facts which may appear in a particular case arising, or which is claimed to have arisen, under that general question. One court has jurisdiction in criminal cases; another in civil cases; each in its sphere has jurisdiction of the subject matter. Yet the facts, the acts of the party proceeded against, may be the same in a civil case as in a criminal case. . . . We conclude that jurisdiction of the subject matter is the power lawfully conferred to deal with the general subject involved in the action": *Hunt v. Hunt*, 72 N. Y. 217; 28 Am. Rep. 129; *State* ⁵³⁷ v. *Smith*, 104 Mo. 419; *State v. Neville*, 110 Mo. 345; *Musick v. Kansas City etc. Ry. Co.*, 114 Mo. 309.

In the case at bar, the justice had jurisdiction of the subject matter, and the execution was regular upon its face, but the judgment was void for the want of jurisdiction of the defendant therein, no process having been served upon it. In such circumstances it was held in *Bornschein v. Finck*, 13 Mo. App. 120, that the defendant in the judgment had no adequate remedy at law, and that injunction to restrain the collection of the judgment and execution was the proper remedy. A similar ruling was announced in *United States etc. Ins. Co. v. Reisinger*, 43 Mo. App. 571.

A different ruling was, however, made by the supreme court in *Stockton v. Ransom*, 60 Mo. 535, in which plaintiff sought to restrain by injunction the sale of personal property under an execution issued on a void judgment, and it was held, in so far as the facts appeared, the plaintiff had an ample and adequate remedy at law. That case was followed and approved in *Bear v. Youngman*, 19 Mo. App. 41, in which it was held that injunction was not the proper remedy, even though the judgment was void.

The same question was again before the supreme court in *St. Louis etc. Ry. Co. v. Reynolds*, 89 Mo. 146. The suit was to restrain by injunction the collection of a judgment purporting to be rendered in favor of the defendant, M. L. Reynolds, by a justice of the peace. The petition alleged that the justice of the peace acquired no jurisdiction of the defendant in the judgment

sought to be enjoined. The court said: "If the judgment of the justice is void, then will the execution issued thereon be void also, and equity will not interfere to do a nugatory act. The remedy of the railway is ample and adequate at law, and this prevents the interposition of a court of equity, as a suit could be maintained against ⁵³⁸ the constable as a trespasser, and the purchaser's pretended title would be valueless. This is elementary law." What was said in that case to the effect that a suit could be maintained against the constable as a trespasser was with respect to a collateral matter not involved in the case, was merely obiter, and should not be regarded as decisive of that question. Aside from that question the decision is in line with the weight of authority in this state. The cases of *Bornschein v. Fink*, 13 Mo. App. 120, and *United States Ins. Co. v. Reisinger*, 43 Mo. App. 571, should therefore be overruled.

The execution, being regular upon its face and emanating from a court having jurisdiction of the subject matter, was a sufficient protection to the constable against any action of trespass which might be brought against him by the judgment debtor, notwithstanding both judgment and execution were void, but it does not for that reason follow that the defendant in that suit did not have full, complete, and adequate remedy at law against the collection of a judgment which it alleges to be void. The defendant in the execution, plaintiff here, could have replevied the property from the purchaser after its sale by the constable under the execution. In such case the remedy at law would be ample and adequate.

The judgment and execution being void, no title would have passed to the purchaser of the property thereunder, notwithstanding such execution may have been a protection to the officer against an action of trespass against him by the owner of the property.

It would be difficult, if not impossible, to reconcile the authorities in this state in regard to the granting injunctive relief to restrain the collection of taxes assessed without authority of law against personal property, nor shall we attempt to do so, because unnecessary to a determination of this case, but it may not be ⁵³⁹ out of place to suggest that such relief should not be granted, if at all, except to avoid a multiplicity of suits, or under peculiar circumstances.

The judgment whose collection is sought to be restrained in this case is absolutely void for want of service of process on the plaintiff herein, and, as under such circumstances the law affords plaintiff adequate legal relief, the temporary injunction was im-

providently granted. It follows that the judgment of the St. Louis court of appeals, affirming the judgment of the court below, is affirmed.

Gantt, P. J., and Sherwood, J., concur.

INJUNCTION AGAINST JUDGMENTS.—Merely erroneous and irregular judgments, whether against infants or adults, cannot be enjoined. Void judgments can be enjoined: *Levystein v. O'Brien*, 106 Ala. 352; 54 Am. St. Rep. 56, and note. Relief by injunction from a judgment without notice will not be given when the party complaining has an adequate and complete remedy at law: *Hamblin v. Knight*, 81 Tex. 351; 26 Am. St. Rep. 818, and note.

PROCESS valid on its face protects the officer serving it: *Note to Tellefsen v. Fee*, 163 Mass. 188; ante, p. 379.

JURISDICTION is the right to adjudicate concerning the subject matter in a given case: *Springer v. Shavender*, 118 N. C. 33; 54 Am. St. Rep. 70, and note.

EXECUTION BASED UPON VOID JUDGMENT is absolutely void, and may be attacked collaterally as well as directly, and its enforcement may be restrained by injunction: *Olson v. Nunnally*, 47 Kan. 391; 27 Am. St. Rep. 296. A judicial sale thereunder may be treated as void: *Pope v. Benster*, 42 Neb. 304; 47 Am. St. Rep. 703, and note. See *Great West Min. Co. v. Woodmas etc. Min. Co.*, 12 Colo. 46; 13 Am. St. Rep. 204.

SPRINGFIELD v. SMITH.

[138 MISSOURI, 645.]

TAXATION—LICENSE TAX—POWER TO IMPOSE.—The state may collect an ad valorem tax on property used in a calling, and at the same time impose a license tax upon the pursuit of that calling, and may delegate such power to a municipal corporation. Such power may be exercised by a city, when delegated to it, either as a police regulation, or for the purpose of raising revenue within constitutional limitations.

TAXATION—LICENSES—ORDINANCES.—An ordinance imposing a reasonable license tax upon each car operated by a street railway company, and also imposing a fine upon such company for operating its cars without having paid such license tax, is valid.

TAXATION—MUNICIPAL EXEMPTION—CONSTRUCTION OF ORDINANCES—STREET RAILWAYS.—Municipal exemption of a street railway from taxation cannot be extended by construction beyond the plain terms of the grant, and ordinances containing such exemption are to be strictly construed against the company and in favor of the public.

TAXATION—LICENSE TAX—RIGHT OF MUNICIPALITY TO EXACT—CONSTRUCTION OF ORDINANCE.—In construing an ordinance of a city conferring upon a company authority to construct and operate a street railroad, the right to exact license fees will not be denied simply because it has not been expressly reserved, and if the contract between the city and the company does not in terms dispense with the payment of a license, the rights of the latter are not impaired by a subsequent ordinance requiring such payment.

Stewart, Cunningham & Eliot, for the appellant.

L. Walker, T. W. Silvers, and T. B. Love, for the respondent.

650 BRACE, J. The plaintiff is a city of the third class, with express power, by ordinance, to grant the right to any person or corporation to make and construct street railroads in any street in said city, and to regulate and control the use thereof (Rev. Stats. 1889, sec. 1576); to levy and collect a license tax on "street railroad cars" operated by any corporation (Rev. Stats. 1889, sec. 1506), and to levy and collect taxes for general revenue purposes on all mixed, personal, and real property within the limits of the city taxable according to the laws of the state: Rev. Stats. 1889, sec. 1495.

The defendant is the general manager and secretary of the Metropolitan Street Railway Company, which by assignment succeeded to all the rights, privileges, and franchises granted by the city to the Citizens' Railway Company, and the Woodland Heights Rapid Transit and Improvement Company, and, under the direction and management of the defendant, was operating its street-cars in said city at the time the complaint herein was filed, without license, as required by the ordinances of said city, approved April 5, 1892 (Rev. Ord. 1892, art. 1, c. 15), section 7 of which provides inter alia that: "No person, corporation, or company shall use, run, or drive, or cause to be used, run, or driven for hire, pay, profit or compensation any street-car . . . without a license therefor from the city. The charges for such license shall be for each street railroad car or **651** coach of whatever kind ten dollars per year." Section 21 of which imposes a fine of not less than five dollars nor more than one hundred dollars for the violation of the requirements of section 7.

The defendant was arrested upon a complaint for the violation of this ordinance, fined one hundred dollars in the recorder's court, from which he appealed to the Greene county criminal court, where, upon a trial de novo, he was again found guilty and his punishment assessed at a fine of fifty dollars. From the judgment of which court he appealed to the St. Louis court of appeals, by which court the cause was transferred to this court on the ground "that the questions arising for decision involve the construction of certain provisions of the constitution of this state."

The only defense made to the action is a claim of exemption by the Metropolitan Street Railway Company from the operation of this ordinance by reason of the acceptance by it, and its assignors, of two prior ordinances of the city, approved October

3, 1889, the conditions of which have been duly performed by them. These ordinances were of like tenor and effect, one relating to the Citizens' Street Railway Company, and the other to the said Transit and Improvement Company. The former is as follows:

"Be it ordained by the city council of the city of Springfield as follows:

"Section 1. That the Citizens' Street Railway Company be and is hereby permitted to change its motive power from horse and mule power to electricity motor power as provided for in the acts of the general assembly of the state of Missouri, approved March 18, 1887.

"Sec. 2. Said Citizens' Street Railway Company shall, in the change of its said motive power, do and perform all work upon its superstructure and tracks in ⁶⁵² a way and manner so as not to stop or materially interrupt ordinary traffic and travel upon the streets occupied by it until the grades of the streets are established; in all cases where improvements are provided for or contemplated, and all places of change, erection of poles, and work necessary for such change of motive power, shall be done under the supervision of the street committee of the city, to the end that said railway may be operated when said motive power is changed without damage to person or property, and in a way to impede ordinary traffic and travel on the streets as little as possible; provided, that said street railroad company shall keep the street between their tracks and for two feet outside of the outside rail thereof in the same condition as the remainder of the street is kept by the city.

"Sec. 3. The said street railroad company shall charge not more than five cents for a single trip one way, or one dollar for twenty-five trip tickets, and not more than one-half the regular fare for children under twelve years of age, and nothing for children under three years of age.

"Sec. 4. That inasmuch as the contemplated change of motive power will be attended with expense, it is further provided that this privilege to operate said electric motor power on the streets now occupied by said Citizens' Street Railway Company shall continue for thirty-five years from the publication of this ordinance. And said Citizens' Railway Company shall have the right and privilege within the present and future corporate limits of the city of Springfield, Missouri, and the additions thereto, of building, erecting, laying, operating, maintaining, repairing, and using electric apparatus and appliances, electric ma-

chines, engines and apparatus, towers, masts, lamp-posts, lamps, posts, poles, wires, pipes, and all other machinery, apparatus, and appliances necessary and convenient for the use and application of electricity for the purpose of lighting ⁶⁵³ and of using, operating, renting, and applying such electric machines, electric apparatus, and appliances, towers, masts, lamp-posts, poles, wires, pipes, and apparatus and appliances for the purpose of conveying and supplying electric currents for light and power for hire and use in any and every capacity for which electricity is now or may hereafter be used; and of so using and occupying the streets and alleys of said city of Springfield for said purpose, and for the erection of towers, masts, posts, lamps, poles, etc., thereon, and the laying of wires and pipes therein, and for repairing the same without injury or detriment to private rights or property of individuals or corporations, or without public detriment, except temporary inconvenience caused by the erection of such towers, masts, lamp-posts, poles, and the laying and running of such wires and pipes and repairing of same—all to be done under the police regulations of the city; provided, that such change of motive power shall be made within one year after the street improvements on the streets are completed by the city, otherwise the city reserves the right to repeal this ordinance as to the streets occupied by said company upon which such motive power has not been so changed."

It is contended that these ordinances granting powers and franchises to the said two companies, the benefits of which passed to the Metropolitan Street Railway Company, constitute contracts between the city and these companies as to which the said provisions of sections 7 and 21, of article 1, chapter 15, of the ordinances of 1892, are void, under article 1, section 10, of the constitution of the United States prohibiting laws impairing the obligation of contracts.

It seems to be conceded in the argument of the learned counsel for the defendant that if the right to levy the tax in question is a reasonable exercise of the ⁶⁵⁴ police power of the city, then the ordinances of 1889 can afford no defense to the action, since it was not within the power of the legislative authority of the city to exempt the franchise thereby granted from the operation of the governmental power of the city to regulate the use thereof. But it is contended that the ordinance in question is an exercise of the taxing power of the city, for the purposes of revenue, and not of the police power for the purpose of regulation, hence was the subject of contract, and was in fact contracted away so far as the Metropolitan Street Railway Com-

pany is concerned by the ordinances of 1889, which it is contended constitute a contract for that purpose within the protection of the provision aforesaid of the federal constitution. In support of this contention we are cited to a line of cases of which Mayor etc. of New York v. Second Avenue R. R. Co., 32 N. Y. 261, is the leading one. But, in the view we take of this case, a review and discussion of those cases in which express power to levy and collect a license tax was not given is deemed unnecessary. It is beyond question that, by the sections of the statute cited, the plaintiff city was invested with express power not only to tax the property of street railway companies for revenue purposes (Rev. Stats. 1889, sec. 1495) but to tax, license, and regulate the business of running street railroad cars in the city: Rev. Stats. 1889, secs. 1506, 1576. That the state may collect an ad valorem tax on property used in a calling, and at the same time impose a license tax upon the pursuit of that calling, and may delegate such power to a municipal corporation, is well-settled law in this state: *Aurora v. McGannon*, 138 Mo. 38, and cases cited. Express power having been granted to the city in this instance by section 1506 to levy and collect a license tax on the running of street railroad cars for hire in the streets of the city, there is no necessity of deducing ⁶⁵⁵ such right from the general police power of the city. It may be exercised as granted, either as a police regulation, or for the purpose of raising revenue within constitutional limitations. Conceding, for the sake of argument, that the tax imposed by the ordinance is for revenue purposes, and not simply for the purpose of police regulation, and conceding further that the ordinances of 1879 constitute a contract quoad the matters therein treated, if such contract, when properly construed, is an agreement on the part of the city not to levy and collect such tax thereafter, then such contract might to that extent be held to be ultra vires and void, upon the authority of *State v. Hannibal etc. R. R. Co.*, 75 Mo. 208, and not within the protection of the federal constitution. There is no necessity, however, for so ruling in this case for the reason that the so-called contract when properly construed cannot be so interpreted. The principles upon which such contracts are to be construed with reference to the taxing power are well settled. They are to be liberally construed in favor of the public. "Grants of this class are not to be extended by construction beyond the plain terms in which they are conferred, but should be construed strictly against the corporation, or those claiming under the grant": *Wyandotte v. Corrigan*, 35 Kan. 21. They are special privileges, as to which

"nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation and doubt is fatal to the claim": *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Newton v. Commissioners*, 100 U. S. 561; *Rice v. Railroad Co.*, 1 Black, 358. "Exemptions of this kind are to be strictly construed, the rule being that the right of taxation exists unless the exemption is expressed in clear and unambiguous terms": *Railway Co. v. Philadelphia*, 101 U. S. 656 528; *Delaware Railroad Tax*, 18 Wall. 206. Illustrating the application of these principles, in *Wyandotte v. Corrigan*, 35 Kan. 21, a case quite analogous to the one in hand, it was held that where an ordinance granting a street railway franchise for twenty-one years providing how and when the road shall be constructed, how it shall connect, that the tracks and the street between the tracks shall be kept in repair and up to grade, and regulating the price to be charged for fare of passengers, such ordinance will not exempt the corporation from reasonable regulation by the city in the operation of the road; nor will it prevent the city from levying and collecting a license tax thereon, by ordinance subsequently passed; which in this case was one hundred dollars per annum. In *New Orleans v. New Orleans etc. R. R. Co.*, 40 La. Ann. 587, it was held that "a contract conferring the right to lay and operate a street railway, without dispensing with the payment of a license, is not impaired by the exaction of such license"; and in that case a license tax of two thousand five hundred dollars per annum was sustained; and, going further in the same direction, it was held by the same court, in *New Orleans v. Orleans R. R. Co.*, 42 La. Ann. 4, 21 Am. St. Rep. 365, that "a contract between a municipal corporation and a railroad company, by which the latter pays a bonus for the franchise therein conferred by the city, cannot be construed as conferring an immunity from the payment of license on its business by the company, in the absence of an express stipulation to that effect in the contract." In *Railway Co. v. Philadelphia*, 101 U. S. 528, it was held that when the charter of a railway company provided that it should pay a license fee of thirty dollars per car per annum required by the ordinances of the city, its charter rights were not impaired by a subsequent statute and ordinance requiring the payment of a license fee of fifty dollars per car per annum. In a recent work on street railway ⁶⁵⁷ law (*Booth on Street Railway Law*, sec. 281), the following rule is deduced from the authorities: "In construing the charter of a company conferring authority to construct and operate a street railway, the right to exact license

fees will not be denied because it has not been expressly reserved in the grant; and where the contract between the city and the company does not in terms dispense with the payment of a license, the rights of the latter are not impaired by a subsequent ordinance requiring such payment." The ordinance under which the defendant claims exemption in this case has been set out in full, and, applying to it these principles of construction, no argument is required to demonstrate that it does not, by the terms used, nor by any fair implication therefrom, exempt the street railway company from the license tax which the city was expressly authorized to impose, and subject to which power the company took the franchise therein granted. The cases of *State v. Corrigan etc. Ry. Co.*, 85 Mo. 263, 55 Am. Rep. 361, and *Kansas v. Corrigan*, 86 Mo. 67, in neither of which was the question of the power of taxation involved, are not in point in this case. The ordinance imposing the tax being valid, it became the duty of the company to take out the license required thereby, in order to protect its employes from the penalty imposed for the violation thereof, and the defendant, having been guilty of such violation by running its cars without such license, was properly fined: *Wyandotte v. Corrigan*, 35 Kan. 26.

The judgment of the criminal court of Greene county is therefore affirmed.

All concur.

TAXATION.—LAWS GRANTING EXEMPTIONS from taxation are strictly construed: *Hibernia Ben. Soc. v. Kelly*, 28 Or. 173; 52 Am. St. Rep. 769; and all reasonable intendments indulged in favor of the state: *Note to Commonwealth v. Makibben*, 29 Am. St. Rep. 389.

LEGISLATURE—DELEGATION OF LEGISLATIVE POWERS TO MUNICIPAL CORPORATIONS—TAXATION.—The constitutional maxim which prohibits the legislature from delegating its power to any other body or authority is not violated by vesting municipal corporations with certain powers of legislation as to matters of purely local concern, of which the parties immediately interested are supposed to be better judges than the legislature: *Chicago v. Stratton*, 162 Ill. 494; 53 Am. St. Rep. 325, and note. And it may by general law confer upon cities and towns the power to impose occupation or license taxes for municipal purposes: *Magneau v. Fremont*, 30 Neb. 843; 27 Am. St. Rep. 436. The charter of a city conferring upon it power "exclusively to license, regulate, and tax any or all lawful occupations," etc., authorizes it to exact of a company running street-cars a fixed sum per car as a license tax, and does not conflict with a constitutional provision requiring taxes to be uniform: *Denver City Ry. Co. v. Denver*, 21 Colo. 350; 52 Am. St. Rep. 239, and note. See *Allentown v. Western Union Tel. Co.*, 148 Pa. St. 117; 33 Am. St. Rep. 820, and note.

SCHOOL DISTRICT OF KANSAS CITY v. SHEIDLEY.

[138 MISSOURI, 672.]

GIFTS.—NOTES of a donor payable in future to a donee are not the subject of a gift.

GIFTS ARE NOT COMPLETE until the money is paid or the property is delivered. A note or other promise to pay in future is not a gift.

NEGOTIABLE INSTRUMENTS—CONSIDERATION.—A note promising to pay a school district a certain sum of money for the establishment of a library is not without sufficient consideration merely because the maker receives no benefit or value moving from the beneficiary to himself. The consideration for the note is sufficient if the beneficiary expends money or incurs liability in reliance thereon and in furtherance of the establishment of a library, nor does the insanity of the maker of the note subsequent to its execution, and after its liabilities are incurred, affect or destroy the consideration.

NEGOTIABLE INSTRUMENTS—DELIVERY.—If notes are delivered to a third person, by consent of the maker and payee, with directions by the maker to deliver them to the payee whenever called for, this is a good and sufficient delivery.

NEGOTIABLE INSTRUMENTS—CONSIDERATION—PUBLIC POLICY.—The fact that a board of education, in the exercise of its official discretion, regulates its action in establishing a library to some extent with reference to the amount, value, and character of voluntary contributions, whether made or promised, does not render its action void as against public policy, and the fact that its action is regulated to some extent by the voluntary contribution of a note, does not render the latter void as tending to unduly influence such action.

CONTRACTS—WANT OF CONSIDERATION—PLEADING.—If defendant pleads want of consideration for a contract, the court must consider its legality, and its illegality is sufficiently raised by an objection in the nature of a demurrer to the evidence to require its consideration on appeal.

CONTRACTS—ILLEGALITY—PLEADING.—If plaintiff, to make out his case, is required to show that the contract sued on is, for any reason, illegal, the court should not enforce it, whether such illegality is pleaded as a defense or not, but, if such illegality does not appear from the face of the contract, or from the evidence necessary to prove it, and depends upon extraneous facts, the defense is new matter, and must be pleaded to be available.

NEGOTIABLE INSTRUMENTS—CONSIDERATION.—EVIDENCE that the maker of a note was a man of great wealth is inadmissible upon the sole issue of want of consideration, but if one defense is that such maker was insane at the time of making the note, large in amount, evidence of his moderate means is admissible in rebuttal as bearing upon his legal capacity.

W. L. Stocking and C. O. Tichenor, for the appellants.

Gage, Ladd & Small, for the respondents.

678 MACFARLANE, J. Plaintiff, a public school corporation, sues the defendants, as executors of George Sheidley, deceased, upon three promissory notes dated March 9, 1894, each

for \$5,000, payable respectively, six, twelve, and eighteen months after date, one of which is as follows:

"\$5,000.00. Kansas City, Mo., March 9, 1894.

"Six months after date I promise to pay School District of Kansas City, Missouri, or order, at the Union National Bank, Kansas City, five thousand dollars, for value received, with interest at the rate of no per cent per annum.

"GEORGE SHEIDLEY."

By answer defendants admit the execution of the notes, but set up as defenses: 1. That, at the time of their execution, the testator was of unsound mind and incapable of making them; 2. That they were wholly without consideration; and 3. That they were never delivered. The case was tried to a jury and a verdict was found for the plaintiff on all three counts, judgment was rendered in accordance therewith, and defendants appeal.

On the question of want of capacity of deceased to make the notes, defendants assign no error, but agree that that issue was fairly tried.

The evidence shows that the building occupied by the school district for a library was regarded as wholly insufficient, and for several years prior to the execution of these notes the erection of a new building had been under consideration by the board of education. For the purpose of purchasing a site, and erecting the building, an issue and sale of bonds of the district had been contemplated.

Previous to this transaction, George Sheidley had expressed an intention of making a donation of \$25,000 to the district, to be used in the purchase of 679 books. About this time the board came to the conclusion that the proceeds of bonds could not be lawfully applied to the purchase of a site for the building, and, there being no other funds with which to make such purchase, it concluded that the enterprise would have to be abandoned. Sheidley, being informed of the difficulty and probable failure of the enterprise for want of means to purchase a site, advised the board of his willingness to allow it to use the intended donation in any manner it saw fit.

A meeting between him and a committee of the board was held, and his proposed donation for that purpose was accepted. Sheidley, at the time, did not have the ready money, but proposed giving his notes to the district payable in the future, but promising that they would be paid whenever the money was needed. It was thereupon agreed that he should make five notes

of \$5,000 each, payable to the district, and, as he was expecting to leave Kansas City the next morning, he agreed to place them in the hands of Thomas B. Tomb, for the board, to be handed to it when called for. The next morning, March 9, 1894, he executed the notes and delivered them to Tomb as agreed, and informed the president of the board that he had done so.

A meeting of the board was immediately called, and the president made the following report of what had been done.

"Since recess was taken last Thursday evening we have, in company with J. C. James and J. V. C. Karnes, called on Mr. George Sheidley, who had heretofore offered to give \$25,000 toward buying books for use in the library building to be erected, and, owing to the embarrassment of the board about securing a site for said building, Mr. Sheidley agreed to change the form of his donation and was willing to allow this sum ⁶⁸⁰ to be used in such way as the board might deem best to secure the erection of said building, and to make sure of such offer he has placed said sum in the hands of Thomas B. Tomb, to be held for this board, and to be turned over whenever the board may call for the same to be used in securing said building."

A vote of thanks was thereupon tendered to Mr. Sheidley for his liberal donation, and the following resolution was adopted:

"Whereas, in the judgment of this board, it is expedient that the school district borrow \$200,000 for the purpose of erecting a public library building, containing the offices of the board of directors of the school district, and to issue therefor the bonds of the district, therefore,

"Resolved, that there be submitted to the qualified voters of the school district of Kansas City, in the county of Jackson and state of Missouri, at the biennial election for school directors to be held on the third day of April, 1894, a proposition authorizing the board of directors of said school district to borrow on behalf of the school district the sum of \$200,000 for the purpose of erecting a public library building, containing the offices of the board of directors of the school district, and for the payment thereof to issue the bonds of the school district. Such bonds to be of the denomination of \$1,000 each, dated July 2, 1894, payable twenty years from their date, with interest at the rate of four per cent per annum, payable semi-annually on the second days of July and January in each year, both principal and interest payable in gold coin of the United States of America in the city and state of New York.

"Resolved, that the president and secretary of the board be and they are hereby authorized and directed to sign and publish,

according to law, notice of the ⁶⁸¹ submission of such proposition, and to take all other necessary steps for the proper submission thereof, in accordance with the terms of this resolution."

In pursuance of this resolution an election was held, which resulted in an almost unanimous vote in favor of borrowing \$200,000 for the purpose of erecting a public library building. Bonds were thereafter issued and sold, and the proceeds were placed in the hands of the treasurer. This was all concluded July 14, 1894. Mr. Sheidley was taken sick about the 1st of July, 1894, and was thereafter, until his death, incapable of attending to business.

On the 14th of July, 1894, the president of the board demanded the notes of Tomb, who declined to deliver them, on account of objections by members of Sheidley's family. The board afterward, in February, 1895, purchased a site for \$30,000, \$5,000 of which was paid in cash, out of the general revenues of the district, and assumed mortgages on the land, extending over a number of years, for the balance of the purchase price. The board thereupon proceeded in the erection of the building.

At the request of the plaintiff the court gave the jury the following instructions:

"1. You are instructed that, in order to constitute a consideration for the notes in suit, it is not necessary that George Sheidley should have himself received, or have expected to receive, any benefit on account thereof. But, if you believe from the evidence that the plaintiff, through its board of education, relying upon the fact that the five notes had been executed and left with Mr. Tomb, incurred and paid expense in connection with the submission to a vote of the people of the question as to the issue of the bonds of the district, and other expenses in connection with the issue of the bonds, and did incur a liability of \$200,000 by ⁶⁸² the issue and sale of the bonds, and that said action of the plaintiff, through its board of education, was induced by the promise of the defendant to execute said notes, and by his subsequent execution thereof, and that the purpose of defendant in making said promise and executing said notes was to enable and induce the plaintiff to take such action, this constitutes a good consideration for the notes.

"2. The jury are instructed that, to constitute a delivery of the notes in suit, it was not necessary that they should be placed by the defendant himself in the hands of any member of the board of education. But, if you believe from the evidence that, in pursuance of an arrangement and a promise to that effect, made by George Sheidley to Messrs. Yeager, Karnes, and James

on the evening of March 8, 1894, he did on the next day execute the notes and leave them with Mr. Tomb for the board of education, with instructions to him to hand them to the board when any of its members should call for them, intending thereby to place them at the disposal of the board of education, this constitutes in law a complete delivery of the notes to the plaintiff."

Defendants requested and the court refused to give the following instructions:

"1. The jury are instructed that a promissory note is but the promise to pay money in the future, and, if made and delivered purely as a gift, is without consideration, and cannot be enforced against the maker. Such a note is but a promise to make a gift in the future.

"2. The only act claimed to have been done by plaintiff upon the strength of the verbal promise of George Sheidley to give \$25,000 is the submission for the voting of certain of its bonds for which plaintiff received full value.

cs3 "3. The jury are instructed that although it may be the fact that plaintiff would not have submitted the proposition to vote for bonds to build a library building, except for a promise on the part of George Sheidley to give \$25,000, yet you are instructed that such submission constitutes no consideration for the notes referred to in the petition.

"4. The jury are instructed that at the time George Sheidley signed the notes sued on there was no subsisting liability on the part of said Sheidley to the plaintiff, and hence there was no consideration for said notes, and your verdict must be for defendants.

"5. The jury are instructed that the notes sued on are in the possession of one Tomb, and always have been, and that, therefore, plaintiff is not the holder thereof, and hence your verdict must be for defendants.

"6. Under the pleadings and the evidence your verdict must be for the defendants."

1. The substantial and most important controversy in this case is, whether under the evidence, any consideration for the notes sued upon was shown. It is conceded by plaintiffs' counsel that Sheidley received no benefit for his promises which can be regarded as a sufficient consideration to support them.

That the notes were intended by the maker, and accepted by the payee, as voluntary donations is unquestioned. "It is essential to a gift that it goes into effect at once, and completely. If it regards the future it is but a promise, and, being a promise without consideration, it cannot be enforced, and has no legal

validity: *Spencer v. Vance*, 57 Mo. 429; *Tomlinson v. Ellison*, 104 Mo. 105.

That the note of a donor to a donee is not the subject of a gift is well-settled law. Such a note is but the promise of the donor to pay money in the future. The gift is not completed until the money is paid. ⁶⁸⁴ There is no delivery of the gift, but a mere promise to deliver in the future. Such a note, treated purely as a gratuitous promise, cannot be enforced either in law or equity.

The question then is, Can these notes be enforced as valid contracts, notwithstanding Sheidley received no benefit therefrom, and intended them as purely gratuitous donations? If so, there must have been a legal consideration moving from the district to him. To constitute such consideration it is not essential that Sheidley should have derived some benefit from the promise. The consideration will be sufficient to support the promise, if the district expended money and incurred enforceable liabilities in reliance thereon. If the expense was incurred and the liability created in furtherance of the enterprise the donor intended to promote, and in reliance upon the promises, they will be taken to have been incurred and created at his instance and request, and his executors will be estopped to plead want of consideration. The gratuitous promises will thus be converted into valid and enforceable contracts: *Brooks v. Owen*, 112 Mo. 251; *Koch v. Lay*, 38 Mo. 147; *Steele v. Steele*, 75 Md. 477; *University v. Livingston*, 57 Iowa, 307; 42 Am. Rep. 42; *Simpson etc. College v. Tuttle*, 71 Iowa, 596; *Trustees v. Garvey*, 53 Ill. 401; 5 Am. Rep. 51; *Amherst Academy v. Cows*, 6 Pick. 427; 17 Am. Dec. 387; *Pitt v. Gentle*, 49 Mo. 74; *Richelieu Hotel Co. v. International Encampment*, 140 Ill. 248; 33 Am. St. Rep. 234.

Mr. Parsons says: "On the important question, how far voluntary subscriptions for charitable purposes, as for alms, education, religion, or other public uses, are binding, the law has in this country passed through some fluctuation, and cannot now be regarded as on all points settled. Where advances have been made, or expenses or liabilities incurred by others in consequence of such subscriptions, before any notice of ⁶⁸⁵ withdrawal, this should, on general principles, be deemed sufficient to make them obligatory, provided the advances were authorized by a fair and reasonable dependence on the subscriptions; and this rule seems to be well established. And the expenses or liabilities need not have been incurred by the plaintiff if others of the

subscribers incurred them on the faith of the defendant's subscription": 1 Parsons on Contracts, 8th ed., side p. 453.

In *Koch v. Lay*, 38 Mo. 147, Wagner, J., says: "Where notes are given by one or more persons to any corporation or other legal person, or any trustees, by way of voluntary subscription, to raise a fund to promote an object, these notes are open to the defense of want of consideration, unless the payee has expended money, or entered into engagements, which, by a legal necessity, must cause loss or injury to the payee if the notes are not paid. There are many cases which hold that gratuitous promises may be enforced, where they have operated to induce engagements and liabilities, within the knowledge of the promisor. Incurring expense, and assuming liabilities in consequence of the promise, is regarded as a sufficient consideration for the promise."

It appears from the evidence beyond any reasonable controversy, we think, that while the board of directors regarded the erection of a building for a public library, in connection with the schools of the district, to be of great public need, yet it had wholly abandoned the enterprise, for the reason alone that it had not on hand, and could not procure, the means necessary for purchasing the land on which to build it. At this juncture Mr. Sheidley made his offer to donate \$25,000 to the district, to be used by the board of directors in such way as it might deem best to secure the erection of said building. This offer was accepted, and the notes in suit were executed and placed in the ⁶⁸⁶ hands of Tomb, as hereinbefore stated. Sheidley knew perfectly well the difficulty under which the board was placed, and his intention unquestionably was that the money, when paid, should be applied to the purchase of a site for the building, and that the enterprise should go on at once.

The board of directors, relying upon these promises, immediately submitted to a vote of the district a proposition to borrow \$200,000 and issue the obligations of the district for its payment. The election was held at an expense to the district of about \$550. The bonds were thereafter issued and sold, and valid obligations of the district were thereby created for \$200,000.

Under the well-settled principles of law above stated the notes are supported by a sufficient consideration. In reliance on the promises, and in furtherance of the public enterprise they were intended to promote, the district in good faith expended a considerable sum in holding an election, and incurred presumably a valid indebtedness for a large amount. The expendi-

ture incurred and the indebtedness created were necessary in order to secure money for the erection of the building. This necessity was well known to Sheidley when he executed the notes.

2. It appears from the evidence that Sheidley was adjudged insane in October, 1894, and that the site for the building was not bought until February, 1895. From these facts it is argued that the promises were revoked before the site was purchased, and there was, therefore, no consideration for the notes. It cannot be said that the purchase of a site and the erection of the building were independent enterprises. They constituted but one undertaking, namely, that of securing a library building. The notes became valid and irrevocable contracts as soon as the district, relying upon their payment, expended money or incurred liability ^{or} in promoting the general enterprise. This occurred before Sheidley was adjudged insane, and his insanity or death thereafter could not revoke them.

3. The purchase of the site before the notes were collected could not effect a revocation of agreements which had become valid and binding obligations before that time, though the application of the proceeds had been expressly limited to the purchase of the site, for the reason that the purchase price has not yet been paid. The proceeds are still to be applied to such purchase. But it does not appear that any such condition was imposed. The board of directors were given the discretion to use the proceeds in such way as it might deem best, in order to secure the erection of the building. There would be no misapplication of the funds, under the conditions of the gift, though applied to the construction of the building.

4. It is also insisted that there was no consideration for the promises, for the reason that the erection of the building was legally incumbent on the board, and the voluntary performance of an act which was legally incumbent on the party to perform is not in law a sufficient consideration. This contention has a sufficient answer in the fact that no imperative legal duty rested upon the board to provide a library building. The board of directors is given the power to establish and maintain libraries, but it is not made its duty to do so. The discretion is to be exercised by the board in view of all the circumstances and conditions: Rev. Stats. 1889, secs. 8109, 8112.

But boards of education are given express power to accept gifts for the erection of library buildings: Acts 1891, p. 205. Though they may determine to provide a library, the character and cost may be determined by the voluntary aid they may re-

ceive, or be promised. Work done, or expenses incurred, in ^{oss} reliance upon promises to give in the future would as well furnish a consideration for such promise as it would if the entire enterprise depended upon the promise. We think the consideration for the notes sufficient, and find no error in giving and refusing instructions on this branch of the case.

5. We think there was a sufficient delivery of the notes. It was not essential that the actual manual possession should have passed to some member of the board in order to effect a delivery. A constructive delivery was sufficient. All that was necessary was that the control of the notes should have passed from Sheidley with his consent, and that they should have been placed by his direction under the power and control of the board of education: Daniel on Negotiable Instruments, sec. 63 a; Richardson v. Lincoln, 5 Met. 201; Welch v. Dameron, 47 Mo. App. 227.

The evidence shows that the notes were placed by Sheidley in the hands of Tomb, with directions to hand them to the board when called for. This was done pursuant to a previous agreement had with the board. Tomb testified that when the notes were handed to him Mr. Sheidley said: "Whenever the board of education called for them I should give them to them." The instruction on the question of delivery properly declared the law:

6. Defendants insist that if the board of education was induced to order and hold an election, and to issue the bonds of the district, by the promise of Sheidley to give \$25,000 in furtherance of the enterprise, then such promise is void as being contrary to public policy.

It is undoubtedly the policy of the law that all public officers should be uninfluenced and unbiased in the discharge of their official duties, and, as said by Mr. Bishop: "Any contract between an officer and a ^{oss} private person, by which the former undertakes to do anything of official duty, right or wrong, in accord with such duty or contrary to it, is in a greater or less degree an obstruction to the unbiased exercise of his office, even where it does not influence him corruptly; therefore it is void": Bishop on Contracts, sec. 500. But we are unable to see that the sound policy of the state was violated in this action of the board, all the circumstances being considered. The action of the board was not induced by the promises of Sheidley in the sense that its judgment and discretion were influenced thereby. The board had, before that, exercised its judgment and determined the desirability of a new public library building.

The obstacle in the way of voluntary action was the need of money to purchase a site. Its conclusion and the only obstacle in the way of carrying it out were well known. The promises of Sheidley only empowered the board to act upon its judgment already formed and publicly declared. It made the way clear for the board to perform what it considered a public duty. We can see nothing in the action of the board of education calculated to control or influence its duty to the public, or which is the least immoral in its tendency. The policy of the state, by express law, favors and encourages donations for the erection of public library buildings, and we can see nothing inconsistent with the free, honest, and impartial exercise of official discretion for a board of education to regulate its actions to some extent with reference to the amount, value, and character of voluntary contributions, whether made or promised.

The fact that the statute gives power to boards of education to establish and maintain libraries for the use of the public school districts thereof is a recognition by the state of their utility and desirability; and the ⁶⁰⁰ only question boards really have to deal with is the ability of the district to establish and maintain them. Boards must necessarily be influenced more or less in their actions by the private contributions that may be secured or promised. Such action, when not otherwise influenced, cannot be regarded as contrary to public policy.

7. It is insisted by plaintiff that the illegality of the contract not having been pleaded as a defense, the question should not be considered on this appeal. The rule is, that if a plaintiff, in order to make out his cause of action, is required to show that the contract sued upon is, for any reason, illegal, the court should not enforce it whether pleaded as a defense or not. But when the illegality does not appear from the contract itself, or from the evidence necessary to prove it, but depends upon extraneous facts, the defense is new matter and must have been pleaded in order to be available: *Musser v. Adler*, 86 Mo. 445; *St. Louis etc. Assn. v. Delano*, 108 Mo. 217.

In this case, defendants pleaded want of consideration, and the notes are concededly mere gratuitous promises to pay in the future. The notes were therefore void as gifts. In order to prove that they were valid contracts, supported by a sufficient consideration, it became necessary for the plaintiff to prove the entire transaction between Sheidley and the board of education, and the subsequent action of the board taken in reliance on the promises. If the notes had been illegal, as against public policy, the fact was necessarily disclosed by plaintiff in making out its case,

and it would have been the duty of the court to deny its assistance, whatever the condition of the pleading. The question was, therefore, sufficiently raised by the instruction in the nature of a demurrer to the evidence to require its consideration on appeal.

⁶⁹¹ 8. Evidence was admitted on the trial, over the objection of defendants, that Mr. Sheidley was a man of large means. This evidence was clearly inadmissible on the issue raised upon the defense that the notes were without consideration. But the defense was also made that, at the time the notes were executed, defendants' testator was of unsound mind and incapable of transacting business. The notes amounted to \$25,000, a very large sum to give away, and, for a man of moderate circumstances, would have furnished a circumstance tending to prove want of capacity. To rebut that tendency evidence that he was a man of wealth was admissible. If defendants wished to limit the effect of the evidence, they should have asked an instruction for that purpose: *Garesche v. St. Vincent's College*, 76 Mo. 332; *Standard Milling Co. v. White Line etc. Transit Co.*, 122 Mo. 273.

The judgment is affirmed.

Barclay, C. J., Gantt, Sherwood, Burgess, and Brace, JJ., concur.

Robinson, J., dissents.

GIFT—WHAT MAY BE SUBJECT OF—PROMISSORY NOTE.—The promissory note of a donor, as a gift, is a mere naked revocable promise without a sufficient valid consideration, and creates no obligation upon the part of the maker or his representatives: *Hall v. Howard*, Rice, 310; 33 Am. Dec. 115, and note; *Mader v. Cool*, 14 Ind. App. 299; 56 Am. St. Rep. 304.

NEGOTIABLE INSTRUMENTS—DELIVERY—SUFFICIENCY OF.—Delivery, actual or constructive, of a note is as essential to its validity as the signature of its maker: *Purviance v. Jones*, 120 Ind. 162; 16 Am. St. Rep. 319, and note. While actual or manual delivery is not indispensable to the validity of a note, still it must appear that the maker in some way evinced an intention to make it an enforceable obligation against himself, according to its terms, by surrendering control over it, and intentionally placing it under the control of the payee or of some third person for his use; *Purviance v. Jones*, 120 Ind. 162; 16 Am. St. Rep. 319, and note.

CONTRACTS—CONSIDERATION—SUFFICIENCY OF.—Endowment of institutions of learning, expense, liability, and trouble of officers of such institutions in raising endowments, or the undertaking of such officers to give "free tuition to twenty students forever," constitute a sufficient consideration upon which to base a contract: *Burlington Univ. v. Barrett*, 22 Iowa, 60; 92 Am. Dec. 377, and note.

CONTRACTS—ACTIONS UPON ILLEGAL—PLEADINGS.—Though it is sometimes necessary to plead the facts upon which the illegality of a contract depends, it is never necessary to plead the

law. When the facts appear either upon the pleadings or proofs, either party may insist upon the law applicable to such proofs: *Handy v. St. Paul etc. Co.*, 41 Minn. 188; 16 Am. St. Rep. 695, and note. See, *Morrill v. Nightingale*, 93 Cal. 452; 27 Am. St. Rep. 207; *Clafin v. United States etc. Co.*, 165 Mass. 501; 52 Am. St. Rep. 528, and note.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

BITTNER v. CROSSTOWN STREET RAILWAY COMPANY.

[153 NEW YORK, 76.]

STREET RAILWAYS, RATE OF SPEED.—There is no negligence, as a matter of law, in the mere fact of running a street railway car at a high rate of speed, but the jury must be permitted to determine whether, under all the attendant circumstances, the rate of speed testified to by the witnesses was excessive and therefore dangerous.

NEGLIGENCE—ERROR OF JUDGMENT IN SUDDEN EMERGENCY.—If a boy runs suddenly in front of an electric street railway car and is struck by it, the railway corporation is not liable for the subsequent error of judgment on the part of the motorman in charge of the car in reversing its movement, whereby the boy is again run over.

NEGLIGENCE, ACTION IN A SUDDEN EMERGENCY.—If one who is confronted with a sudden emergency uses his judgment, his employer is not liable, though, from error in such judgment, injury is inflicted on another.

Action by the administrator of Charles Bittner, an infant, to recover damages for his death, claimed to be due to the negligence of the defendant railway company. It operated an electric street railway in the city of Buffalo. . The decedent, then a little more than eight years of age, on the seventeenth day of October, 1892, suddenly ran in front of, and was struck by, a car in charge of one of the defendant's motormen. It passed over the boy. The motorman then reversed the movement of the car, and, according to the testimony of one of the witnesses, the car, after first running over the boy, was then backed over him, and then, going forward, went over him for the third time. There was much testimony in contradiction to that of this witness, but the jury rendered a verdict in favor of the plaintiff, and a judgment was thereupon entered in the trial court, which, on appeal to

the general term, was affirmed because of an equal division of the judges. A further appeal was then taken to the court of appeals.

Porter Norton, for the appellant.

Emory P. Close, for the respondent.

⁷⁹ GRAY, J. If it were not for the testimony which was given by the witness Toms upon the trial, it would not be possible to say that there was any evidence upon which negligence⁸⁰ could be predicated of the defendant. The history of the occurrence shows that the deceased heedlessly ran in front of the car, and in such close proximity to it as to render its striking him a certain occurrence. There is no conflict in the testimony with respect to the principal facts. The boy started to cross the street in the middle of the block, when a vehicle was proceeding between him and the car tracks, which, from its peculiar construction precluded a view beyond it. Running upon an angle across the street, he passed around the horses' heads, without looking for, or apparently seeing, the approaching car upon the other side of the wagon. He was familiar with the locality, and the evidence warranted the inference that he was quite capable of taking care of himself, at least, to the extent demanded by the occasion. He was on his way from his sister's residence to his grandfather's, upon the other side of the street, as he had been in the habit of doing. Except for the testimony of Toms that the car was proceeding at a rate of from twelve to fifteen miles an hour, that after it had passed over the boy's body, it went as much as two or three times its length before it was stopped, and that then the boy was still living and was endeavoring to raise himself up from the ground, when the car backed down over him and then was impelled forward and again over him the third time, there would be no ground whatever for saying that any question was left open for the jury to pass upon, with respect to the conduct of the motorman. Toms' evidence was so shaken as to its credibility by the other testimony in the case, that it became of the highest importance that the jury should be so carefully instructed by the trial judge upon the law applicable to the facts as that there should be no room for a belief that they might have been misled. There was no negligence in the mere fact of the car running at a high rate of speed. No law regulated that, and it was for the jury to say, in view of the surrounding conditions at the time, whether such a rate of speed, if they believed Toms' testimony about it, was excessive and, therefore, dangerous under the circumstances.

⁸¹ While we think the evidence to show negligence in the motorman was of the very slightest character and barely to be relied upon, in view of the other testimony and of the probabilities of the situation, we will concede that it may have been sufficient to raise a question for the jury, and we will proceed to consider the question in the case upon which the judges differed at the general term. That question arose upon a request made by the defendant that the jury should be instructed "that the defendant is not responsible for the error in judgment, if there was any, on the part of the motorman, in the management of the car after it struck the boy." The trial judge ruled upon this request as follows: "I have already charged you upon this proposition." Referring to the portion of his charge to which he must have referred, it reads as follows: "I may say, if the defendant was entirely free from fault in the first instance, or if the boy was guilty of negligence in running upon the track in the way he did, and the car had passed over him, a number of feet beyond him, and the boy was injured in the legs, as it is claimed by one of the plaintiff's witnesses, and was attempting to get up from the track, and the motorman was careless in the management of his car by running back upon him, and then killing him, the question of whether or not the boy was guilty of negligence in the first instance would be of no importance in that condition of things, and the plaintiff could recover, notwithstanding the boy was negligent in first going on the track."

The defendant was entitled to have the jury clearly instructed that an error in the exercise of judgment by the motorman would not make the defendant liable for the results in the management of the car, in the emergency which occurred after the deceased was struck down, and the charge did not cover that point; or, at least, not in such exact language as, in our judgment, to make it perfectly clear to the jurors' minds. To instruct them that, if the motorman was careless in so managing his car as to run back upon the boy, the plaintiff might recover, was not the clear equivalent of an instruction that, if the motorman erred in judgment in what he did after the car ⁸² struck the boy, the defendant would not be responsible for that error of judgment. The evidence in the case would have warranted the jury in finding that the deceased was guilty of contributory negligence in placing himself directly in front of the passing car, and that the motorman was not guilty of any negligence in striking him. If they should have reached that conclusion, and were then brought face to face with the subse-

quent situation, after the boy had been knocked down and run over, they could only return a verdict for the plaintiff upon the basis of some act of negligence then occurring on the part of the defendant's servant, the motorman, by which the accident was aggravated. If they could believe the evidence of the witness Toms, that the car had passed so far beyond the boy, and then, while he was still alive, was backed down upon him and again was sent over him, they could, perhaps, say that the motorman was careless in the management of his car at the time, and that, through such carelessness, the boy was in fact killed. But if they believed that the motorman was endeavoring, in the exercise of his judgment, to prevent injury to the boy, then there was no carelessness on his part, but merely an error of judgment, for which the defendant could not be held responsible. Upon the evidence, it appears that the motorman was confronted with a sudden emergency and it should have been distinctly stated to the jury that if, in what he did, he used his judgment, the defendant was not responsible; even if it was an error which brought about the lamentable results claimed. Even the failure to exercise the best judgment would not be evidence of negligence: *Wynn v. Central Park etc. R. R. Co.* 133 N. Y. 575. Judge Hatch, in his opinion at the general term, has very fully reasoned out the proposition, and it is not necessary for us to say more than we have said.

For the reasons given, the judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur.

RAILROADS—STREET—EXCESSIVE SPEED—NEGLIGENCE. While some courts hold that where the speed of a street railway company is greater than that permitted by ordinance it is negligence per se, the better rule appears to be that it is a circumstance from which negligence may be inferred, and is always proper to be considered by the jury: *Hall v. Ogden City Street Ry. Co.*, 13 Utah, 243; 57 Am. St. Rep. 726, and note. See *Evers v. Philadelphia Traction Co.*, 176 Pa. St. 376; 53 Am. St. Rep. 674.

NEGLIGENCE—ACTS DONE IN AN EMERGENCY.—The law does not require that a person who is surprised and confused by a sudden danger should act or be judged according to any strict or fixed rule: *Duame v. Chicago etc. Ry. Co.*, 72 Wis. 523; 7 Am. St. Rep. 879. But he must have gotten into danger without negligence or fault of his own: *Aiken v. Pennsylvania R. R. Co.*, 130 Pa. St. 380; 17 Am. St. Rep. 775, and note. See *Consolidated Traction Co. v. Scott*, 58 N. J. L. 682; 55 Am. St. Rep. 620, and note.

MASTER AND SERVANT—NEGLIGENCE OF SERVANT—SUDDEN EMERGENCY.—A restaurant keeper whose servant grasps a burning lamp, and, in attempting to carry it from the room, is burnt, and then throws the lamp from him, when it explodes and injures a customer, is not liable: *Donahue v. Kelly*, 181 Pa. St. 93; 59 Am. St. Rep. 632, and note.

PEOPLE v. NELSON.

[153 NEW YORK, 90.]

CRIMINAL LAW.—PENAL STATUTES MUST BE STRICTLY CONSTRUED, and cannot be extended to cases not clearly covered thereby.

SEDUCTION—AGE OF CONSENT.—An essential element of the crime of seduction is the consent of the female founded upon a contract of marriage. She must be deemed capable of giving consent if old enough to contract to marry, though, if the prosecution were for the crime of rape, her youth was such that her consent would afford no protection to the accused.

SEDUCTION UNDER PROMISE OF MARRIAGE CAN TAKE PLACE BUT ONCE.—Subsequent sexual intercourse between the parties, though brought about by the repetition of the same promise, cannot be deemed seduction where, under the statutory definition of that crime, it is necessary that the female against whom it is committed shall be of previously chaste character.

SEDUCTION.—CHASTE CHARACTER, as that term is employed in the statute defining the crime of seduction, does not mean mere reputation for chastity, but actual personal virtue. A female who has been previously seduced, though by promise of marriage, cannot, therefore, be regarded as of chaste character, so that further yielding on her part under the influence of the repetition of the promise can be considered a second seduction.

SEDUCTION.—A FEMALE CANNOT BE REGARDED AS OF CHASTE CHARACTER who has voluntarily submitted to sexual intercourse, on the ground that at the time she had not reached the age of consent, if her age was such that she might have made a valid contract of marriage.

Thornton A. Niven, for the appellant.

George McLaughlin, for the respondent.

92 VANN, J. In March, 1891, when the defendant was twenty years of age and the prosecutrix was fifteen, he asked her to marry him, and she said that she would if her parents would consent. On the 2d of August following, he proposed sexual intercourse, which she at first refused, but, upon his promise to marry her "if anything happened" as soon as she discovered that she was pregnant, she finally consented. From that time until March, 1893, he had connection with her every two or three months, and on each occasion, according to her statement, before the act he promised to marry her "if he got her into trouble." On the 11th of February, 1892, the day that she became sixteen years old, there was a mutual promise to marry without any condition. After this, however, the same as before, each act of sexual intercourse was preceded by a promise exacted by her that he would marry her if she became pregnant. The first time that he had to do with her after she was sixteen was on the 4th of July, 1892. As the indictment

was not presented until September, 1893, or more than two years after the first act of sexual intercourse, the defendant insisted upon the trial, and insists upon this appeal, that his conviction was barred by the limitation prescribed by section 285 of the Penal Code. He further claims, and the point was distinctly made at the trial, that if any subsequent act is relied upon to convict, it does not satisfy the statute, because at that time the prosecutrix had ceased to be chaste. The position of the people upon the subject is, that all intercourse with the prosecutrix before she became sixteen is conclusively presumed to have been without her consent, because, by the statute then in force, the "age of consent" was sixteen years, and, accordingly, ⁹³ they seek to avoid the bar of the statute by basing the conviction on the first act of intercourse that occurred after she became of that age.

Seduction under promise of marriage was not a crime at common law, but was made such by chapter 111 of the laws of 1848. This statute was substantially re-enacted in the Penal Code, which provides that "a person who, under promise of marriage, seduces and has sexual intercourse with an unmarried female of previous chaste character, is punishable by imprisonment for not more than five years, or by a fine of not more than one thousand dollars, or by both": Pen. Code, sec. 284. By the next section it is provided that "the subsequent intermarriage of the parties, or the lapse of two years after the commission of the offense before the finding of an indictment, is a bar to a prosecution for a violation of the last section": Pen. Code, sec. 285. No age of consent is mentioned in any of the sections relating to the subject of seduction, but the statute which defines the crime of rape provided, at the time the offense in question is alleged to have been committed, that "a person who perpetrates an act of sexual intercourse with a female not his wife, under the age of sixteen years, under circumstances not amounting to rape in the first degree, is guilty of rape in the second degree, and punishable with imprisonment for not more than ten years": Laws 1892, c. 325, amending section 278 of the Penal Code. In 1895 the section was further amended so as to increase the limit of age, as applied to rape, to the period of eighteen years, although, under the Revised Statutes, it was but ten years: Laws 1895, c. 460; 2 Rev. Stats., 1st ed. sec. 22, p. 663. The only other statute relating to the subject of age, as applied to the relations of the sexes, is the Code of Civil Procedure, which provides that an action may be maintained by a woman to annul her marriage

when she had not attained the age of sixteen at the time of the marriage, and it took place without the consent of the one having legal charge of her person, was not followed by consummation or cohabitation, and was not ratified after she attained the age of sixteen years: Code Civ. Proc., sec. 1742. ⁹⁴ None of these limitations upon the power to consent have been expressly applied by statute to the crime of seduction, and we have no power to extend them by implication to an offense that is purely statutory. Penal statutes must be strictly construed, and cannot be extended to cases that are not clearly covered thereby. An essential element in the crime of seduction is the consent of the female, founded upon a contract to marry, and plain language on the part of the legislature would be necessary to permit us to hold that the prosecutrix, although old enough to make that contract, was not old enough to consent to the defendant's advances: *People v. Alger*, 1 Park. C. C. 333; *Crozier v. People*, 1 Park. C. C. 453, 456. This is especially true since, by another section of the same statute, an act of sexual intercourse with a female under sixteen, whether chaste or not, even with her consent and without any promise of marriage, was made a crime of a graver nature. As protection was thus afforded to girls under the prescribed age by the severe punishment imposed for rape, it is not probable that the legislature intended to import the age limit into the section relating to the milder offense of seduction, because there was no necessity for it, and nothing to indicate any intention to do so. If the people had seen fit to prosecute the defendant for rape committed upon the prosecutrix prior to February, 1892, neither the presence nor the absence of consent would have been material, except as to the degree merely, and the statute of limitations would have been five years instead of two: Code Crim. Proc., sec. 142. As they did not do so, but proceeded against him for another crime, quite distinct in theory and nature, they must be limited to that crime and cannot be allowed to add an element from another offense in order to avoid the statute of limitations. It follows, therefore, that according to the testimony of the prosecutrix, her seduction was accomplished on the 2d of August, 1891, or more than two years before the indictment was found. It is true that subsequently, and within the period of two years, there were further acts of intercourse based on concurrent as well as prior promises to marry. We think, however, that a woman can ⁹⁵ be seduced but once, at least under the statute in question, and that the first voluntary act on her part, after she is able

to understand its nature and comprehend its enormity, is the only one in which she can participate as a victim. In *Cook v. People*, 2 Thomp. & C. 404, the indictment contained two counts for seduction under promise of marriage, one charging the offense to have been committed July 2d, and the other August 19th. In reversing the conviction the court said: "An important requisite to the offense charged is, that the female against whom it is alleged to have been committed, shall have been of a previously chaste character. The requisition of the statute, it is held, relates not to the reputation of the prosecutrix, but to her actual condition, and requires absolute personal chastity. It is, therefore, impossible that the offense be twice committed against the same female. If she has once consented to and willingly permitted sexual intercourse with herself, she no longer possesses that chaste character required by the statute as an essential ingredient of the offense." In another case, where the illicit intercourse between the prosecutrix and the defendant began four or five years before the indictment was found, and continued until within two years of that date, it was held not to be a case of seduction within two years previous to the finding of the indictment and not to be within the statute. The court said: "If the illicit intercourse began four or five years before the indictment, and continued until within two years, the jury should have found for the defendant on the question of seduction within two years. It would be a rather loose construction of the statute to hold that a woman who had continued in the practice of fornication with a man for four or five years, and up to the time she prosecutes, had been seduced within the last two years. The counsel for the prosecution on the trial seems to have supposed the commission of the crime might be charged, as it were, with a continuance for several years, or that each occasion was a first seduction. . . . But seduction and the act of illicit intercourse, under certain circumstances, complete the crime, and such a construction ⁹⁶ is hardly within the spirit of the act, which was not intended to punish illicit cohabitation, but the seduction of a virtuous female under a promise of marriage": *Safford v. People*, 1 Park. C. C. 474, 480. In a case that arose in the state of Michigan, under a similar statute, it appeared that illicit intercourse was had between the parties at short intervals, and as opportunity offered, and it was held that, to warrant a conviction of seduction for the second or third or later acts, there should be clear and satisfactory proof of reformation

and that the burden of proof in that regard was upon the prosecution: *People v. Clark*, 33 Mich. 112.

Our statute does not punish seduction generally, but only when it is committed under promise of marriage upon an unmarried woman of "previous chaste character." Chaste character, as thus used in the statute, does not mean reputation for chastity, but actual personal virtue: *Kenyon v. People*, 26 N. Y. 203, 207; 84 Am. Dec. 177. As was said in the case cited, "the female must be chaste in fact when seduced," and "the legislature could only have meant personal qualities that make up the real character"; or, as was said in another case, she "must be actually chaste and pure in conduct and principle, up to the time of the commission of the offense": *Carpenter v. People*, 8 Barb. 603, 608. The same words used in a statute upon the same subject in another state were held to mean the "real moral qualities" of the woman, or her "character in its accurate sense and as signifying that which" she "really is": *State v. Prizer*, 49 Iowa, 531, 532; 31 Am. Rep. 155.

The only answer made by the learned counsel for the people to the fact that the prosecutrix had surrendered her chastity more than two years before indictment found is that she was not within the age of consent, and that hence her acts were not unchaste. This argument would have the same force even if the previous intercourse had not been with the defendant, but with some third person. Under the present statute, it would apply to a female, eighteen years of age, although she could have made a valid will of personal property at the age of sixteen: *Laws 1867, c. 782; Laws 1895, c. 460*. Her favors ⁹⁷ might be common to all, yet she would be chaste by operation of law. Impure in fact, she would be pure by statute; a Lucretia in the state of New York, but a Messalina everywhere else. We do not think that the legislature meant constructive chastity when it said previous chaste character, but that it meant chastity in fact, according to the popular sense of that word. Character pertains to the person, and is the distinguishing mark of what the person is. It is not founded on presumptions of law, but on good conduct and pure thoughts, and only one who is morally and physically pure can be said to have a chaste character within the meaning of the statute under consideration.

It is insisted that, unless there is a fixed standard by which it can readily be determined when consent will indicate unchastity, such doubt and confusion will arise as may lead to in-

justice. We think, however, that an ironclad rule, applied inflexibly to all females under a given age would be harsh, unequal, and unjust. It might lead to the conclusive presumption that a prostitute was chaste, simply because she was young, while the same presumption would not extend to an older person, whose feeble mind and ignorance of evil called for the protection of the law. The safer course is to leave the question of capacity to consent, where, as we think, the legislature in this class of cases has left it, to the judgment of a jury, guided by evidence showing the intelligence of the subject and her ability to distinguish right from wrong.

For these reasons we think that the defendant was unlawfully convicted, that the judgment should be reversed, and, as the facts cannot be changed, that the indictment should be dismissed.

O'BRIEN, J., dissenting. I dissent on the ground that unchastity, within the meaning of the statute, cannot be imputed to a female in consequence of intercourse involving the crime of rape, whether that crime was the result of violence or of actual or legal incapacity to consent. The fact that the age of capacity to consent has been enlarged by statute ⁹⁸ may furnish a good reason for the repeal or modification of the statute defining seduction, but, so long as the statute remains as it is, the age limit for consent concludes the courts.

All concur with Vann, J., for reversal, except O'Brien, J., who reads memorandum of dissent.

STATUTES.—Penal statutes should be strictly construed: *Meadowcroft v. People*, 163 Ill. 56; 54 Am. St. Rep. 447, and note.

SEDUCTION—CRIME OF.—The offense of seduction created and punishable by Michigan statute is committed if the man has carnal intercourse, to which the woman assented, if such assent was obtained by a promise of marriage made by the man at the time, and to which, without such promise, she would not have yielded: *People v. De Fore*, 64 Mich. 693; 8 Am. St. Rep. 863, and extended note on the crime of seduction as defined in the American statutes. Previously chaste character signifies that which the person really is, in distinction from that which she may be reputed to be: *Andre v. State*, 5 Iowa, 389; 68 Am. Dec. 708. See monographic note to *State v. Carron*, 87 Am. Dec. 405-411, on seduction as a criminal offense.

WEHLE v. UNITED STATES MUTUAL ACCIDENT ASSOCIATION.

[153 NEW YORK, 116.]

INSURANCE, ACCIDENT.—DROWNING is a death from external violence.

INSURANCE, ACCIDENT—RIGHT TO EXAMINE CORPSE. WITHIN WHAT TIME MUST BE EXERCISED.—Where a policy of insurance against accident stipulates that the insurer, by its medical adviser, shall have the right to examine the person or body of the assured in respect to any alleged injury or cause of death, such right must be exercised immediately upon receiving notice of the death, and, if not exercised until after interment, is waived. Especially is this true when it does not appear that after such interment any facts came to the knowledge of the insurer warranting the belief that death had occurred from any cause excepted from the contract of insurance.

David Murray, for the appellants.

Charles Wehle and Nathaniel Myers, for the respondents.

121 PER CURIAM. It is our judgment that the order of the general term was correct in ordering the verdict directed by the trial court to be set aside, and that a new trial should be had. The decision of the case at the trial turned upon the one question whether the plaintiffs had shown themselves entitled to recover the amount of the insurance claimed, by reason of the death of their testator within the operation of the policy, which provided for a liability in the event of death resulting from personal bodily injuries, through external, violent, and accidental means. The plaintiffs were entitled to have the jury say whether the deceased died from the action of the water; in which case, as that would be a death from external violence within the meaning of the policy, they would be entitled to a verdict: *Paul v. Travelers' Ins. Co.*, 112 N. Y. 472; 8 Am. St. Rep. 758; 6 Hurl. & N. 845. One of the issues raised by the pleadings was as to the cause of the death, and upon that question the jury should have been permitted to pass. The view of the trial judge, however, was that an express provision of the insurance contract had not been complied with by the plaintiffs. That provision was the one which permitted the medical adviser of the defendant to examine the person or body of ¹²² the insured, in respect to any alleged injury or cause of death. As there was no post-mortem examination on the part of the representatives of the insured, the balance of that provision need not be considered. The provision as to the examination of the person or body of the insured was not only expressly assented to by the insured when he made application for the insurance and therefore

should be given effect as his express agreement, but it was a reasonable provision and quite necessary in accident insurance, as affording a protection against fraud. Its meaning is, that in case of an injury, or of a death, the defendant shall be authorized through its medical adviser, to make an examination, either of the person with respect to the alleged injury, or of the body, to ascertain the cause of the death, as the case might be. It was the agreement between the insurer and the insured that there should be a strict compliance with the provisions and conditions of the policy, and, accordingly, the plaintiffs did give the immediate notice, which was one of the conditions, and that fact was not only admitted by the answer, but, being stated in open court and with the president of the defendant upon the witness stand, received no contradiction. The effect of the giving of immediate notice was to impose upon the defendant the obligation immediately to make such investigation of the occurrence as to enable it to decide whether to insist upon its right to an examination of the body in order to satisfy itself as to the cause of the death. It was not at liberty to wait indefinitely, or for any unreasonable length of time. The provision, though not, as before observed, of an unreasonable nature, nevertheless was one which, in the nature of things, called for prompt action on the part of the insurer. Although no time is specified within which the permission to examine may be availed of, still, a due regard for the sentiments of the family and friends of the deceased, if not public policy, required as immediate an exercise of the option to examine as was possible. Conditions in insurance policies, as in all other contracts, should be construed strictly against those for whose benefit they were reserved: *Paul v. 123 Travelers' Ins. Co.*, 112 N. Y. 472; 8 Am. St. Rep. 758. It was an unreasonable delay on the part of the insurer to wait until after the body of the deceased had been interred, and nothing appears in the evidence to show any excuse for it, if it was deemed that an examination of the body was necessary. From September 4th until September 9th an opportunity was afforded for an examination of the body, and, in the absence of evidence to the contrary, we must assume that the immediate notice conceded to have been given of the death left an ample margin of time for such an examination. We do not think that there was any ambiguity with respect to the permission to examine the person or body of the insured, and, if it should appear in any case that at some subsequent date, after the interment of the body, circumstances or facts coming to the knowledge of the insurer warranted a reasonable belief that death was

occasioned by means or causes excepted from the contract of insurance, a reasonable construction of this provision would authorize the insurer to insist upon an exhumation of the body and upon a dissection of it. But in this case there was nothing in the evidence to show that the defendant had reason to believe in the existence of any excepted cause of death. In fact, the proofs of an accidental death from drowning were such that a verdict to the contrary could not be said to have been justified.

We hold, in this case, that the provision authorizing an examination of the body of the insured should have been availed of immediately upon the receipt of the notice of the death, which was conceded to have been immediately given, and that the delay in the demand for an examination of the body was, as matter of law, so unreasonable, in the absence of any facts or circumstances excusing it, as to deprive the defendant of any defense to the action upon that ground.

Inasmuch as it does not appear that an examination of the body was denied to the association, it is immaterial to consider the question as to whether the demand for it was made upon the proper person. The permission was, in fact, given by the insured himself through the insurance contract, and, if it had been attempted to be availed of with the result of an opposition ¹²⁴ on the part of those having a legal right to make it, the question would then be open for consideration, whether it was such as to have brought about a forfeiture of the policy.

For these reasons, the order of the general term appealed from should be affirmed, and judgment absolute should be ordered in favor of the plaintiffs and against the defendant corporation and its receiver, with costs.

All concur, except Vann, J., not sitting.

INSURANCE—ACCIDENT—DEATH FROM EXTERNAL VIOLENCE.—Unnatural death, the result of accident of any kind, imports an external and violent agency as the cause within the meaning of an insurance policy limiting recovery to death caused "through" external, violent, and accidental means: *American Acc. Co. v. Reigart*, 94 Ky. 547; 42 Am. St. Rep. 374, and note. Death by drowning is within such provision: Monographic note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 860. See extended note to *Paul v. Traveler's Ins. Co.*, 8 Am. St. Rep. 763-766.

FIRST NATIONAL BANK v. SHULER

[153 NEW YORK, 163.]

PARTIES—DEATH OF THE DEFENDANT, NECESSITY OF MAKING HIS EXECUTRIX A PARTY AS SUCH.—If, after a suit is commenced against a grantor and his wife and another who were his grantees in certain transfers, which are assailed as fraudulent, to set aside such transfers, the grantor dies, and his wife is appointed his executrix, she must be made a party as such. This is not accomplished by filing a supplemental complaint averring such death and appointment, and that she is his sole devisee and legatee. Unless she is made a party as executrix, the rights of the general creditors of the estate cannot be put in issue nor litigated on the trial.

PARTIES.—TO A SUIT TO SET ASIDE AN ASSIGNMENT for the benefit of creditors as fraudulent the assignor is a necessary party, and, in the event of his death, his executor or administrator.

CREDITORS' BILL, LIEN OF.—The plaintiff in a creditors' action acquires by its commencement a lien upon the choses in action and equitable assets of the debtor, entitling such plaintiff, in the successful event of the action, to priority of payment thereunder in preference to other creditors, regardless of the priority of the respective judgments.

CREDITORS' BILL, LIEN OF, EFFECT OF DEATH UPON. The lien acquired by the filing of a creditors' bill is not defeated by the death of the debtor before judgment.

CREDITORS' BILL, LIEN OF.—As respects chattels subject to be taken on execution unless the action is brought in aid of an execution, the creditors' bill does not create any lien as against other creditors, or, if any lien exists, it is so imperfect and incomplete that it may be defeated by the subsequent levy of a writ in favor of another creditor, made before a receiver is appointed.

PARTIES DEFENDANT HAVING BOTH AN INDIVIDUAL AND A REPRESENTATIVE CAPACITY.—If a defendant in an action is also the executor of a decedent who, in his lifetime, was a necessary party thereto, and the cause proceeds to judgment, such defendant cannot be deemed to be before the court in his representative capacity, where no order is entered making him a party in that capacity. The judgment cannot bind the interest which he represents, and must, therefore, be reversed for a defect of parties.

RES JUDICATA—PARTIES.—A judgment against one sued as an individual does not bind him as a trustee or executor, nor does a judgment against one as a trustee or executor bind him as an individual in a subsequent action, although the identical issue is involved, and the decision in the first action was upon the merits.

Albert C. Tennant, for the appellant.

Z. S. Westbrook, for the respondent.

¹⁶⁵ **ANDREWS, C. J.** We think the proceedings and judgment in this case are fatally defective for the omission of the plaintiff to bring in and make the defendant Elizabeth N. Shuler a party defendant in the action, in her capacity as executrix of the original defendant, Isaac C. Shuler. The action was in ¹⁶⁶ the nature of a creditor's bill, instituted by the plaintiff as a judgment creditor of Isaac C. Shuler before his death, and

after the issuing and return of an execution against his property unsatisfied, to set aside a general assignment for the benefit of creditors, made by the judgment debtor to one Waldron on the nineteenth day of November, 1889, and also to set aside certain transfers of property made by him to the defendant Elizabeth N. Shuler prior to the making of his general assignment, on the ground that such assignment and transfers were in fraud of his creditors. The debtor, Isaac C. Shuler, Waldron, his general assignee, and Elizabeth N. Shuler and others were joined as defendants in the action. The defendants named answered the complaint, and in their answers denied the alleged fraud. After issue joined, the defendant Isaac C. Shuler died. Subsequently, the plaintiff, upon an affidavit stating the death of Isaac C. Shuler, that he left a will appointing the defendant Elizabeth N. Shuler his executrix, and making her his sole legatee and devisee, that the will had been duly proved and that the executrix had qualified, applied to the court for an order permitting the plaintiff to serve a supplemental complaint alleging the facts stated in the affidavit. Notice of the application was given to the surviving defendants and the motion was granted, the defendant Elizabeth N. Shuler not appearing thereon. The supplemental complaint was served on the defendants. It simply averred the death of Isaac C. Shuler; the making of the will; the appointment of the defendant Elizabeth N. Shuler as executrix; that she was the sole legatee and devisee under the will, its proof and her assumption of the office of executrix. In other respects it left the averments of the original complaint unchanged, as also the demand for relief.

No answer was made to the supplemental complaint, and the action went to trial before a referee upon the issues originally framed. There was no allusion in the papers on which the motion for leave to serve a supplemental complaint was made of an intention to make the executrix a party to the action. No order was made continuing the action against her ¹⁶⁷ as executrix or directing that she be made a party in her representative character. Not only was there no order making the executrix a party, but she was not named as a party in the process, pleadings, or judgment. No relief was demanded against her as executrix, and, so far as appears, her rights as executrix or the rights of the general creditors of the estate were not put in issue or actually litigated on the trial.

The referee found and decided that the general assignment executed by Isaac C. Shuler to Waldron, and certain transfers

made by him to his wife, embracing chattels and securities, were fraudulent and void as against the plaintiff, and directed that a receiver be appointed, and a referee to take the account of the property and assets fraudulently assigned or transferred, and that the defendants Waldron and Elizabeth N. Shuler account for and transfer to the receiver to be appointed the property in the hands and the proceeds of the property assigned and transferred to them, and that the same be applied by the receiver to the payment of the plaintiff's judgment. An interlocutory judgment was subsequently entered in conformity with the decision of the referee, and a receiver appointed, and also a referee to take the accounts. The referee stated the accounts, and, on the coming in of his report, application was made in behalf of the plaintiff for final judgment in the action, which was directed. On the application for final judgment a motion was made in behalf of the defendant Elizabeth N. Shuler, individually and as executrix (of which previous notice had been given), to modify the interlocutory judgment by striking out the provision therein appointing a receiver, and the direction that the defendants account for and transfer to him the assigned property and its proceeds, and by inserting a direction that the receiver appointed thereby transfer and deliver to Elizabeth N. Shuler, as executrix, all money or other property in his possession as receiver which had come to his hands under the terms of the interlocutory judgment. The motion also included as part of the relief demanded that Elizabeth N. Shuler as executrix be made a party defendant in the action. The motion was ¹⁶⁸ wholly denied, and the final judgment was thereupon entered. The defendant Elizabeth N. Shuler filed exceptions to the report of the original referee, and among other things, excepted to the direction for the appointment of a receiver, and that the defendants account for and transfer to him the property received by them, or either of them, under the assignment and transfer which had been adjudged fraudulent, to be applied in satisfaction of plaintiff's judgment. These facts sufficiently present the question upon which our judgment proceeds.

Isaac C. Shuler was living when the action was commenced, and was made a defendant. The action, as has been stated, was in part to set aside his general assignment for the benefit of creditors, made by Isaac C. Shuler to the defendant Waldron. For the purpose of this relief, Isaac C. Shuler, the assignor, was an indispensable party. By the assignment, he created a trust to dispose of his property in the way and for

the purposes disclosed in the instrument. He divested himself by the assignment of the legal title to the assigned property, and it became vested in the assignee as trustee. But, as between himself and the assignee, he had a right to insist that the assignee should perform the trust and devote the assigned property to the payment of his debts, as prescribed in the assignment. The plaintiff brought its action in hostility to the assignment, and sought to annul and defeat it for alleged fraud. The assignor was entitled to insist upon its validity, and to be heard before the property should be taken by the judgment of the court from the possession of his assignee and devoted to the payment of the plaintiff's debts in disregard of the assignment. The assignor was entitled to any surplus which might remain after the purposes of the trust were accomplished, and although it might appear that there would be no surplus, nevertheless he had the right to contend that his estate should be distributed under the terms of the assignment, and that it was a valid and not a fraudulent instrument. The authorities are decisive in affirming the general rule that, in a creditor's action brought to impeach and set aside a general ¹⁶⁹ assignment by a debtor of his property for the benefit of creditors, the court will not proceed to judgment in the absence of the debtor as a party defendant, unless by death or other circumstance his joinder, as a defendant, is wholly impracticable: *Lawrence v. Bank of Republic*, 35 N. Y. 320; *Miller v. Hall*, 70 N. Y. 250; *Gaylords v. Kelshaw*, 1 Wall. 81; *Beach's Equity Jurisprudence*, sec. 940. It has been held in some cases that in a suit brought by a creditor against a fraudulent alienee of the debtor, to set aside a specific transfer for fraud, where the conveyance was absolute and transferred as between the parties an indefeasible title or interest, the fraudulent vendor is not a necessary party: *Buffington v. Harvey*, 95 U. S. 103; *Campbell v. Jones*, 25 Minn. 155; *Potter v. Phillips*, 44 Iowa, 357. See, also, *Fox v. Moyer*, 54 N. Y. 130. But the relaxation of the rule has never, so far as we can discover, been extended to the case of an assignment in trust for the benefit of creditors, and the principle upon which the exception is founded does not bring the case within its operation. It may apply to the transfers made to Mrs. Shuler, which were absolute and unconditional, and, if they were alone sought to be set aside, might have justified the bringing of the action against her alone, without joining the party from whom she derived title. But Isaac C. Shuler having been a necessary party to the action in respect of the claim to set aside the general assignment, it follows that upon his

death, pending the action, it could not legally proceed without bringing in his personal representative as a party. This was not done. The procuring of the order to serve a supplemental complaint and its service on the defendant Elizabeth N. Shuler did not make her a party to the action in her representative capacity. The supplemental complaint disclosed facts which made it necessary that there should be a substitution of the personal representatives of the deceased defendant in his stead. But it was not followed by procuring an order for substitution nor by a substitution by consent. Where a necessary defendant is not made a party, it is not sufficient even that the court direct such party to be brought in, but it should refuse to ¹⁷⁰ proceed until he is made a party in fact: *Peyser v. Wendt*, 87 N. Y. 322; *Mahr v. Norwich Union etc. Ins. Soc.*, 127 N. Y. 452. The rule which requires that all persons shall be made parties to an action, whose rights may be affected by the judgment, and without whose presence there cannot be a final and complete determination of the controversy, is not simply a rule of practice or convenience. It has been established in order to give finality to litigation, and in the interest of justice, that the rights of persons shall not be jeopardized or embarrassed by judgments purporting to bind their rights or interests where they have had no opportunity to be heard. A party to an action may, by consent or by failure in due time or manner to raise the objection that other persons should have been made parties, conclude himself to his own prejudice. But the court, on its own motion, if necessary, will interfere in behalf of third persons not parties to the litigation whose interests are involved in the issue presented, and, by requiring them to be brought in, or by staying proceedings, protect them against an injurious adjudication, and may reverse a judgment when it appears that necessary parties were not before the court, although no objection had been taken in the pleadings or on the trial: *Osterhoudt v. Rigney*, 98 N. Y. 230; *Galusha v. Galusha*, 138 N. Y. 272; *Moulton v. Cornish*, 138 N. Y. 133. The principle previously established by the decisions, that where a complete determination of the controversy cannot be had without the presence of other parties, it is the duty of the court to direct them to be brought in, is now embodied in the statute: Code Civ. Proc., sec. 452.

The fact that the defendant Elizabeth N. Shuler was a party defendant in her individual character does not obviate the objection. She had a separate individual interest in the litigation, which was instituted in part to avoid transfers made to

her by the debtor, and it was during his lifetime that she was joined as defendant in the action and answered the complaint. By his death and her appointment as executrix she was invested with a new character as the representative of her husband and his creditors and of his estate. Since the enactment ¹⁷¹ of chapter 314 of the Laws of 1858, an executor or administrator represents creditors as well as the decedent, and is authorized to assert the rights of creditors as against any transfers of property made by the debtor in violation of their rights. But the executor or administrator may also, acting in good faith and as the representative of the decedent, assert and vindicate the validity of transfers of personal property made by him in his lifetime when assailed by creditors. There may arise, in respect to the attitude in which the executor or administrator stands to creditors on the one hand and on the other to the decedent and his transactions, embarrassing questions of duty and propriety. But whether the transfers made by the decedent, sought to be set aside at the instance of creditors after the death of the debtor, are valid or void, the personal representative is entitled to be heard, and his presence as a party is as necessary as that of the debtor if he was still living.

Upon the pleadings and proceedings in this case, the defendant Elizabeth N. Shuler was not in a position to assert any defense in her representative character either to insist upon the validity of the transfers, or, if found to be fraudulent, that the plaintiff had acquired no lien upon the tangible property or its proceeds embraced therein, no receiver having been appointed in the action prior to the death of Isaac C. Shuler. By the judgment all the property and proceeds are directed to be applied to the payment of the plaintiff's judgment, although it appears that at least one other judgment of earlier date against the decedent was outstanding and unsatisfied. The statute prescribes the order in which the debts of a decedent shall be paid out of his assets. It proceeds upon the general equitable principle of equality among creditors. The rule is well settled in this state that the plaintiff in a creditor's action acquires, by the commencement of the suit, a lien upon the choses in action and equitable assets of the debtor, which entitles him, in the successful event of the action, to priority of payment thereout in preference to other creditors, irrespective of the priority of the respective judgments: *Edmeston v. Lyde*, 1 Paige, 637; 19 Am. Dec. 454; *Corning v. White*, 2 Paige, 567; 22 Am. Dec. 659; and this lien is not displaced ¹⁷² or defeated by the death of the debtor before judgment: *Brown v. Nichols*, 42 N. Y. 26.

But in respect of chattels, subject to be taken on execution, the rule seems to be that unless the action is brought in aid of an execution, the mere commencement of the action creates no lien as against other creditors, and, if any lien whatever exists, it is so incomplete and imperfect that it is subject to be overreached by a subsequent levy in favor of other creditors, made before the appointment of a receiver: *Lansing v. Easton*, 7 Paige, 364; *Becker v. Torrance*, 31 N. Y. 631; *Van Alstyne v. Cook*, 25 N. Y. 489; *Davenport v. Kelly*, 42 N. Y. 193; *Storms v. Waddell*, 2 Sand. Ch. 494. When a receiver is actually appointed without an intervening levy having been made, the appointment operates as an equitable levy and a sequestration of the chattels for the benefit of the plaintiff. It is the appointment of the receiver which makes the lien effective and gives the plaintiff priority. It is claimed in behalf of the appellant that as no receiver had been appointed prior to the death of Isaac C. Shuler, the statute eo instanti on his death prescribed the rule for the distribution of his estate, and operated to subject all tangible property transferred by the decedent in fraud of creditors to general administration, and displaces any inchoate lien which may have been acquired by the commencement of the action, as effectually as though the property had been levied on by other creditors in the decedent's lifetime. We think there is great force in this contention. But we refer to the question, without deciding it, as presenting an independent reason why the defendant Elizabeth N. Shuler was a necessary party to the action in her character as executrix and as trustee of all the creditors of the decedent.

Cases are cited to support the contention that the defendant Elizabeth N. Shuler, having been in fact a party to the action in her individual name, should be regarded as a party in her representative character also. The cases mainly are of two classes, those where the cause of action was upon a right accruing to the plaintiff or existing against a ¹⁷³ defendant in a representative character which was imperfectly expressed in the title of the action, and cases where there was an unnecessary addition of a representative title to the name of the party, when in fact the cause of action was upon an individual right or obligation. In these cases it has been held that the title and pleadings may be considered together to ascertain the true nature of the action, and the action will be treated as an individual or representative one, as disclosed upon an inspection of the whole record: *Stilwell v. Carpenter*, 2 Abb. N. C. 238; 62 N. Y. 639; *Beers v. Shannon*, 73 N. Y. 292; *Litchfield v. Flint*, 104 N. Y.

543; *Jennings v. Wright*, 54 Ga. 537; *Waldsmith v. Waldsmith*, 2 Ohio, 156; *Pennock v. Gilleland*, 1 Pitts. 37. But a suit against one sued as an individual does not bind him as trustee, and, conversely, judgment against one sued in a representative capacity does not conclude him in a subsequent action brought by, or against, him as an individual, although the same identical issue is involved, and the decision in the first action was upon the merits: *Rathbone v. Hooney*, 58 N. Y. 463; *Landon v. Townshend*, 112 N. Y. 93; 8 Am. St. Rep. 712; *Collins v. Hy-dorn*, 135 N. Y. 320. In the present case an inspection of the pleadings does not show that the defendant Elizabeth N. Shuler was made a party in her representative capacity, or that her interest as executrix was considered or determined. The conclusion we have reached will necessarily continue this already protracted litigation, and probably without materially changing the result. But to sustain the judgment would establish a dangerous precedent. It is highly important that the scope and effect of judgments should be subject to no uncertainty, and especially that rights affected by representation should not be imperiled by loose procedure or by a judgment which at best leaves it to a doubtful inference whether the rights have been adjudicated.

The judgment should be reversed and a new trial ordered.

All concur.

JUDGMENT—RES JUDICATA—PARTIES.—A former judgment is not admissible as conclusive evidence of a material fact therein adjudicated unless the parties are identical in the two cases, and also sue or defend in the same right or capacity: *Fuller v. Metropolitan Life Ins. Co.*, 68 Conn. 55; 57 Am. St. Rep. 84, and note.

PARTIES—DEATH—EXECUTORS AND ADMINISTRATORS.—When a party of record dies pending the action, his representative is not thereby made a party, nor does he become affected by any proceedings in the suit until he is brought into court and made a party in due form: Monographic note to *White v. Johnson*, 50 Am. St. Rep. 741.

CREDITORS' SUIT—NECESSARY PARTIES—FRAUDULENT GRANTOR.—A fraudulent grantor, though a proper, is not a necessary, party defendant in an action to subject to the lien of the plaintiff's judgment property alleged to have been fraudulently conveyed: *Blanc v. Paymaster Min. Co.*, 95 Cal. 524; 29 Am. St. Rep. 140. See, also, *Edmeston v. Lyde*, 1 Paige, 637; 19 Am. Dec. 454; monographic note to *Massey v. Gorton*, 90 Am. Dec. 290-293.

CREDITOR'S SUIT—WHAT PROPERTY MAY BE REACHED—CHOSES IN ACTION.—The weight of authority supports the view that equity has no power in ordinary cases to compel the appropriation of choses in action to the payment of their owner's debts: Extended note to *Donovan v. Finn*, 14 Am. Dec. 542; *Greene v. Keene*, 14 R. I. 388; 51 Am. Rep. 400. But see monographic note to *Massey v. Gorton*, 90 Am. Dec. 293-295.

CREDITOR'S SUIT—LIEN—PRIORITY.—Where there is a prior specific lien by judgment or levy of process, a creditor's suit cannot give priority over it. But it has been held to be the better opinion that the judgment creditor who first files his bill to set aside a fraudulent conveyance of real estate has priority: Monographic note to *Massey v. Gorton*, 90 Am. Dec. 296. The same has been held as to property not subject to execution: *Corning v. White*, 2 Paige, 567; 22 Am. Dec. 659.

COLON v. LISK.

[153 NEW YORK, 188.]

JURY TRIAL, CASES IN WHICH PARTIES ARE ENTITLED TO.—The provision in the constitution of New York respecting trial by jury does not limit the right thereto to those cases in which it had existed before the adoption of the constitution, but further extends it to such new cases of like nature as may afterward arise.

JURY TRIAL—STATUTES VOID FOR NOT ALLOWING.—A statute providing that interference by one person with oysters or other shellfish belonging to another is a misdemeanor, fixing as a penalty therefor the ordinary punishment and a further penalty of one hundred dollars for each offense, and that certain officers may summarily seize any vessel found violating the statute, and, upon six days' notice, a justice of the peace may take evidence whether the vessel was used in violation of the statute, and, if he shall determine it so, then that he must order it to be sold and the net proceeds paid to the commissioners of fisheries, game, and forestry, but making no provision for a trial by jury, it is unconstitutional, both for such denial of the right to trial by jury and for authorizing the taking of property, however valuable, and arbitrarily transferring it to the state, irrespective of the damage inflicted and where the trespass may be insignificant and the person committing it guiltless of intentional wrong.

CONSTITUTIONAL LAW—RIGHT OF THE LEGISLATURE TO CONFISCATE PROPERTY FOR THE COMMISSION OF A TRESPASS.—A statute providing that every vessel by aid of which one person shall interfere with the oysters of another planted or cultivated in the waters of the state, or remove any stakes, buoys, or any boundary marks of any planted or cultivated beds may, within one year after its unlawful use, be seized, and thereafter, upon a finding of a justice of the peace that it has been employed in such unlawful use, sold, and the proceeds of the sale turned over to certain officers for the benefit of the state, is unconstitutional. The legislature cannot forfeit the property of one person on the ground that he has interfered with some private right of another without violating the provisions of the national and state constitutions insuring to every person his life, liberty, and property, unless deprived of them through the regular and proper administration of the law according to the rules and forms which have been established for the protection of private rights or the prevention or punishment of public wrongs. Such forfeiture cannot be sustained as an exercise of the police power.

THE POLICE POWER, ACTION OF THE LEGISLATURE WHEN NOT CONCLUSIVE.—A determination by the legislature as to what is a proper exercise of the police power is not final and conclusive, but is subject to the supervision of the courts. The legislature cannot, under the guise of the exercise of this power, provide for the confiscation of private property as a penalty for an invasion or disregard by one person of the property rights of another.

Action of replevin to recover possession of the sloop "Jessie" and her apparel and furniture. The defendants were fish and game protectors and foresters, and justified their seizure and subsequent possession of the property in controversy by pleading that it had been seized in violation of the fisheries, game, and forestry laws of the state in disturbing oysters lawfully planted in the waters thereof. The statute relied upon, after prohibiting interference by one person with the oysters of another lawfully planted or cultivated in any of the waters of the state, authorized certain officers and any other persons to seize any vessel used in violating the statute within one year after such violation, and to give notice to a justice of the peace of the county wherein the seizure was made. He was required to fix a time and place for trial, and to give notice thereof. If, after the trial, he should determine from the evidence that the vessel had been employed in violation of the statute, he was required to order it and its furniture, tackle, and apparel to be sold, and from the proceeds of the sale he was directed to pay the charges and expenses of the proceeding and the remainder to the commissioners of fisheries, game, and forestry. The special term sustained the statute, but, on appeal to the appellate division of the supreme court of the second judicial department, it certified the questions involved to the court of appeals for its determination.

Elmer G. Sammis, for the appellants.

Benjamin Patterson, for the respondents.

192 MARTIN, J. The correctness of the judgment of the court below is dependent upon the power of the legislature to enact the statute under which the defendants seek to justify their seizure of the property in question. It is practically conceded that, if the statute is valid, it justified the acts of the defendants, and the allegations of their answer are sufficient to constitute a defense. The validity of this statute is challenged, and the general question arises whether it falls within the inhibition of any of the provisions of either the federal or state constitution. The constitutional limitations applicable to this question are contained in the provisions of the constitution of this state which declare that, "trial by jury in all cases in which it has been heretofore used shall remain inviolate forever," and the provisions of the federal and state constitutions which provide that no person shall be deprived of life, liberty, or property without due process of law: N. Y. Const., art. 1, secs. 2, 6; U. S. Const., 14th amendment.

The statute under consideration makes any interference by one person with oysters or other shellfish belonging to another a misdemeanor, and adds to the ordinary punishment for such an offense a further penalty of one hundred dollars for each violation thereof. It then provides that certain officers named shall, and any other person may, summarily, without process or other authority, seize any boat or vessel used in violation of the act, and that upon a six days' notice to the person in possession and to the owner, if known, a justice of the ¹⁹³ peace shall proceed to take evidence whether the vessel was used in violation of the statute, and, if he shall determine it was, he must order the same to be sold, and the avails, after deducting the charges and expenses, must be paid to the commissioners of fisheries, game, and forest. No provision for a trial by jury is found in any portion of the act, nor is such a trial permissible under it.

The learned appellate division held that this statute was in contravention of the constitutional provision which insures a trial by jury in all cases in which it has been heretofore used, and upon that ground alone reversed the decision of the special term and sustained the plaintiff's demurrer to the answer. This question was so ably discussed by the learned justice who delivered the opinion of that court that we should deem it wholly unnecessary to do more than concur in the conclusion reached, and upon the grounds so well and ably stated, except for the fact that we cannot agree with the conclusion that the statute is not in conflict with other constitutional provisions. Therefore, while we agree in the result, yet we think the statute violative of other constitutional limitations which render it invalid.

In considering this case, we deem any extended discussion of the question of the invalidity of the statute, because it deprived persons affected by it of the right to a trial by jury, unnecessary, in view of its exhaustive and satisfactory examination by the court below. Section 2 of article 1 of the constitution, which insures a trial by jury in all cases in which it has heretofore been used, was under consideration by this court in the case of *Wynehamer v. People*, 13 N. Y. 378, 426. It was there said that that provision does not limit the right to mere instances in which it has been used, but extends it to such new and like cases as may afterward arise. That principle was also recognized in *People v. Dutcher*, 83 N. Y. 240, 242. The doctrine that the jury trial referred to in that provision means a trial by a common-law jury of twelve men, was also asserted in the latter case, and *Hill v. People*, 20 N. Y. 363, and *Wynehamer v. People*, 13 N. Y. 378, 426, ¹⁹⁴ were referred to as sustaining it. There-

fore, if the right to a trial by jury existed in similar cases at the time of the adoption of the constitution, then clearly this statute was invalid, for the reason that it in no way provided for such a trial, either in the trial court or upon appeal. That the forfeiture of property used in violation of this statute is in effect a penalty we have no doubt. We regard it equally clear that suits to enforce forfeitures or penalties have been generally tried by a jury. Consequently, as the statute under consideration makes no provision for such a trial, but provides another exclusive method, it is in conflict with the provisions of section 2 of article 1 of the constitution of the state: *Wood v. Brooklyn*, 14 Barb. 425, 432; *Warren v. People*, 3 Park. 544.

We are, however, of the opinion that there is another and broader ground upon which this statute should be declared invalid. In discussing the constitutionality of this act, it is to be remembered that the question is to be determined, not by what has been done under it in any particular instance, but by what may be done under and by virtue of its authority: *Stuart v. Palmer*, 74 N. Y. 183; 30 Am. Rep. 289; *Gilman v. Tucker*, 128 N. Y. 190, 200; 26 Am. St. Rep. 464. When considered with that idea in view, it at once becomes obvious that this statute may be employed to confiscate to the state the entire property of an individual for the commission of a trespass upon the property of another, however slight, and this, too, although the owner is guiltless of any intended or actual wrong. If valid, we see no reason why the largest and most valuable vessel sailing on the waters of the state may not be sold under it, and the price arbitrarily transferred to the state, although the measure of any offense committed is but the disturbance or removal of a single buoy or stake, and that by some person for whose act neither the owner nor the person in possession is responsible, or could in any manner control. Moreover, the right of seizure continues for the period of one year. Hence, if this act is valid, it would seem that such a vessel may be seized, condemned, sold, and its value transferred to ¹⁹⁵ the state at any time within a year after a trespass is committed, although there may have been a change of title and the owner may have paid full value, with no knowledge or even suspicion that it is subject to seizure and confiscation. That the legislature has power, under existing constitutional limitations, to pass a law fraught with such consequences, we do not and cannot believe.

It is to be observed, in passing, that the use for which vessels and fixtures may be forfeited under this act does not constitute a nuisance, either at common law, or under this or any other

statute. Nor is the property itself a nuisance. Hence, it is obvious that the validity of this act cannot be maintained upon the ground that either the act or the property is a public nuisance, and, consequently, that the legislature had the power to authorize its abatement. Nor, indeed, is it clear that the legislature would have been authorized to declare the use of such a vessel for that purpose a public nuisance, as it could only do so in case it was detrimental to the public interest. While the legislature may, in a proper case, declare property or its use in a particular manner a nuisance, yet that power is not unlimited. It cannot be used as a cover for withdrawing property from the protection of the law, nor can the legislature, when no public right or interest is involved, arbitrarily declare property a public nuisance for the purpose of devoting it to destruction: *Lawton v. Steele*, 119 N. Y. 226, 233; 16 Am. St. Rep. 813.

By virtue of what power can the legislature enact a statute forfeiting to the state the property of one person, upon the sole ground that he had in some manner interfered with the private rights of another, is an inquiry which at once presents itself. Such an act would seem to be in clear violation of the provisions of both the federal and state constitutions, which insure to every person his life, liberty, and property, unless deprived of them through the regular and proper administration of the law according to the rules and forms which have been established for the protection of private rights or the punishment or prevention of public wrongs. The legislature is not vested with the power to arbitrarily provide that any ¹⁹⁶ procedure it may choose to declare such shall be regarded as due process of law. If it possessed that power, the guaranties of the constitution would be rendered unavailing, and private rights of citizens would be within its absolute control.

If authority to enact the statute under consideration existed, it was by virtue of the police power vested in the legislature. Under that power, persons and property may be subjected to necessary restraints and burdens to secure the general public good. That that power exists is undenied. That it is necessary to the proper maintenance of the government of the state and the general welfare of the community must also be admitted. Although it includes everything essential to the safety, health, morals, and general good of the public, it is by no means unlimited. "To justify the state in thus interposing its authority in behalf of the public it must appear: 1. That the interests of the public generally, as distinguished from those of a particular class, require such interference; and 2. That the means are

reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts": *Lawton v. Steele*, 152 U. S. 133, 137.

It is within the province of the legislature to determine what laws are needed for the protection of the public, and, so long as its measures are calculated and appropriate to accomplish that end, its discretion may not be reviewed by the courts. They must, however, have some relation to that end, and, if they do not really relate to such a purpose, it becomes the duty of the courts to declare them invalid: *Matter of Jacobs*, 98 N. Y. 98; 50 Am. Rep. 636. It is for the judiciary to see that the purpose to be reached by the law is a public one: *Matter of Ryers*, 72 N. Y. 1, 8; 28 Am. Rep. 88. Equal rights and impartial tribunals¹⁹⁷ to enforce them are the results which are intended to be secured by the establishment of constitutional limitations to legislative power: *People v. Marx*, 99 N. Y. 377, 387; 52 Am. Rep. 34. Under the mere guise of a statute to protect against wrong, the legislature cannot arbitrarily strike down private rights and invade personal freedom, or confiscate private property. The police power must be exercised within its appropriate sphere and by appropriate methods: *People v. Arensberg*, 103 N. Y. 399; 57 Am. Rep. 741. This power can be exercised only to promote the public good, and is always subject to judicial scrutiny: *Forster v. Scott*, 136 N. Y. 577, 584. Whenever the legislature passes an act which transcends the limits of the police power, it is the duty of the judiciary to pronounce it invalid, and to nullify the legislative attempt to invade the citizens' rights: *People v. Warden*, 144 N. Y. 529, 535. That power must be exercised subject to the provisions of both the federal and state constitutions. Laws passed in the exercise of it must tend toward the preservation of the lives, health, morals or welfare of the community, and the court must be enabled to see some clear and real connection between the assumed purpose of the law, and the actual provisions thereof, and that the latter tend in some plain and appreciable manner toward the accomplishment of the objects for which the legislature may use this power: *Health Department v. Rector*, 145 N. Y. 32, 39; 45 Am. St. Rep. 579.

The question here to be determined is, whether the enact-

ment of the statute we are considering was a proper exercise of the police power. When we submit this statute to the test of the principles established by the cases already cited, to which many others might be added, it becomes obvious that it cannot be upheld upon the ground that it is within the police power of the state.

It is to be observed that the statute does not relate to the health, morals, safety, or welfare of the public, but only to the private interests of a particular class of individuals. Nor can it be fairly said that the means provided for the protection of those interests are reasonably necessary to accomplish ¹⁹⁸ that purpose. But, on the contrary, they are plainly oppressive and amount to an unauthorized confiscation of private property for the mere protection of private rights. It is in no manner attempted by this statute to protect any public interest, or defend any public right. Nor is it calculated to accomplish that end, but, under the guise of a pretended police regulation, it arbitrarily invades personal rights and private property.

In this case we have a statute which authorizes the seizure, sale, and complete appropriation by the state of the property of an individual, which may reach in value many thousands of dollars. It is manifest that this extraordinary and extreme statute is not necessary, and was not intended for the protection of the public. Its sole purpose was to regulate private interests and enforce private rights. In no sense can it be regarded as a police law, and, consequently, is not within the police power. In this statute we have another example of class legislation where the legislature has attempted to improperly interfere with the private rights of the citizen. This species of legislation has been so often condemned by this and other courts as to render any further discussion of its impropriety and invalidity wholly unnecessary: *Matter of Jacobs*, 98 N. Y. 98; 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 377; 52 Am. Rep. 34; *People v. Arensberg*, 103 N. Y. 388; 57 Am. Rep. 741; *People v. Gillson*, 109 N. Y. 389; 4 Am. St. Rep. 465; *Forster v. Scott*, 136 N. Y. 577. We are clearly of the opinion that the legislature had no authority to pass the statute under which the defendants attempted to justify their acts, and that it is in plain violation of the constitutional provisions to which we have already adverted. For these reasons, the statute must be held invalid, and the decision of the appellate division affirmed.

It follows that the questions certified to this court for its determination must be answered as follows: The first is answered

in the negative and the second in the affirmative, and the judgment appealed from affirmed, with costs.

All concur.

TRIAL BY JURY—CONSTITUTIONAL GUARANTY.—A constitutional provision declaring that the right of trial by jury shall remain inviolate guarantees only the right of trial by jury as it existed at the adoption of the constitution: *State v. Doherty*, 16 Wash. 382; 58 Am. St. Rep. 39, and note; *Pillow v. Southwestern etc. Imp. Co.*, 92 Va. 144; 53 Am. St. Rep. 804, and note.

POLICE POWER—LIMITS OF.—The legislature cannot, under the guise of a police regulation, impose upon property, burdens so unreasonable as to work a practical confiscation thereof; it must appear to the court, when such regulation is called in question, that there is a clear and real connection between the assumed purpose of the law and its actual provisions: *Chicago etc. R. R. Co. v. State*, 47 Neb. 549; 53 Am. St. Rep. 557, and note.

JURY TRIAL—HOW FAR LEGISLATURE MAY REGULATE.—Reasonable regulations affecting the exercise of the right to trial by jury may be prescribed by the legislature. But it may not be injuriously limited or restrained under pretense of regulation: *Mono-graphic note to Flint River Steamboat v. Roberts*, 48 Am. Dec. 193. See extended note to *Saco v. Wentworth*, 58 Am. Dec. 791-793.

MATTER OF WHITNEY.

[158 NEW YORK, 259.]

WILLS, NOT SUBSCRIBED AT THE END THEREOF.—If a will is drawn upon a printed blank covering but one page and containing clauses numbered first and second, at the end of which the testator and the witnesses sign, and such page directs attention to an annexed slip, and there is annexed, fastened by metal staples, another page containing further clauses, numbered third and fourth, such will is not subscribed at the end as required by statute, and cannot be admitted to probate.

Charles S. Baker, for the appellants.

George E. Warner and Henry J. Sullivan, for the respondents.

261 **BARTLETT, J.** This appeal presents the question whether the paper writing alleged to be the last will and testament of James R. Whitney, deceased, was subscribed by the testator at the end thereof, as the statute requires: 2 Rev. Stats. p. 63, sec. 40. The surrogate's court of Monroe county held that it was not, and the learned general term has reversed the decree.

The facts in the case are undisputed. The will is drawn upon a printed blank, covering only one page, and the testator and subscribing witnesses signed at the foot thereof.

The subdivisions of the will, marked respectively "First" and

"Second," fill the entire blank space in the printed form, and at the end of the second subdivision are the words, "See annexed sheet." On a separate slip of paper are written two additional subdivisions, marked respectively "Third" and "Fourth," and this is attached to the face of the will, immediately over the first and second subdivisions, by metal staples, so that the slip annexed has to be raised up or turned back, in order to read the first two clauses.

²⁶² We are of opinion that the question presented is not an open one in this court, and that the alleged will is not subscribed at the end thereof.

In *Matter etc. of Hewitt*, 91 N. Y. 261, the will was written on two sides of an irregular shaped piece of paper, about one-half of it upon one side and the other half upon the other side. The witnesses signed their names at the bottom of the first side and again at the top of the second side. The testator signed his name at the end of the disposing portion of the instrument, near the middle of the second side, and again at the bottom of the second side.

It was held that the statute required that both the testator and the witnesses must sign at the end of the will. Judge Earl said: "Wherever the will ends there the signatures must be found and one place cannot be the end for the purpose of subscribing by testator, and another place be the end for the purpose of subscribing by the witnesses." This court held that the probate of the instrument was properly denied.

In *Matter etc. of O'Neil*, 91 N. Y. 516, the instrument was drawn upon a printed blank, the formal commencement being on the first page and the formal termination at the foot of the third page. The blank space was filled on the first, second, and third pages, and the last or thirteenth clause of the will was partly written on the third page and balance carried over to the blank fourth page. The names of the testator and the witnesses were subscribed near the bottom of the third page, below the formal printed termination of the will, and there only. The written matter on the fourth page was not connected with the main body of the will by reference of any kind, although it was obviously a continuation and completion of the thirteenth paragraph of the will.

This court held that the will was not subscribed at the end thereof, and that the parts of the instrument preceding the signature could not be received, as the will was either valid or invalid as a whole.

²⁶³ In *Matter etc. of Conway*, 124 N. Y. 455, there was a

state of facts quite similar to *Matter of O'Neil*, 91 N. Y. 516, just commented upon, with the exception that at the end of the provisions in the body of the will were the words "carried to back of will," and upon the back of the sheet was the word "continued." Following this word were various bequests, and then below them were added the words "signature on face of the will."

The second division of this court held, with three judges dissenting, that this instrument was not signed by the testator and witnesses at the end thereof, and had been improperly admitted to probate. The dissenting opinion rested mainly upon the fact that there was a clear and distinct reference in the body of the will to the provisions on the back of the paper, and that they were thereby properly connected with the subject matter preceding the signatures.

This court, very recently, in *Matter etc. of Blair*, 152 N. Y. 645, affirmed, without an opinion, the judgment of the general term, first department, reversing the decree of the surrogate's court of the county of New York admitting the alleged will of Lewis R. Blair to probate. This instrument consisted of eight pages; the testator signed at the bottom of seventh page and the witnesses signed at the end of a proper witnessing clause at the top of the eighth page.

After the place for the signatures of the witnesses, but before they were actually signed or the will executed, a clause was added directing the executors to sell at private sale a certain piece of real estate, and to devote the proceeds of the sale in liquidating any deficiency in interest or cash bequests under the will.

The will was then executed, as before stated, and the testator signed the added clause, but the witnesses did not.

The surrogate held that the will was complete without the added clause, and admitted the main body of the instrument to probate, excluding the added words. We held that the additional clause was a part of the will, and that it was not ²⁶⁴ signed at the end thereof by testator and witnesses as required by the statute.

The case at bar is fully covered by the principle of the foregoing cases, and indeed we think it would be far more dangerous to permit the probate of the will before us than in the case of *Matter etc. of Conway*, 124 N. Y. 455, to which we have already referred.

In the latter case there were distinct references and cross-references connecting the outside provisions with the body of the

will, but in the case at bar the only reference to the annexed slip is in the will, and the paper attached contains no word or sign to connect it with the main instrument.

Furthermore, as already pointed out, the separate slip on which two subdivisions of the will are written is attached to the face of the printed blank by metal staples, and could be, after the execution of the will, removed and another slip substituted without danger of detection.

It is true that in the case before us there is no charge of fraud, but we are dealing with general principles and the construction of a statute that was enacted to guard the wills of the dead from alterations of any kind. We have held that this statute should not be defeated by judicial construction or frittered away by exceptions: *Sisters of Charity v. Kelly*, 67 N. Y. 416.

This court has also called attention to the fact that while wills are interpreted so as to carry out the intention of the testator that rule cannot be invoked when construing the statute regulating their execution, as in the latter case courts do not consider the intention of the testator, but that of the legislature: *Matter of O'Neil*, 91 N. Y. 520.

This statute has always been strictly construed, and the will must be a completed whole signed by the testator and witnesses at the end thereof.

The cases referred to by the learned general term to the effect that any written testamentary document in existence at the execution of the will may, by reference, be incorporated into and become a part of the will, provided the reference in ²⁶⁵ the will is distinct and clearly identifies or renders capable of identification by the aid of extrinsic proof the document to which reference is made (*Brown v. Clark*, 77 N. Y. 377) have no bearing upon the point we are considering.

The judgment of the general term should be reversed and the decree of the surrogate's court of Monroe county affirmed, with costs.

All concur.

WILLS—SIGNATURE AT END—WHAT IS.—A subscription by the testator after the attestation clause is "at the end of the will" and valid: *Younger v. Duffie*, 94 N. Y. 535; 46 Am. Rep. 156. See, also, *Chaffee v. Baptist Missionary*, 10 Paige, 85; 40 Am. Dec. 225, and extended note; *Grabill v. Barr*, 5 Pa. St. 441; 47 Am. Dec. 418, and note.

MATTER OF CALLISTER.

[153 NEW YORK, 294.]

HUSBAND AND WIFE, HIS RIGHT TO HER SERVICES.—Though a woman is serving a man in the capacity of clerk upon an agreement to pay her an annual compensation of five hundred dollars, such employment to continue as long as he practices law, and such payment not to be made until he retires from business, he, upon their subsequent marriage, becomes entitled to her services without payment. She need not continue serving him as a clerk, but, if she does so, she cannot enforce any promise to pay therefor, however solemnly made.

HUSBAND AND WIFE, LEGISLATION AS AFFECTING HIS RIGHT TO HER SERVICES.—The legislation of the state of New York upon the subject of the rights of married women has only resulted in abrogating their common-law status to the extent set forth in the various statutes. They have not, by express provision nor by implication, deprived him of his common-law right to avail himself of a profit or benefit from her services. A pre-existing contract between them stipulating for payment by him for such services is necessarily terminated by their marriage.

HUSBAND AND WIFE.—A PROMISSORY NOTE GIVEN BY A HUSBAND to his wife in consideration of moneys which she had accumulated for the purpose of purchasing oil paintings and household decorations, and which had been given her by him, is enforceable against his estate.

WITNESS, LIVING, WHEN PERMITTED TO TESTIFY AGAINST DECEDENT.—If, upon a trial of an action against the estate of a decedent, the holder of a note given by him is called upon to produce it, which she does, and admits the signature to be genuine, she is not competent, as a witness in her own behalf, to testify to the consideration for which the note was made, for the purpose of rebutting the presumption that all pre-existing accounts and demands between them had been settled by such note.

James C. Smith, for Margaret Callister.

W. A. Sutherland, for next of kin.

299 VANN, J. On the 8th of September, 1888, John Callister, a resident of Ontario county, died intestate, leaving a widow, Margaret Callister, since appointed his administratrix, and certain collateral relatives, who were his next of kin. The value of his personal estate was about \$100,000 and his real estate was worth nearly as much more. The appeal brought by Mrs. Callister, individually, involves several distinct and independent claims for money that she alleges was due to her from her husband at the time of his decease. Those claims, so far as it is necessary to now consider them, and the facts relating thereto as found by the surrogate, are as follows:

1. "Said intestate and said Margaret Callister intermarried on the 6th day of May, 1857, and lived together as husband and wife until his death. At some time and about one year preceding such marriage, the intestate, who was a practicing lawyer, employed Margaret Callister, then unmarried, as a copyist or

clerk in his office, and agreed to pay her therefor at the rate of five hundred dollars a year, the employment to continue as long as he practiced law, payment not to be made until he retired from practice; and the intestate practiced law until the time of his death. The rendition of services under such agreement commenced one year prior to such marriage and continued to the time of the death of the intestate, and after such marriage he recognized his agreement to pay for such services by verbal statements and the entry of an item in one of his account books under date of October 23, 1862. On the said twenty-third day of October, 1862, the intestate paid to said Margaret Callister, on account of such services, the sum of five dollars, and never paid her any other sum on account ³⁰⁰ thereof." The referee rejected all of the claim presented under this contract, except the sum of \$495, with interest thereon from August 23, 1888, but the surrogate allowed the entire claim, amounting, with interest, to \$22,197.43, while the general term allowed no part thereof, not even for the services rendered before marriage.

Said contract, however extraordinary and improbable it may appear, must, for the purpose of this appeal, be accepted as found by the surrogate, because the evidence is not printed in the appeal book, and both parties rely upon the findings as made. At the date of the contract but slight advance had been made in legislation toward relieving married women from the harsh features of the common law with reference to the ownership of personal property and the control of real estate belonging to them at the time of marriage. Only the pioneer act of 1848, as amended in 1849, was then in force, which provided that the real and personal property of any woman marrying thereafter and the rents, issues, and profits thereof, should not be subject to the disposal of her husband, nor be liable for his debts, but should continue her sole and separate property as if she were single: Laws 1848, c. 200, sec. 1; Laws 1849, c. 375. By subsequent sections the property of women, then married, was in like manner secured, and the right to take by inheritance, gift, grant, devise, or bequest from any person except the husband, was conferred: Laws 1848, c. 200, secs. 2, 3. The great enabling act of 1860, however, had not been passed and the right of a married woman to acquire property by her trade, business, labor, or services, carried on or performed on her sole and separate account, did not exist: Laws 1860, c. 90; Laws 1862, c. 172. While she could hold her property after marriage the same as before, and could take by gift or grant from others than her husband, notwithstanding her marriage,

she could not create property by going into business and was not entitled to her own earnings, even for services rendered on her own account. Such was the law when the contract under consideration was made between Margaret Walker and John Callister. That contract was, of ³⁰¹ course, valid in all respects until the intermarriage of the parties thereto, but from that time forward and by virtue thereof, the husband became absolutely entitled to the services of his wife without paying for the same: *Blaechinska v. Howard Mission etc.*, 130 N. Y. 497; *Coleman v. Burr*, 93 N. Y. 17; 45 Am. Rep. 160; *Birkbeck v. Ackroyd*, 74 N. Y. 356; 30 Am. Rep. 304; *Reynolds v. Robinson*, 64 N. Y. 589; *Whitaker v. Whitaker*, 52 N. Y. 368; 11 Am. Rep. 711; *Bishop on Married Women*, sec. 472; 9 Am. & Eng. Ency. of Law, 817; *Tyler on Infancy and Coverture*, 314. By entering into the marriage contract she impliedly agreed to render services for her husband without payment therefor, and, while she was not obliged to serve as a clerk in his office, if she did so voluntarily she could not enforce any promise of payment, however solemnly made: *Blaechinska v. Howard Mission etc.*, 130 N. Y. 497, 502. The right of the husband to his wife's services was an essential part of that contract, the same as his obligation to support her. As was said by this court in *Porter v. Dunn*, 131 N. Y. 314, 317, decided in March, 1892, "the legislation in this state upon the subject of the rights of married women has only resulted in abrogating their common-law status to the extent set forth in the various statutes. They have not by express provision, nor have they by implication, deprived the husband of his common-law right to avail himself of a profit or benefit from her services." The contract made before marriage to perform services for compensation and the contract made by marriage to perform services without compensation could not both exist at the same time. There was a pervading and irreconcilable conflict between them, and hence the presumption of law is, that the later contract so modified the earlier as to abrogate or supersede it. While there may be antenuptial contracts, made in view of marriage and to be enforced thereafter, there can be no modified or conditional marriage contract, whereby the services of the wife are excepted from the usual effect of marriage. Necessarily, all marriage contracts are alike in their legal operation, which cannot be changed by agreement nor modified in any way except by legislation. Hence, the marriage contract between ³⁰² Mr. and Mrs. Callister could not be made, and, from its nature, could not exist, without destroying the previous contract for clerical

services, which, in the absence of an express finding, we must assume was not made in contemplation of marriage. The facts found do not permit the inference that he intended by the agreement of 1856 to waive his common-law right to her services if he should subsequently marry her, for there is nothing to indicate that they then contemplated marriage. The contract, as found, is presumed to embrace all the stipulations of the parties, and its failure to state, directly or indirectly, that it was made in view of marriage, and the absence of any fact indicating that marriage had then been thought of, excludes the subject of waiver from consideration. What took place after marriage by way of ratification, performance, or partial payment, could not change the obligation assumed by either party when they intermarried. It was not until after the death of Mr. Callister that there was legislation which would enable a husband to make a valid and enforceable promise to his wife to pay her for her personal services, rendered apart from a separate business: Laws 1892, c. 594; Laws 1896, c. 272; *Hendricks v. Isaacs*, 117 N. Y. 411, 419; 15 Am. St. Rep. 524.

The learned counsel for Mrs. Callister founds his argument in support of her claim upon the theory that as her contract was a chose in action, and hence property, protected by the act of 1848, it survived the marriage ceremony, and was enforceable thereafter the same as it was before. That would perhaps, be true if the contract were not incapable of performance after marriage, because it would violate the theory of absolute unity of husband and wife. A man cannot be entitled to the services of his wife for nothing by virtue of a uniform and unchangeable marriage contract, and at the same time be under obligation to pay her for those services by virtue of a contract made before marriage. She cannot be his wife and his hired servant at the same time, in the absence of legislation permitting her to contract with him for her services. That would be inconsistent with the marriage relation and ³⁰³ disturb the reciprocal duties of the parties. The earlier contract, which is subject to change at will must yield to the later, which the law makes final and unalterable. Certain cases are relied upon by counsel which hold that contracts made between husband and wife before marriage were not, after the act of 1848, extinguished by their matrimonial union as they had been previously at common law: *Power v. Lester*, 23 N. Y. 527; *Dygert v. Remerschnider*, 32 N. Y. 629. It is undoubtedly true that a contract made between a man and a woman before they were married, relating solely to property and not to

services springing from the marital relation, would not be extinguished by their marriage after the passage of said act. There is no reason why any antemarriage agreement that is not inconsistent with the marriage contract should not survive the latter, when the legislature had declared that the property of any woman marrying after a certain date should continue her sole and separate property as if she were single. As to such a contract the wife might well be regarded as a feme sole in the performance of the agreement as well as in the making of it. Where, however, the contract related solely to personal services to be rendered by the woman for the man for a consideration named, and she subsequently agreed either expressly or impliedly to render those services for nothing, the later agreement necessarily supplanted the earlier because both could not exist at the same time. It was an implied part of the marriage contract between Mr. and Mrs. Callister that her services should belong to him without other compensation than support, maintenance, and the discharge of other obligations arising from the marital relation. As the common law, in force at the time, made this a part of that contract, beyond the power of the parties to change or modify it, he became entitled to her services, precisely the same as if no contract had been made between them before marriage. The prior contract ceased to exist by operation of law, except in so far as it had been performed at the date of the marriage. This would entitle Mrs. Callister to recover the contract price for only one year, less the amount paid thereon during the lifetime ³⁰⁴ of her husband, unless she is precluded by the presumption of a settlement arising from the giving of a note by her to her husband on the 1st of January, 1884, which will be considered hereafter.

2. The facts in relation to the second claim of Mrs. Callister were found by the surrogate as follows: "As depositary of his said wife in her individual capacity, the intestate received from and for her moneys, the amount so held by him at the time of his death being \$2,686.93. The various items making up said last-mentioned amount are as follows: 1859, March 23, \$2,267; March 23, \$26.67; April 22, \$2; Oct. 27, \$31.47; 1861, Nov. 29, \$2; 1862, July 10, \$4; Oct. 28, \$4; 1886, Feb. 25, \$162.25; 1887, Oct. 17, \$21; 1887, \$40; 1887, Jan. 3, \$1.37; 1888, Jan. 31, \$50; 1888, May 17, \$75.17. Total, \$2,686.93."

This claim was allowed by the referee and the surrogate but was reversed by the general term, no reason being given for reaching that conclusion.

As to the items that accrued prior to the giving of said prom-

issory note on the 1st of January, 1884, there may be no right of recovery, owing to the presumption of an accounting and settlement, in the absence of explanation, but as to the rest, Mrs. Callister was clearly entitled to a judgment. As no claim to the contrary has been made upon this appeal, discussion is unnecessary.

3. Mrs. Callister bases her third claim against the estate of her husband upon the following facts, as found by the surrogate: "The said Margaret Callister is the holder and owner of a promissory note made by the intestate dated January 1, 1884, to secure the payment of the sum of \$1,200 with interest. The consideration for the said note was money which the said Margaret Callister had accumulated for the purpose of purchasing oil paintings and household decorations, and which was given to her husband at or about the time he made and delivered to her the said promissory note; there was no other consideration for said note, and there was no accounting or ³⁰⁵ settlement of accounts between the said parties when the note was given, and the note in no way related to or affected the other dealings and transactions hereinabove stated."

The referee and the surrogate permitted a recovery for the amount of the note, but the general term reversed this part of the judgment also, without giving any reason therefor. No defense to the note was shown, and the learned counsel for the next of kin admits that Mrs. Callister is entitled to recover the amount thereof.

An important question arises, however, in connection with said note which requires consideration. Upon the trial the counsel for the next of kin called for this note, which, although included in the claim of Mrs. Callister, had not been offered in evidence by her. The note was thereupon produced by her counsel, who conceded that the signature thereto was that of the decedent, and it was then read in evidence under her objection and exception. The next of kin thus established a debt in favor of their adversary for the purpose of raising the presumption that all pre-existing accounts and demands between the parties were settled by the giving of the note. In order to repel this presumption, Mrs. Callister was called as a witness in her own behalf, and asked in substance what the note was given for, and what was said and done between her husband and herself at the time it was given. Notwithstanding the objection that this called for a personal transaction, and was hence incompetent under section 829 of the code, she was permitted to testify to a state of facts warranting the finding, as subsequently made,

that "there was no accounting or settlement of accounts when the note was given and" that "the note in no way related to or affected the other dealings" between the parties. The various rulings admitting this evidence were duly excepted to, and they are now defended upon the ground that when the note was put in evidence by the next of kin, it became "the testimony of the . . . deceased person" within the meaning of the statute. Section 829 of the code, after prohibiting an interested survivor from testifying in his own behalf as to a personal transaction or ³⁰⁶ communication between himself and a deceased person, makes two exceptions to the general prohibition, viz: Where the personal representative of the decedent is examined in his own behalf, or the testimony of the deceased person is given in evidence concerning the same transaction or communication. The last clause applies to both exceptions, for the examination of the representative must be concerning the same transaction, as well as the testimony of the deceased, in order to open the door. The first exception has no application to this case, for no one was examined in behalf of the next of kin, who derived their title from the decedent and stand in the place ordinarily occupied by the personal representative. Whether the second exception applies or not depends upon the meaning of the word "testimony" as thus used in the statute. There is a distinction between testimony and evidence, for the former means statements made under the sanction of an oath, while the latter, which includes the former, but is more comprehensive, means whatever is received to establish or disprove an alleged fact. Testimony is personal, for it is the utterance under oath of a person, while evidence may be either documentary or oral. When a carefully drawn statute relating to evidence, aiming to preserve equality and to prevent unfair advantage, speaks of "the testimony of . . . the deceased person" as "given in evidence," we think it means by testimony the sworn statements of the deceased made on some prior occasion: *Lyon v. Ricker*, 141 N. Y. 225, 231. This construction is in accord both with the object of the statute and the language used in it. The context also shows that the legislature intended to give the word its ordinary meaning, as plainly appears from the next section: Code, sec. 830. The promissory note given by John Callister to his wife was evidence, but it was not the testimony of a deceased person. It would be a loose and dangerous construction to hold that when an instrument executed by a dead man is read in evidence by those who represent him, the living party to the document can testify to whatever was said and done when ³⁰⁷ it was executed.

As was said by the general term: "If this ruling is sustained, then in all cases the evidence created by a writing between the living and the dead may be overthrown by the evidence of the living as to the transaction out of which the writing was created, while the lips of the other party are closed, thus defeating the wise purpose of section 829." We find no well-considered case that so holds. The cases in this court relied upon to sustain the rulings excepted to are *Wadsworth v. Heermans*, 85 N. Y. 639, and *Potts v. Mayer*, 86 N. Y. 302. In the former it was expressly held that the inquiries did not involve a personal transaction, and in the latter the sworn testimony of the deceased person, as given by him on a former trial, was read in evidence before the survivor of the transaction was permitted to give his version of the same matter.

It is well settled that in an action brought by an executor upon a promissory note against the maker thereof, the latter cannot testify as to the consideration, when it involves a personal transaction with the deceased payee: *Van Alstyne v. Van Alstyne*, 28 N. Y. 375; *Alexander v. Dutcher*, 70 N. Y. 385. Even when the executor as plaintiff proves by a witness certain conversations between the deceased and the defendant at a certain place, while the latter may testify that such witness was never present at that place when any conversation was had between him and the deceased, he cannot testify as to anything that was or was not said between them: *Pinney v. Orth*, 88 N. Y. 447. In *Lyon v. Ricker*, 141 N. Y. 225, 227, this court said: "When the plaintiff proved by third parties the declarations of the deceased grantor made at a different time and upon another occasion than the transaction between the deceased and this defendant, those declarations so proved did not become the testimony of the deceased given in evidence within the section of the code under consideration. Although declarations against interest are admitted the same as if the declarant were present and testified in person, yet proof of such declarations by competent third parties is not, within the meaning of this section, the testimony of a ³⁰⁸ deceased person, and it does not open the door for the admission of what would otherwise be plainly incompetent evidence under such section." The court had before it, when this decision was made, all the cases relied upon to justify the ruling in question: See, also, *Benjamin v. Dimmick*, 4 Redf. 7, 13.

We think that the testimony of Mrs. Callister was erroneously received, and, hence, that the finding predicated upon it has no foundation to rest upon. Without that finding the presumption

would be that the giving of the note was *prima facie* evidence of an accounting and settlement of all demands between the parties up to the date of the note: *Lake v. Tysen*, 6 N. Y. 461; *De Freest v. Bloomingdale*, 5 Denio, 304; *Wright v. Wright*, 74 Hun, 138. Whether that presumption would extend to a demand not yet due, such as the claim for services rendered under the contract before marriage that did not become due until Mr. Callister died, it is unnecessary to now decide, for a new trial must be granted as to the individual claims presented by Mrs. Callister, since they may all be affected by the presumption unless it is rebutted: *Tummonds v. Moody*, 20 N. Y. St. Rep. 812; 3 N. Y. Supp. 714; *Abbott's Trial Evidence*, 809. As the finding was in her favor upon this point, she has the right to a new trial, so as to rebut the presumption by other testimony than her own, if she can, for it may be that there are other witnesses who can testify to the same facts as to which she was improperly allowed to speak. Since there must be a new trial as to all of her personal claims they require no further consideration upon this review.

The appeal brought by Mary Radcliffe and others, as next of kin of John Callister, involves a claim presented against his estate by Margaret Callister, as administratrix of her deceased father, Robert Walker. That claim has been fully and satisfactorily considered by the general term and we do not care to add anything to what that learned court has said upon the subject: *Matter of Callister*, 88 Hun, 87.

Our conclusion, therefore, is that upon the appeal brought by Margaret Callister, individually, the judgment of the general ³⁰⁹ term should be so modified as to award a new trial in accordance with the law as laid down in this opinion and as thus modified affirmed, with costs to abide event; and that upon the appeal brought by Mary Radcliffe and others, the judgment of the general term should be affirmed, with costs to Margaret Callister, as administratrix of Robert Walker, deceased, the order to be settled by the judge who prepared the opinion of the court.

All concur.

HUSBAND AND WIFE—RIGHT TO HER SERVICES—MARRIED WOMEN STATUTES.—The results of the service and labor of a wife during coverture become the property of the husband for their support: *Prescott v. Brown*, 23 Me. 305; 39 Am. Dec. 623; *Norcross v. Rodgers*, 30 Vt. 588; 73 Am. Dec. 323. Agreements or other transactions between a husband and wife having for their object the payment by the one to the other for services rendered, or the vesting in one the profits or accumulations of a business conducted

by him or her are discussed in the monographic note to *Michigan Trust Co. v. Chapin*, 58 Am. St. Rep. 492-499. As to the validity of contracts between husband and wife under married women statutes, see monographic note to *Kantrowitz v. Prather*, 99 Am. Dec. 599, 600.

HUSBAND AND WIFE—VALID CONTRACTS BETWEEN.—A note given by a husband to his wife for moneys received by him for her from her father's estate, under an agreement that he will hold such moneys in trust for her as her separate estate, is valid and binding upon his heirs and representatives as evidence of such trust, and enforceable as such: *Veal v. Veal*, 89 Ky. 314; 25 Am. St. Rep. 534, and note.

WITNESSES—COMPETENCY OF ONE PARTY TO CONTRACT AFTER DEATH OF OTHER.—Under the statutes of Missouri, a wife is not, after the death of her husband, a competent witness to prove an antenuptial contract between them, in a suit by her son against the personal representative and heirs of her husband to enforce a provision in such contract in favor of such son: *Nowack v. Berger*, 133 Mo. 24; 54 Am. St. Rep. 663, and note.

FURMAN v. FURMAN.

[153 NEW YORK, 309.]

JUDGMENTS, VACATING FOR FRAUD.—The court has power to set aside a judgment for fraud and deceit practiced by a party thereto, and may do so after the lapse of the period of time designated in sections 724, 1282, and 1290 of the Code of Civil Procedure of New York.

JUDGMENT, VACATING AS TO AN INNOCENT PARTY.—A judgment may be vacated for fraud and deceit practiced by one of the parties thereto, though thereby another party not implicated in the fraud or deceit loses the benefit of the judgment as *res judicata*.

Appeal from an order vacating a judgment. It was insisted that such order was not made within the time allowed by statute, and sections 724, 1282 and 1290 of the Code of Civil Procedure were relied upon. The first of these sections authorized the court, at any time within one year after notice thereof, to relieve a party from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. Section 1282 prohibits the hearing of a motion to set aside a final judgment for irregularity after one year from the filing of the judgment-roll, unless notice of the application is given for a day within the year. Section 1290 declares that a motion to set aside a final judgment for error in fact not arising upon the trial shall not be heard after the expiration of two years since the filing of the judgment-roll, unless notice is given for a day within such two years. Persons who, at the time the judgment is rendered, are less than twenty-one years of age, or insane, or imprisoned on a criminal charge, are not subject to

the provisions of section 1290, provided the motion is brought on for hearing within five years, or, in case the disability has ceased, within a year after such ceasing.

Delos McCurdy and Raphael J. Moses, for the appellants.

Henry A. Monfort, for the respondents.

³¹² ANDREWS, C. J. The order of the special term entered April 30, 1896, from the affirmance of which this appeal is taken, vacated an interlocutory judgment entered in this action June 27, 1877, for the partition of real property situated in Queens county, and discontinuing the action. The order was made upon motion in behalf of certain devisees of Garrit Furman, who died June 6, 1848, and who by his will devised a life estate in the premises to his son William H. Furman, with remainder in fee to the issue of the son living at his death, and the lawful issue of such issue as might have died prior to that time. The land devised consisted of a farm of one hundred and nine acres. The partition action was brought by one of the five children of William H. Furman, the devisee for life, to whom, prior to its commencement, the latter had conveyed an undivided one-fifth part of his life estate, and taken back a mortgage thereon from the grantee, his son, of forty thousand dollars, the nominal amount of the purchase money. William H. Furman, the devisee for life, and his living children other than the plaintiff, were made defendants in the action, as was also Minnie Waldron Furman, alleged in the complaint to be the only child of Victor, a deceased son of said William. William H. Furman had five children, and each child, if living at his death, would be entitled ³¹³ under the will to one-fifth of the estate in fee. The complaint alleged the interests of the several defendants, and that by the death of Victor the defendant Minnie Waldron Furman was entitled in remainder to his one-fifth interest. The interlocutory judgment adjudged the interests as set forth in the complaint and that an actual partition of the premises could not be made without great prejudice, etc., and the judgment directed that they be sold at public auction and that the mortgage of forty thousand dollars be paid to the defendant William H. Furman out of the proceeds of the share of the plaintiff. The referee appointed to make the sale advertised the sale to be made August 1, 1877. Intermediate the entry of the judgment and the day appointed for the sale, the parties interested, other than William H. Furman and Minnie W. Furman, upon affidavits charging that the action was brought at the solicitation of the life tenant, William H. Furman, and upon fraudulent repre-

sentations made by him to the plaintiff as to the purpose of the mortgage of forty thousand dollars, and other fraudulent representations to induce his children to consent to the partition, and that it was conducted by the father's attorney, made an application to the court on motion for an order vacating the judgment and discontinuing the action. The affidavit of one of the moving parties alleged upon information and belief that the defendant Minnie W. Furman was not the lawful issue of Victor, the deceased son of William H. Furman. The motion was brought on on notice to the proper parties and resulted in an order made August 13, 1877, appointing a referee to determine the costs to which the respective parties were entitled, and directing that upon payment thereof "the judgment herein be set aside and vacated and this action discontinued."

Philip S. Crooke, the guardian ad litem of Minnie W. Furman, appealed from the order and it was affirmed November 30, 1877. The parties in interest, other than William H. Furman and Minnie W. Furman, afterward consented to the vacation of the judgment and the discontinuance of the action, and an order to that effect as to the consenting parties ³¹⁴ was entered May 1, 1879. The referee, appointed by the order of August 13, 1877, declined to determine the amount of costs to which the guardian ad litem was entitled, and it finally resulted in an order, dated March 5, 1881, made by the court, on notice to the attorney and guardian ad litem of the infant, taxing his costs at ninety-five dollars, and directing that "upon the payment of the same the judgment entered up in said action be vacated and set aside and said action be discontinued." No order vacating the judgment and discontinuing the action, in pursuance of the order of March 5, 1881, was ever entered. There is no record evidence that the costs fixed by that order were paid. Philip S. Crooke, the guardian ad litem, died soon after the order was made. It appears that before that time the plaintiffs' attorney sought to adjust with him the amount of costs, and was ready to pay the amount which should be fixed upon. No proceeding in the action, so far as appears, was taken from the time of the entry of the order of March 5, 1881, until this motion was made in 1896, a period of fifteen years. But, in 1894, Minnie W. Furman (now Minnie W. Braun) commenced an action to partition the same premises, claiming a one-fifth interest therein as the sole child of Victor Furman. The facts are numerous and complicated, but those stated are sufficient to present the questions on this appeal. We think the order appealed from should be affirmed.

1. The court had jurisdiction to make the order of August 13, 1877, and the subsequent order of March 5, 1881. The power of the court to control its judgments and to set aside a judgment for fraud or deceit practiced by a party is undoubted, and is not subject to the limitation of time prescribed in sections 724, 1282, and 1290 of the Code of Civil Procedure. Cases of fraud are not within these sections.

2. The court having jurisdiction to set aside in its discretion the judgment for the fraud of the father, William H. Furman, in inducing plaintiff to bring the action, and his other children to consent to the partition, the defendant Minnie W. Braun has no right to complain because the vacation of the ³¹⁵ judgment may deprive her of the benefit of the adjudication therein as to her legitimacy. This is the necessary result of granting the relief to which the other parties were adjudged to be entitled. The defendant Minnie has no vested right to have the judgment stand as to her. Her right as the child of Victor to take his interest in the land is not affected by the vacation of the judgment. If she is his lawful child, she is still entitled to it, and is not precluded by the vacation of the judgment from asserting it, as in fact she has done in the suit brought by her for partition in 1894 and now pending. She loses by the vacation of the judgment an adjudication in her favor on the question of legitimacy, but that is an incident to the exercise by the court of its power to vacate the judgment for the fraud of William H. Furman. The whole judgment falls, although she was not a party to the fraud.

3. The general term found that there was an inference from the circumstances, the long silence, the commencement of the partition suit by Mrs. Braun in 1894, and other circumstances, that the costs fixed by the order of March 5, 1881, had been paid. The attorneys and the guardian ad litem connected with the litigation have died, and the fact of payment is rendered difficult of direct proof. We think this finding of the general term cannot be disturbed on this appeal. Moreover, as a precaution, the costs were tendered to the executor of the guardian ad litem before the making of the present motion, and this, we think, was sufficient to justify the granting of the order. The motion is supplementary to the motion upon which the order of March 5, 1881, was founded, and is made in substance to establish that the condition in that order had been complied with.

4. The rights of Mr. Towns, whatever they may be, are not prejudiced by the order in question.

We think the court had jurisdiction to grant the order on

motion and that the decision of the general term affirming it should be affirmed.

All concur, except Gray, J., absent.

Of the Vacating of Judgments and Decrees on Motion, when not Specially Authorized by Statute.

Power Exists Independently of Statutory Authority.—In many, and perhaps in all, of the states of this Union, statutes have been enacted authorizing courts to vacate or set aside judgments rendered against a litigant through his surprise, mistake, inadvertence, excusable neglect, or for other causes operating to his prejudice by preventing a decision upon the merits. It is not our purpose here to consider any of these statutes, but, rather, to treat our subject as developed by the decisions of the courts independently of them. In the first place, it must be conceded that courts, or, at all events, courts of record, have, independently of any statute, an inherent authority by virtue of the principles of the common law to vacate judgments entered by them: *Kemp v. Cook*, 18 Md. 130; 79 Am. Dec. 681; *Ladd v. Stevenson*, 112 N. Y. 325; 8 Am. St. Rep. 748.

Power, by what Courts may be Exercised.—This authority has sometimes been spoken of as vested in all courts, and at other times as being vested only in courts of record or of general jurisdiction: *Johnson v. Shumway*, 65 Vt. 389. While the decisions upon the precise subject are infrequent and meager, they, as well as many general expressions in the opinions of the courts where the question was not necessarily involved, tend to the conclusion that, independently of statutory authority, a court of limited jurisdiction, having once entered a judgment, has no authority to vacate it, whether upon proceedings seeking a new trial or otherwise: *Hitchcock v. Probate Judge*, 99 Mich. 128; *People v. Justices*, 1 Johns. Cas. 179.

Courts of probate are in some states of limited, and in others of general, jurisdiction. Their power to vacate orders entered by them has sometimes been affirmed, and, furthermore, has been held not to be restricted in point of time, and therefore it was decided that during the pendency of the guardianship of an insane or incompetent person, any order previously entered might be vacated by the court upon motion: *Dutcher v. Hill*, 29 Mo. 271; 77 Am. Dec. 572. If this rule exists, the rights of every person dependent upon an order or decree of these courts may be swept away at remote periods of time on the ground that the court still retains jurisdiction of the estate and guardianship, and all proceedings remain in fieri to the same extent as they were held by common law to remain in the courts of record during the continuance of the term. The existence of the rule must, however, we think, be denied. Sometimes such denial has been placed upon the ground that the court was of special or limited jurisdiction. In the great majority of cases, however, it is equally, if not more, defensible, upon the ground that the order or decree sought to be set aside involved a decision of the court upon a substantial matter which might affect the rights not only of the parties to the proceeding, but also of third persons, and the stat-

ute creating the court had not conferred any authority upon it to vacate or disregard its decision, and either contemplated that parties aggrieved thereby should seek redress by appeal or should be left without any remedy whatsoever: *Estate of Hudson*, 63 Cal. 454; *Pettee v. Wilmarth*, 5 Allen, 144; *Besaneon v. Brownson*, 39 Mich. 388; *Hitchcock v. Probate Judge*, 99 Mich. 128.

Authority is Judicial and Cannot be Exercised by the Legislature.—

The authority to vacate judgments is judicial in character, and must, it is said, be exercised by the court rather than by the judge, and an order vacating a judgment cannot, therefore, be made by a judge or chancellor nor otherwise than when sitting as a court: *Ross v. Grange*, 27 U. C. Q. B. 306; *Mearns v. Grand Trunk Ry. Co.*, 6 U. C. L. J. 62. Another consequence of the rule that the authority to vacate a judgment is judicial is, that it cannot be exercised directly by the legislature. This department of government can, it is true, enact statutes which, if constitutional, must control the action of the courts in cases to be thereafter presented, but, if a judgment has already been entered, the legislature cannot direct that it be vacated or set aside, nor can it create grounds for vacating it which were inadequate for that purpose when it was entered: *White v. Herndon*, 40 Ga. 493; *Lewis v. Webb*, 3 Greenl. 326; *Beaupre v. Haerr*, 13 Minn. 367; *Lawson v. Jeffries*, 47 Miss. 686; 12 Am. Rep. 342; *Merrill v. Sherburne*, 1 N. H. 199; 8 Am. Dec. 52; *Burch v. Newbury*, 10 N. Y. 374; *De Chastellux v. Fairchild*, 15 Pa. St. 18; 53 Am. Dec. 570; *Taylor v. Place*, 4 R. I. 324; *Hill v. Sunderland*, 3 Vt. 507; *Arnold v. Kelley*, 5 W. Va. 446; *Griffin v. Cunningham*, 20 Gratt. 31; *Davis v. Menosha*, 21 Wis. 491; *United States v. Klein*, 13 Wall. 128; *State v. Wheeling etc. Co.*, 18 How. 421; *Cooley's Constitutional Limitations*, 6th ed., 113. Hence, if a statute is enacted providing that in all cases where judgment heretofore has been, or hereafter may be, obtained in any court of record by means of perjury, subornation of perjury, or other fraudulent act, practice, or representation of the prevailing party, an action may be brought by the party aggrieved to set aside such judgment at any time within three years after the discovery by him of such perjury, subornation of perjury, or of the facts constituting such fraudulent act, practice, or representation, it must be denied effect as to all judgments rendered prior to its enactment: *Wieland v. Shillock*, 24 Minn. 345. It is true that the supreme court of one state has said: "There cannot now, certainly, be any doubts as to the power of the legislative department of the government to pass a law authorizing the opening of judgments and the granting of new trials. This has been an authority uniformly exercised by the government of the state from its commencement, and has never, so far as I know, been seriously questioned": *Ex parte Bibb*, 44 Ala. 140; *Norton v. Shields*, 44 Ala. 177. In support of this language various decisions were cited, some pronounced by the supreme court of the United States. None of them, in our judgment, is inconsistent with the theory that the setting aside of a final judgment is a judicial act, and hence cannot be accomplished by the legislature, except where, by the constitution of the state, it is also authorized to exercise judicial functions. In *Calder v. Bull*, 3 Dall. 386, it was held that an act of the legislature of Connecticut

granting a new trial in a particular case was not unconstitutional as an ex post facto law, nor did it violate the constitution of Connecticut, for the reason that: "It appears that the legislature or general court of Connecticut originally possessed and exercised all legislative, executive, and judicial authority; and that, from time to time, they distributed the two latter in such manner as they thought proper, but without parting with the general superintending power, or the right to exercise the same whenever they should judge it expedient." The court, however, admitted that it was true "that the awarding of new trials falls properly within the province of the judiciary," and that the assumption of power in question could be sustained only upon the ground that the legislature of Connecticut had exercised a judicial authority vested in it by the constitution of the state. So in *Baltimore etc. Ry. Co. v. Nesbit*, 10 How. 395, it was held that after there had been an inquisition by a jury in a proceeding to acquire certain lands which was ratified and confirmed by the county court, the legislature might subsequently direct that court to set aside the inquisition and order a new one, but this decision was sustained by the court which rendered it only upon the ground that the inquisition, though confirmed, was not a final judgment of itself entitling the landowners to rely thereon, that the statute under which the inquisition had been made merely authorized the corporation to exercise certain rights of eminent domain on payment or tender to the owner of land of the valuation fixed by the jury, and that no payment or tender having been made prior to the statute setting aside the inquisition, neither party had acquired any vested right therein. The court said: "It can hardly be questioned that, without acceptance by the acts and in the mode prescribed, the company were not bound; that if they had been dissatisfied with the estimate placed upon the land, or could have procured a more eligible site for the location of their road, they would have been at liberty before such acceptance wholly to renounce the inquisition. The proprietors of the land could have no authority to coerce the company in its adoption. This being the case, there could, up to this point, be no mutuality, and hence no contract, even in the constrained and compulsory character in which it was created and imposed upon the proprietors by the authority of the statute."

Who may Move to Vacate.—Either party to a judgment who is prejudicially affected by it may move to vacate it, whether it is apparently rendered for or against him: *Merchants' etc. Bank v. Halman*, 80 Ga. 624; *Coleman v. Case*, 66 Iowa, 534; *Parsons v. Johnson*, 66 Iowa, 455; *Baugh v. Baugh*, 37 Mich. 59; 26 Am. Rep. 495; *Downing v. Still*, 43 Mo. 309; *Hardin v. Lee*, 51 Mo. 241; *Gere v. Gundlach*, 57 Barb. 13; *Hinsdale v. Hawley*, 89 N. C. 87; *Walton v. Walton*, 80 N. C. 26; *Hardie v. Woodward*, 75 Pa. St. 479. It may appear to be a judgment in his favor, as where it is for the recovery by him of money or property or some other form of relief, but that which is granted him is less than he asked for and conceives himself to be entitled to. In such a case, if he is not granted all the relief to which he is entitled, or the property or money recovered is less than that for which he has sued, he is prejudiced by the judgment and as much entitled to move for its vacation as if he were the defendant

or judgment debtor. If several persons are prejudicially affected by a judgment, any of them may move to vacate it, and none can be denied relief because the others do not choose to join in the motion to vacate it: *Fall v. Evans*, 20 Ind. 210; *Storm Lake v. Iowa Falls etc. Ry. Co.*, 62 Iowa, 218; *St. John v. Holmes*, 20 Wend. 609; 32 Am. Dec. 603; *Franks v. Lockey*, 45 Vt. 395. Under the rule that no one is entitled to have a judgment vacated who is not prejudicially affected by it, relief may sometimes be denied a party thereto, though he was prejudicially affected by it when entered, if by a subsequent transfer of the property the judgment can no longer injure him: *Powell v. McDowell*, 16 Neb. 424. Probably, however, in cases of this character, a motion for the vacation of a judgment may be prosecuted in the name of such party for the benefit of his successor in interest where there has been a transfer of the property. The further consideration of this question will be reserved for that part of the note which treats of the rights of persons who are not parties to a judgment to prosecute proceedings to vacate it.

Motions by Third Persons, not Bound by the Judgment.—It is often said that if the parties to a judgment are content to permit it to stand, third persons cannot be allowed to complain of it or to institute proceedings to annul it, whether by motion or by independent suit. This is undoubtedly always true where the third person who is seeking to assail the judgment is a mere intermeddler and cannot be injured by permitting it to stand when assailed: *Uzzle v. Vinson*, 111 N. C. 138; *Foster v. Mansfield etc. Ry. Co.*, 146 U. S. 88. It is also true when the third person moving to vacate a judgment can be affected thereby only in so far as it tends to decide a question of law in which he is interested. Hence, it was held that brokers who might be subject to prosecution under an act of the legislature prohibiting the sale of railroad tickets could not be permitted, after the entry of a judgment sustaining a prosecution against another broker, to appear in the action seeking to have the judgment set aside on the ground that the action was collusive and brought solely for the purpose of obtaining a decision of the court affirming the constitutionality and validity of the act under which they anticipated prosecution: *In re Burdick*, 162 Ill. 48.

Third Person Who may Move to Vacate.—Notwithstanding general expressions to the contrary, it is by no means true that the right to move for the vacation of a judgment is limited to the parties to the action. The rule is, or at least should be, that none but the persons affected by the judgment at the time it is entered, or those who have succeeded to their interest through operation of law, can move to vacate it; but one who is thus affected need not be a nominal party to the action to be entitled to move for relief. Hence, in all those cases in which actions are prosecuted for the benefit of persons not named as parties thereto, but under such circumstances that persons not so named are bound by the judgment, if it is permitted to stand, they are entitled to have it set aside on motion where any sufficient ground for such action exists: *McWillie v. Martin*, 25 Ark. 556; *Lowber v. Mayor of New York*, 26 Barb. 262; *McClurg v. Schwartz*, 87 Pa. St. 521; *Aetna Ins. Co. v. Aldrich*, 38 Wis.

107; Mann v. Aetna Ins. Co., 38 Wis. 114. This rule is applicable not only when property or the title thereto is the subject matter of the action, and such title is equitably vested in one not a party to the suit, but for whose benefit it is prosecuted or defended, but also in all other cases where the operation of the judgment must be prejudicial to another, as where it settles an account or otherwise establishes a claim against a principal for which his surety is answerable, or creates a lien on property, the title to which is vested in a third person: *In re Flynn*, 136 N. Y. 287.

Motions by Grantees and Assignees.—During the pendency of the suit transfers may be made by one of the parties thereto, so that the judgment finally entered must necessarily affect the rights of the transferee. In many of the states he is entitled to be substituted on the record in place of the party to whose interest he has succeeded, and in all, we apprehend, he may be allowed to appear and take upon himself the same control and management of the action to which his assignor was entitled. At all events, if judgment is subsequently entered prejudicially affecting the assignee's interest, he is entitled to move, either in his own name or in that of his assignor, to have such judgment vacated: *Plummer v. Brown*, 64 Cal. 429; *People v. Mullan*, 65 Cal. 396; *Malone v. Big Flat Min. Co.*, 93 Cal. 384; *Mueller v. Reimer*, 46 Minn. 314; *Ladd v. Stevenson*, 112 N. Y. 325; 8 Am. St. Rep. 748; *Knott v. Taylor*, 99 N. C. 511; 6 Am. St. Rep. 547. A more difficult question is presented when the motion is made by an assignee or other successor in interest who did not become such until after judgment was entered, and where he may properly be regarded as a mere intruder or volunteer. It is true that in one instance a judgment was vacated at the instance of one who had become an assignee of the defendant many years after its entry, he being allowed to proceed in the name of his assignor: *People v. Mullan*, 65 Cal. 396. In this case it was assumed, though erroneously, that the judgment to be vacated was void. If void, there was no objection to its being vacated at the instance of a stranger or by the court without any action by any party in interest, for, "being a dead limb on the judicial tree," its effect was not diminished by setting it aside. As to such judgment no amount of inaction or acquiescence on the part of the original defendant could give it validity. In other words, if void, it was not a judgment at all, and the successor of the defendant or any other stranger might ask the court to strike it from the records. If, however, a judgment is not void on its face nor suffered for the purpose of defrauding some third person, we believe the better rule to be that it will not be vacated at the instance of one not a party thereto, who, voluntarily, after its entry, purchases property affected thereby, or otherwise chooses to place himself in a position where its enforcement may operate to his detriment. If a party against whom a judgment is entered chooses to waive any irregularity which may have occurred prior to such entry, it seems to be against sound public policy to permit a stranger to take his place for the purpose of complaining of that of which the original party did not complain. It is well settled that a mere right to file a bill in equity, as to com-

plain of fraud or to surcharge an account, is not assignable: *Cross v. Sacramento Sav. Bank*, 66 Cal. 462; *Sanborn v. Doe*, 92 Cal. 152; 27 Am. St. Rep. 101; *Whitney v. Kelly*, 96 Cal. 146; 28 Am. St. Rep. 106; *Milwaukee etc. Ry. v. Milwaukee etc. Ry.*, 20 Wis. 174; 88 Am. Dec. 740; note to *Marshall v. Means*, 56 Am. Dec. 449. The jurisdiction exercised in proceedings to vacate judgments, though by motions addressed to the courts in which they were entered, is ordinarily equitable in character, having for its object the relief of the moving litigant from some judgment operating unjustly against him and which has been procured by some fraud or irregularity in which he did not participate, or some surprise, accident, or other misfortune against which he could not guard by the exercise of reasonable diligence. If a judgment is entered under such circumstances that a defendant may move to vacate it, he may, nevertheless, without intending any fraud or being guilty of any collusion, choose not to exercise his right to so move. Other judgments may afterward be entered against him, and he may make transfers of property which is either subject to the lien of the judgment or the title to which is otherwise affected thereby. In either event, we believe, both upon principle and authority, that a person who thus becomes affected by a judgment through transfers made or other acts occurring after its entry should not be permitted to assail it, unless void on its face, by any proceedings to set it aside, whether by motion or independent suit: *Farwell v. Huston*, 151 Ill. 239; 42 Am. St. Rep. 237; *Havens v. First Nat. Bank*, 162 Ill. 35; *Jacobs v. Burgwyn*, 63 N. C. 196; *Hauer's Appeal*, 5 Watts & S. 473; *Drexel's Appeal*, 6 Pa. St. 272; *Robinson v. Stevens*, 63 Vt. 555; *Packard v. Smith*, 9 Wis. 184.

During the Term at which the judgment was entered it could scarcely be regarded as final, for the court still possessed ample authority to amend, to modify, or to set it aside upon any sufficient reason, and perhaps in no event, where the rules of the common law have not been modified by statute, can an order of court vacating a pre-existing judgment be either regarded as void or assailed or annulled by any appellate proceeding: *Rich v. Thornton*, 69 Ala. 473; *Ashley v. Hyde*, 6 Ark. 93; 42 Am. Dec. 685; *Underwood v. Sledge*, 27 Ark. 295; *McClellan v. Binkley*, 78 Ind. 503; *Taylor v. Lusk*, 9 Iowa, 444; *State v. Sowders*, 42 Kan. 312; *Townshend v. Chew*, 31 Md. 247; *State v. Treasurer*, 43 Mo. 228; *King v. Meyer*, 97 Ga. 379; *Gwynn v. Parker*, 119 N. C. 19; *Wells v. Andrews*, 133 Mo. 663; *Scales v. Scales*, 65 Mo. App. 292; *Scott v. Smith*, 133 Mo. 618; *Hyde v. Kent*, 47 Neb. 26; *Nelson v. Ghiselin*, 17 Mo. App. 663; *Volland v. Wilcox*, 17 Neb. 46; *Frawley v. Feather*, 46 N. J. L. 429; *Kelty v. High*, 29 W. Va. 381; *Doss v. Tyack*, 14 How. 297. We shall not, therefore, undertake any investigation of the circumstances in which a judgment may be vacated during the continuance of the term at which it was rendered, and in what we shall hereafter say it will be assumed that no action was taken seeking the vacation of the judgment in question until after that term had expired.

After the Lapse of the Term at which the judgment is rendered, the power of the court to vacate it on motion is much more restricted

than during the term, though we believe no rule can be formulated which will everywhere be recognized as correct, prescribing the precise limits of this power. There may be statutory authority for acting after the close of the term upon some proceeding instituted while the term is yet unexpired, as where notice is given during the term of a motion for a new trial, which is not disposed of, and, in fact, may not be in a condition to be presented, until after the lapse of the term. So during the term notice of an application to vacate a judgment may be given, and it may be granted afterward. There is some conflict of authority upon the subject, but we believe that where a motion is made to vacate a judgment, or notice of such motion is given, within the time in which the court has power to grant it, it is not indispensable that it be disposed of within the term, and therefore that an order vacating a judgment after the term or after the time specified in some statute is neither erroneous nor void, if the motion therefor was made in due time: *Note to Nicklin v. Robertson*, 52 Am. St. Rep. 795-799; *Atchison etc. Ry. Co. v. Elder*, 149 Ill. 173. After the close of the term at which a judgment was rendered it is too late to move to set it aside, except for such grounds as, by the practice of the courts of the state, may be interposed regardless of the lapse of time: *Trawick v. Trawick*, 67 Ala. 271; *Soulard v. Vacuum etc. Co.*, 109 Ala. 387; *Rawdon v. Rapley*, 14 Ark. 203; 58 Am. Dec. 370; *Baldwin v. Kramer*, 2 Cal. 582; *Robb v. Robb*, 6 Cal. 21; *Bell v. Thompson*, 19 Cal. 706; *Shaw v. McGregor*, 8 Cal. 521; *People v. Greene*, 74 Cal. 400; 5 Am. St. Rep. 448; *Hall v. Paine*, 47 Conn. 429; *Clements v. Empire etc. Co.*, 96 Ga. 319; *Morgan v. Hays*, Breese, 126; 12 Am. Dec. 147; *McChesney v. Chicago*, 161 Ill. 110; *People v. McWethy*, 165 Ill. 222; *Wood v. Payea*, 138 Mass. 61; *McBrien v. Riley*, 38 Neb. 561; *Moore v. Hinnant*, 90 N. C. 163; *Clemmons v. Field*, 99 N. C. 400; 6 Am. St. Rep. 529; *Rogers v. Watrous*, 8 Tex. 62; 58 Am. Dec. 100; *Crawford v. Fickey*, 41 W. Va. 544; *Barbour County Court v. O'Neal*, 42 W. Va. 295; *Bronson v. Schulten*, 104 U. S. 410. "Where an action is finally determined by the entry of a final judgment and the lapse of the term, the court, for most purposes, has exhausted its jurisdiction over it, and is in the same condition with respect to both the subject matter and the parties as if no action had been begun. Therefore, if, after a final judgment or after an order setting aside a homestead or confirming a judicial sale, the court proceeds to enter another judgment or to disturb the order setting aside the homestead or confirming the sale, its action is void, unless its jurisdiction has been continued by some motion or proceeding appropriate for that purpose": *State v. Railroad*, 16 Fla. 708; *Fleet v. Gilbert*, 66 Ill. App. 678; *Fossett v. McMahon*, 74 Tex. 546; *Freeman on Judgments*, sec. 121. It follows from the application of these principles that an order entered after the lapse of the term purporting to vacate a judgment in a case or under circumstances which give the court no power to make such order must be void, and, if so, that all further proceedings taken in the case on the assumption that the judgment has been vacated are equally void: *Woodruff v. Matheney*, 55 Ill. App. 350; *Kelly v. Heath etc. Co.*, 66 Ill. App. 52S. It has been held that jurisdiction of the court to vacate a

judgment at a subsequent term cannot be reserved by incorporating in the judgment a provision stating that leave is granted to move at the next term to set it aside: *Hill v. St. Louis*, 20 Mo. 584.

Consent to Vacating.—There is some doubt whether the parties to a judgment may, after the expiration of the term, consent that it be vacated and the cause retried, where the court is not authorized to act in the absence of such consent. The rule that consent cannot confer jurisdiction has been held to apply to such a contingency: *Little Rock v. Bullock*, 6 Ark. 282; *Anderson v. Thompson*, 7 Lea, 259. At all events, there can be no doubt that the court is not bound by the stipulation of the parties, and may refuse to set aside a judgment after the lapse of the term, though they have agreed that it shall do so: *Kidd v. McMillan*, 21 Ala. 325. It was said in the opinion of this case that: "If the parties agree that it may be set aside and tried again, and the court, in pursuance of the agreement, does set the judgment aside, and proceeds to try the cause, a second judgment is not void for want of jurisdiction"; and *Lee v. Houston*, 20 Ala. 301, was cited in support of this opinion. This question was not, however, involved in either case. The question at issue in *Lee v. Houston*, 20 Ala. 301, was whether an order amending a judgment was void on the ground that the amendment had been made when there was no sufficient evidence to warrant it. The court very properly said that, as the statute had conferred authority upon the court to amend the judgment, it had thereby given it jurisdiction, the exercise of which could not be declared void on the ground that the evidence upon which it had acted was incompetent or inadequate. The term at which a judgment is entered lapses either upon the adjournment of the court sine die or upon the calling of the next term: *Townshend v. Chew*, 31 Md. 247. The rule restricting the authority of the court to the term is not less applicable to appellate than to subordinate courts: *Donnell v. Hamilton*, 77 Ala. 610.

Courts of Chancery seem never to have been restricted as to the time within which they might vacate their decrees nor as to the grounds upon which they might direct such vacation, except that it would not be directed if the parties had had a hearing and were awarded a decision on the merits. A party might obtain the vacation of a decree irrespective of the lapse of the term, provided he had not been guilty of such laches as rendered his equity stale, and he demonstrated to the court that, without any fault imputable to him, his cause had not been heard on the merits: *Carter v. Torrance*, 11 Ga. 654; *Herbert v. Rowles*, 30 Md. 271; *Beekman v. Peck*, 3 Johns. Ch. 415; *Bennett v. Winter*, 2 Johns. Ch. 205; *Curtis v. Ballagh*, 4 Edw. Ch. 635; *Millspaugh v. McBride*, 7 Paige, 509; 34 Am. Dec. 360; *Smith v. Alton*, 22 N. J. Eq. 572; *Cawley v. Leonard*, 28 N. J. Eq. 467; *Erwin v. Vint*, 6 Munf. 267; *Hargrave v. Hargrave*, 9 El. & E. 14; *Benson v. Vernon*, 3 Brown P. C. 626; *Robson v. Cranwell*, 1 Dick. 61; *Davenport v. Stafford*, 8 Beav. 503; *In re Swire*, 30 Ch. Div. 239; 2 *Daniell's Chancery Practice*, 1230; 2 *Maddox's Chancery Practice*, 466. This rule, unless very discreetly administered, must have left litigants and others whose rights were dependent upon apparently

final decrees in interminable uncertainty. It is probably still in force in those courts which profess to act solely upon the chancery practices unmodified by legislation, but it has been abrogated in England. Thus in a recent case it was said: "The court has no jurisdiction after the judgment at a trial has been passed and entered to rehear the case. This is clear. Formerly the court of chancery had power to rehear cases which had been tried before it even after a decree had been entered; but this is not so since the judicature acts. So far as I am aware, the only cases in which the court can interfere after the passing and entering of a judgment are these: 1. Where there has been an accidental slip in the judgment as drawn up, in which case the court has to rectify it under order XXVII, R. 11; 2. When the court itself finds that the judgment as drawn up does not correctly state what the court actually decided and intended. I am not now speaking of cases where the court acts by consent of the parties; I think that with consent of the parties I should have had jurisdiction, but on the authorities this is not free from doubt." Hence, it was held in this case that though it was claimed that the consent of the parties to the judgment entered has been given by mistake, yet as the evidence on the motion might be conflicting, the court should decline to proceed, leaving the applicant to such relief as he might be able to secure by an independent suit: *Ainsworth v. Wilding*, 1 Ch. 1896, p. 673.

Cases Applying the Chancery Rule to the Vacating of Judgments.—When we come to consider the grounds upon which a judgment may be vacated on motion after the lapse of the term, we find a deplorable conflict of authorities. The procedure upon the hearing of a motion is certainly less calculated than that of a regular trial for the presentation of the evidence necessary for the decision of a question of fact, and we can but regard it as unfortunate that a judgment should be subject to assault upon mere motion interposed after the lapse of a considerable time and supported by extrinsic evidence. From the earliest times our courts have affirmed, in emphatic and often repeated language the verity of juridical records, and that a wise public policy requires that they should be secure from collateral assault and contradiction. This language is delusive if it means nothing more than this security shall continue until undermined by some motion in the original cause, which is usually capable of being submitted upon affidavits, and in which parties may not have the advantage of the cross-examination of the witnesses, and the trial of which is rarely attended with the care and deliberation commonly characterizing the trial and decision of a suit in equity or an action at law. It has sometimes been said that a motion to vacate a judgment is, irrespective of the time when it is interposed, a direct, rather than a collateral, attack thereon, and perhaps the majority of judicial utterances upon this subject have inclined to this view. We have already in a note to this series of reports expressed our inability to concur therein, and have asserted that, in our judgment, such a motion, unless made during the term or within some time specified in a statute authorizing it, should be supported only by the record, and therefore should be regarded as a collateral, rather than a direct, at-

lack: Note to *Morrill v. Morrill*, 23 Am. St. Rep. 105. For errors of law occurring during the progress of a trial a remedy is usually afforded by some appellate proceeding. When a litigant is, by some cause for which he is not blamable and against which he could not have guarded by the exercise of ordinary diligence, deprived of the privilege of a hearing and a decision on the merits, remedies are afforded him either by a motion for a new trial or by some other motion specially provided by some statute authorizing relief to be granted upon his application therefor within a time designated. If it be held, as it everywhere is, that, notwithstanding these various remedies, relief may still be had by motion to vacate the judgment, though not made within the time specified in any statute, it is evident to us that the cases in which such relief may be granted should be restricted so as to come within some well-known and easily comprehended rule and so as not to offer a premium to laches and inattention, nor to discourage care and diligence. Quite a number of American decisions warrant the application to judgments at law of the rule hereinbefore stated as controlling courts of chancery when applications are made to vacate their decrees, namely, that when the applicant has not been heard upon the merits, as where judgment has been entered against him by confession or upon default, the court has authority to interpose at any time regardless of the lapse of the term to the extent of so far vacating the judgment as to permit of a trial on the merits of any defense claimed to have existed at the entry of the judgment, especially if the moving party shows any fraud practiced upon him by his adversary or otherwise excuses his failure to defend at the proper time: *Hall v. Jones*, 32 Ill. 38; *Fleming v. Jencks*, 22 Ill. 475; *Hall v. Holmes*, 30 Md. 558; *Loree v. Reeves*, 2 Mich. 133; *Hurlburt v. Reed*, 5 Mich. 30; *Nichells v. Nichells*, 5 N. Dak. 125; 57 Am. St. Rep. 540; *Powell v. Jopling*, 2 Jones, 400; *Breden v. Gilliland*, 67 Pa. St. 34; *King v. Brooks*, 72 Pa. St. 363. This rule affirms that a motion to vacate a judgment can be granted under substantially the same conditions that relief might be had by a suit in equity. In truth, relief has been granted on motion, the granting of which we should be inclined to criticise, were it the result of an independent suit in equity, as where the defendant sought to open a judgment to plead payments made prior to its entry: *United States v. Millinger*, 17 Blatchf. 451; or that the cause of action was infected by usury: *Fleming v. Jencks*, 22 Ill. 475; or barred by the statute of limitations: *Herman v. Rinker*, 106 Pa. St. 123; *Ellinger's Appeal*, 114 Pa. St. 505; or founded upon an illegal consideration: *Bredin's Appeal*, 92 Pa. St. 241; 37 Am. Rep. 677. Perhaps no class of judgments is so likely to have been entered without a hearing on the merits of the parties interested therein as those which result from proceedings in rem. With respect to judgments of this class it has been said: "A judgment in rem, at least before its final execution, is never so conclusive upon the court which rendered it as to prevent it from opening a default or vacating or setting it aside for sufficient reason": *In re Rochester*, 136 N. Y. 83.

If a Judgment is Void for want of jurisdiction over the parties or the subject matter, there is no doubt that it may be vacated upon

motion, no matter what length of time has interposed since its entry: *Pettus v. McClannahan*, 52 Ala. 55; *Baker v. Barclift*, 76 Ala. 414; *Jennings v. Pearce*, 101 Ala. 538; *People v. Green*, 74 Cal. 400; 5 Am. St. Rep. 448; *People v. Mullan*, 65 Cal. 396; *People v. Pearson*, 76 Cal. 400; *Whartan v. Harlan*, 68 Cal. 422; *Crane v. Barry*, 47 Ga. 476; *Olney v. Harvey*, 50 Ill. 453; 99 Am. Dec. 530; *Hanson v. Wolcott*, 19 Kan. 207; *Foreman v. Carter*, 9 Kan. 674; *Outhwite v. Porter*, 13 Mich. 533; *Cotton v. McGehee*, 54 Miss. 621; *Mueller v. Reimer*, 46 Minn. 314; *Hallett v. Righters*, 13 How. Pr. 43; *Hervey v. Edmunds*, 68 N. C. 243; *Winslow v. Anderson*, 3 Dev. & B. 9; 32 Am. Dec. 651; *Ladd v. Mason*, 10 Or. 308; *Pantall v. Dickey*, 123 Pa. St. 431; *Philadelphia v. Jenkins*, 162 Pa. St. 451; *In re College Street*, 11 R. I. 472; *Mills v. Dickson*, 6 Rich. 487; *State v. Waupaca Co. etc.*, 20 Wis. 640; *Ex parte Crenshaw*, 15 Pet. 119; *Shuford v. Cain*, 1 Abb. U. S. 302. Under these circumstances, that which purports to be a judgment is not such in fact or in law. It is ineffectual for any lawful purpose, and the court, in vacating or striking it from the record, but obliterates an entry which has at all times been without legal efficiency. There having been no authority in the court to enter the judgment, it can interpose no conditions for vacating it, and the applicant is entitled to such vacation whether he had any defense to the action or not, and, therefore, need not by affidavit or otherwise, support his motion, by showing the existence of any defense to the action, or that the judgment, if it were permitted to stand, would be unjust: *Norton v. Atchison etc. Ry.*, 97 Cal. 388; 33 Am. St. Rep. 198; *De La Montanya v. De La Montanya*, 112 Cal. 101; 53 Am. St. Rep. 165; *St. Paul Sav. Bank v. Authier*, 52 Minn. 98. In these cases the legal declaration that the judgment is void is necessarily deducible from the application of the law of which all persons are conclusively presumed to be informed, to the facts appearing upon the record. If the service of process appears by the record to have been made, or attempted to be made, upon one who was absent from the state, and it appears that he has not entered his appearance in the action, and that no property of his is held under attachment therein (*Jennings v. Pearce*, 101 Ala. 538), or that the judgment is of a character which the court cannot pronounce or enforce against one who is beyond its jurisdiction (*De La Montanya v. De La Montanya*, 112 Cal. 101; 53 Am. St. Rep. 165), such judgment, being necessarily void, may be vacated on motion. Though a court has had jurisdiction both of the parties and of the subject matter, such jurisdiction may have terminated or have been suspended, as by the taking of an appeal to another court, or by the filing of a petition to remove the cause to the national courts, or by the entry of a final judgment and the lapse of the term: *Freeman on Judgments*, secs. 121, 135. A judgment subsequently entered is void in the extreme sense and appears to be so by the record, and may, therefore, be at any time vacated upon motion: *North American etc. Co. v. Colonial etc. Co.*, 3 S. Dak. 590. A judgment may be void though the court has jurisdiction over the subject matter and the parties, if it proceeds to dispose of matters over which it was not authorized to act in the controversy before it, or to grant relief of a character which it has no power to grant: *Freeman on Judgments*, sec. 120 c; *Reynolds v. Stockton*, 43

N. J. Eq. 211; 3 Am. St. Rep. 305; *Seamster v. Blackstock*, 83 Va. 232; 5 Am. St. Rep. 262; *United States v. Walker*, 109 U. S. 258. Such judgment, may, therefore, be vacated on motion, whether the term has ended or not: *Thomas v. American etc. Co.*, 47 Fed. Rep. 550.

Jurisdictional Infirmities not Disclosed by the Record.—The question about which there is the greatest doubt and upon which the decisions are most irreconcilable and most evenly divided is whether, upon a motion to vacate a judgment for want of jurisdiction, interposed after the lapse of the term, the court may grant the relief sought where the jurisdictional infirmity is not apparent upon the record, and must, therefore, be established by extrinsic evidence. There is no doubt that a large number of decisions have been made sustaining the vacating of judgments for want of jurisdiction not apparent upon the face of the record. In some of these cases the attention of the court seems not to have been called to the fact that this action was not sustained by, or was inconsistent with, the record in the cause. In many instances, the cases relied upon in the opinion as sustaining the action of the court did not do so, for the reason that in them the want of jurisdiction appeared by the record. We apprehend, however, that at the present time a slight preponderance of the authorities supports the view not only that a motion to vacate a judgment is a direct, rather than a collateral, attack, but, further, that if the ground of the motion is want of jurisdiction over the parties, this absence of jurisdiction may be established by extrinsic evidence, whether such evidence contradicts that found in the record or not: *Allen v. Rogers*, 27 Iowa, 106; *Hanson v. Wolcott*, 19 Kan. 208; *Coulbourn v. Fleming*, 78 Md. 210; *Pattison v. Hughes*, 80 Md. 559; *St. Paul Sav. Bank v. Authier*, 52 Minn. 98; *Heffner v. Gunz*, 29 Minn. 108; *Cotton v. McGehee*, 54 Miss. 621; *Alabama etc. Ry. Co. v. Bolding*, 69 Miss. 255; 30 Am. St. Rep. 541; *Vilas v. Plattsburgh etc. R. R. Co.*, 123 N. Y. 440; 20 Am. St. Rep. 771; *Taylor v. Granite State P. Assn.*, 136 N. Y. 343; 32 Am. St. Rep. 749; *Parker v. Spencer*, 61 Tex. 155; *Carr v. Commercial Bank*, 16 Wis. 50; *Shuford v. Cain*, 1 Abb. U. S. 302. It was said in a comparatively recent Pennsylvania decision: "The court has no power to strike off a judgment except for want of jurisdiction or other fatal irregularity appearing on the face of the record": *Philadelphia v. Jenkins*, 162 Pa. St. 451. This sentence is lamentably ambiguous in that it cannot be ascertained therefrom whether the qualifying words "appearing on the face of the record" are intended to be applicable to the want of jurisdiction or only to the irregularities. Probably, however, they apply to the latter word only, for in a decision made by the same court at the same term a judgment was directed to be vacated upon an affidavit showing that the proceedings resulting in the judgment had been taken without the knowledge or consent of the plaintiff, although, after the rendition of the judgment, he had assigned it to a third person for the purpose of collecting it and accounting for the proceeds: *Vanderpool v. Vanderpool*, 162 Pa. St. 394.

Evidence must be Clear.—In a majority of the cases in which motions to vacate judgments for want of jurisdiction have been granted, it appeared either beyond dispute or by a very decided preponderance of the evidence that the process had not been served, and that

cially affected, and the opinion of the court showed that the principles the interests of innocent third persons were not likely to be prejudicially involved in its decision had not been given the consideration which they deserved. Where the practice prevails of permitting a motion to vacate a judgment because of want of jurisdiction to be granted upon extrinsic evidence, the courts guard as much as possible against the evils likely to result from such practice by refusing to act unless the evidence offered on behalf of the applicant is uncontradicted, or the preponderance in its favor is so great as to leave the court little or no doubt of its truth: *Quarles v. Hiern*, 70 Miss. 891; *Hunt v. Childress*, 5 Lea, 247; *United States v. Gayle*, 45 Fed. Rep. 107.

Mere Defects in Form or Service of Process.—We have elsewhere shown that there is a substantial difference between want of jurisdiction and a defect in obtaining it; that where there are mere irregularities in the issuing or form of process or in the manner of its service, the defendant must take advantage of the irregularity by some motion or proceeding in the court in which the action is pending; and that, failing to do so, he cannot successfully claim that the judgment against him is void: *Freeman on Judgments*, sec. 126. The application of this principle to a motion to vacate a judgment after the lapse of the term because of a defect in the process or its service would seem to require the denial of such motion, for the reason that the judgment assailed is not void. The cases sustaining the vacation of judgments for mere defects in process or in its service (*Simcock v. First Nat. Bank*, 14 Kan. 529; *Heffner v. Gunz*, 29 Minn. 108; *In re Charlebois*, 6 Mont. 373), will generally on examination be found to have involved defects of so substantial a character that the process or its service might very properly be regarded as void. Perhaps the case of *In re Charlebois*, 6 Mont. 373, may be regarded as an exception to this rule. Under the Revised Statutes of that state, the notice of a hearing of a petition for the probate of a will was required to be published at least three times upon three different days of publication, if published in a weekly newspaper. An order admitting a will to probate in a case in which the notice was published but twice in a weekly paper was declared to be void, and an order setting aside the order based upon such inadequate publication was sustained. The affidavit on file showed that the publication was for two consecutive weeks only. In December, 1880, an order was entered admitting the will to probate, and reciting that due notice of the time and place appointed for the hearing of such petition had been given to all persons interested, as required by law. The estate was subsequently administered upon, and in September, 1881, an order was entered distributing the whole of the estate to the sole legatee under the will. Four years afterward a son of the decedent petitioned the court to set the probate of the will aside on the ground that the court had never acquired jurisdiction, for the reason that the notice had not been published for three weeks. The court held that the recital found in the order admitting the will to probate did not import absolute verity, for the reason that it contradicted the record, that the attack was not a collateral, but a direct, proceeding to have the order set aside and held for naught, and therefore that the relief sought should be granted.

Of course, if process is absolutely void, its service cannot confer jurisdiction upon the court issuing it. Hence it was held that a warrant for arrest issued by the clerk of the court in the absence of the judge, and contrary to a rule of the court, was void, and that a judgment based thereon should be vacated on motion: *The Berkeley*, 38 Fed. Rep. 920.

Cases Denying Right to Vacate for Want of Jurisdiction, when the Record Does not Show that the Judgment is Void.—We have already indicated our conviction that those decisions warranting the vacating of a judgment upon a motion after the lapse of the term for want of jurisdiction when such want of jurisdiction is not apparent from the record, are unsound in principle and are likely to lead to deplorable results by permitting judgments to be assailed and overthrown upon extrinsic evidence and after the lapse of such considerable periods of time that there is always great danger of rendering uncertain that which ought to be regarded as certain, and either of encouraging laches or a resort to false evidence which, from the lapse of time, it is difficult, if not impossible, to meet and overcome. These and other considerations have led the courts in several of the states to hold that they will not permit a motion to vacate a judgment made after the lapse of the term to be supported by extrinsic evidence: *Pettus v. McClannahan*, 52 Ala. 55; *Newton v. Alabama etc. Ry. Co.*, 99 Ala. 468; *Kizer etc. Co. v. Mosely*, 56 Ark. 544; *People v. Goodhue*, 80 Cal. 199; *People v. Harrison*, 84 Cal. 607; *Jacks v. Baldez*, 97 Cal. 91; *Whitney v. Daggett*, 108 Cal. 232; *Drake v. Steadman*, 46 S. C. 474. In some other states substantially the same result is reached by limiting the effect of an order vacating a judgment for want of jurisdiction to the parties to the action, except in those instances where the record discloses the want of jurisdiction, or at least a state of facts sufficient to put third persons upon inquiry: *Harrison v. Hargrove*, 120 N. C. 96; 58 Am. St. Rep. 781.

Extrinsic Evidence in Rebuttal—Supplying Evidence of Jurisdiction.—When a motion is made to vacate a judgment for want of jurisdiction, and extrinsic evidence is relied upon by the applicant, it may, of course, be opposed by other extrinsic evidence contradicting it. The application may, however, be made upon the ground that the return of the service of process and the other evidence contained in the record show that the court acted without jurisdiction. In this event, the question must arise whether by any means the record may be perfected or other evidence received showing that, notwithstanding the apparent omission of some fact necessary to jurisdiction, such fact did, nevertheless, exist, and that the action of the court, therefore, was not in the absence of jurisdiction. In *Reinhart v. Lugo*, 86 Cal. 395, 21 Am. St. Rep. 52, the very extreme position was taken that the judgment of the court was dependent for its validity solely upon there being in the record at the time it was entered sufficient evidence of the due service of process, and that no substantial defect in this evidence could subsequently be cured. In a note to this case we, at the time it was re-reported in this series, expressed our conviction that it was inconsistent with the prior decisions of the court in which it was rendered, and maintained that,

though the evidence of the service of process found in the record was insufficient, the evidence thereof could be amended or supplied, not for the purpose merely of authorizing a new judgment based upon such evidence, but to show that the judgment previously entered was not entered without jurisdiction, and was not therefore void; and in support of this contention we cited *Allison v. Thomas*, 72 Cal. 562; 1 Am. St. Rep. 829; *Estate of Newman*, 75 Cal. 213; 7 Am. St. Rep. 146; *Burr v. Seymour*, 43 Minn. 401; 19 Am. St. Rep. 245; *Shenandoah etc. R. R. Co. v. Ashby*, 86 Va. 232; 19 Am. St. Rep. 898; *Frisk v. Reigelman*, 75 Wis. 499; 17 Am. St. Rep. 198; *Freeman on Judgments*, 4th ed., sec. 89 b. The court whose decision was thus criticised thereafter overruled it, quoting our language and adopting our views upon this subject: *Herman v. Santee*, 103 Cal. 519; 42 Am. St. Rep. 145.

Where Terms of Court have been Abolished.—In some of the states as in California, provisions of law respecting terms of court have been abrogated by statutory or constitutional provisions. Hence, there is in those states no such thing as the commencement or the ending of a term of court. There are statutes, however, authorizing the vacating of judgments upon motions made within the time and for the grounds therein specified. The question must occasionally arise, when the law has been thus changed, whether a judgment may be vacated at all unless for one of the causes specified in the statute. Thus, a motion was made within a very few days after the entry of a judgment against a corporation, to vacate it for want of jurisdiction, on the ground that the person upon whom service of process had been made as the agent or representative of the corporation was not such in fact at the time the service was made, and, therefore, in contemplation of law, process had not been served upon the corporation at all. The motion was not supported by any affidavit of merits tending to show that the corporation had any defense whatever to the action. Relief could not, therefore, be granted under the provision of the statutes of the state, because they clearly required, where the motion was made pursuant to their provisions, that it should be accompanied by an affidavit of merits. The court was of the opinion, however, that though the statute was not otherwise applicable, the time specified therein within which a motion could be made to vacate a judgment might be adopted by analogy as a proper time within which to permit such a motion to be interposed, though not for the ground, nor under the circumstances, under which relief was sanctioned by the statute. The court declared that, under the present system prevailing in that state under which terms of court had been abolished, a motion to set aside a judgment must be made within a reasonable time, "and perhaps, following the analogy of section 473, six months might be considered the extent of a reasonable time for any motion; but however that may be, there is no question in the case at bar as to reasonable time, because the motion was made within ten days after the judgment." Furthermore, the court said: "Where a return shows that a nonresident was personally served with summons within the state, and it is made to appear to the court that such return was false, it would be strange if,

within a reasonable time, the court could not, upon application, set aside the service or the false return of service, and vacate the judgment. There is no reason why in such a case the nonresident should be put to the necessity of an independent action. We hold, therefore, that where a nonresident has not been personally served within the state, the court has power, within a reasonable time, when it finds that it has been deceived by a false return of such service within the state, to quash the service of summons, and vacate the judgment": *Norton v. Atchison etc. R. R. Co.*, 97 Cal. 388; 33 Am. St. Rep. 198.

Vacating because the Appearance by an Attorney was Unauthorized.—Whether relief may be had against a judgment where process has not been served and the appearance of the party complaining has been entered by an attorney not authorized to do so is a question upon which the authorities are in irreconcilable conflict. If relief is sought by an independent suit in equity, perhaps a majority of them affirm that it may be granted irrespective of the question whether the attorney who entered such appearance was responsible or irresponsible: *Freeman on Judgments*, sec. 499; note to *Bunton v. Lyford*, 75 Am. Dec. 146-151; *Great etc. Co. v. Woodmas etc. Co.*, 12 Colo. 46; 13 Am. St. Rep. 204; *Corbett v. Timmerman*, 95 Mich. 581; 35 Am. St. Rep. 586; *Winters v. Means*, 25 Neb. 241; 13 Am. St. Rep. 489; *McEachern v. Brackett*, 8 Wash. 652; 40 Am. St. Rep. 922. Certainly a suit in equity is better adapted than a motion in the original action for obtaining and presenting the evidence necessary to the decision of the question, whether the act of the attorney was authorized or not. In those states in which a motion to vacate a judgment for want of jurisdiction may be granted though made after the lapse of the term and supported by extrinsic evidence only, the fact that the defendant has appeared by an attorney having no authority to enter such appearance cannot constitute any obstacle to the granting of a motion, unless the fact of such appearance was known to the defendant and he has been guilty of laches in delaying for an unreasonable time in seeking relief therefrom: *Kenyon v. Scherck*, 52 Ill. 382; *Bradley v. Welch*, 100 Mo. 258; *Winters v. Means*, 25 Neb. 241; 13 Am. St. Rep. 489; *McKelway v. Jones*, 17 N. J. L. 345; *Vilas v. Plattsburgh etc. R. R. Co.*, 123 N. Y. 440; 20 Am. St. Rep. 171; *Yates v. Horanson*, 7 Rob. (N. Y.) 12; *Bryn Mawr N. B. v. James*, 152 Pa. St. 364; *Latimer v. Latimer*, 22 S. C. 257; *Woods v. Dickinson*, 7 Mackey, 301. Even where an attorney has been authorized to appear, relief may sometimes be obtained on motion from a judgment procured in consequence of his disregarding the instructions of his client or acting in bad faith toward him. Thus if a judgment is entered upon an agreement of counsel, against the prohibition of his client, it will be vacated upon an application seasonably made, though payment of such judgment has been made to such attorney. If the parties can be placed in statu quo: *Dalton v. West End etc. Ry. Co.*, 159 Mass. 221; 38 Am. St. Rep. 410. A wife, sued for a divorce in a state of which she was a nonresident, employed counsel to appear and file an answer for her therein. Afterward, a controversy arose between her and her attorney respecting payment for

his services, the result of which was, that without any consultation with, or notification to, her he withdrew his appearance and answer, and permitted the cause to be tried as for want of an answer and a judgment thereon to be entered granting the divorce. Some months afterward, on being informed of these facts, she moved that the judgment be vacated and that she be allowed to file an answer to the complaint. This motion was denied in the trial court, but its action was reversed upon appeal upon the ground that there was no excuse in law or in morals for the abandoning of the cause by the attorney without giving his client ample notice and a full opportunity to procure other counsel to defend the cause, and that the judgment was entered upon default after an answer had been interposed. In this case, however, it appeared by an inspection of the record not only that an answer had been filed, but that the attorney had withdrawn such answer, for the reason that the defendant had refused to pay him a reasonable retainer fee. The court said: "We unhesitatingly characterize the course of counsel in attempting to withdraw the answer as an act of bad faith, and as such it was an act beyond the scope of an attorney's authority, and hence, in legal contemplation, the act was without binding force or effect. The nature of the pretended act of withdrawal and the motive with which it was done were spread out in writing upon the records of the district court before the default was entered, and hence we hold that it was error in the court below to direct the entry of a default judgment in the case. The judgment in its very inception was tainted with the vice of irregularity, and hence, under the settled practice, was vulnerable to attack by motion to set it aside as an illegal judgment. The defendant had the right to move the court below to set it aside, and, in doing so, the defendant was not in the attitude of appealing to the favor of the trial court": *Nichells v. Nichells*, 5 N. Dak. 125; 57 Am. St. Rep. 540. Notwithstanding the decided preponderance of authority sustaining orders vacating judgments on motions after the lapse of the term because based on the unauthorized appearance of attorneys, we cannot yield to them our assent, and think it extremely dangerous to act in such cases where the judgment and all the proceedings are regular on their face, unless such action is by an independent suit in equity, where the trial is more likely than a mere motion to develop the truth respecting the contention of the parties, and where the court will be controlled by the application of the rule that where the equities are equal, the legal title prevails, or, in other words, will not grant relief against a defendant whose equities are of as high a character and as worthy of protection as are those of the complainant: *Denton v. Noyes*, 6 Johns. 298; 5 Am. Dec. 237; *American etc. Co. v. Oakley*, 9 Paige, 496; 38 Am. Dec. 561; *Chadbourn v. Johnston*, 119 N. C. 282; *University v. Lassiter*, 83 N. C. 38.

Fraud in the procurement of a judgment is a most potent ground for relief therefrom when the party aggrieved is proceeding by a suit in equity. In nearly all, if not in all, of the states of this Union statutes have been enacted authorizing courts to grant relief to parties against whom judgments have been entered through their inadvertence, mistake, or excusable neglect, or through fraud practiced

upon them by their adversaries. When proceeding under these statutes there can be no doubt that fraud practiced upon a litigant, whereby he has been prevented from presenting his cause of action or of defense upon the merits is sufficient to entitle him to relief from a judgment entered against him, if he applies therefor within the time and in the manner prescribed by statute: *Chambliss v. Reppy*, 54 Ark. 539. We apprehend, however, that these statutes may operate as a limitation upon the pre-existing common-law authority of the court to act, to the extent of requiring it to refuse relief by motion when the applicant has not proceeded within the time prescribed. Fraud in the procurement of a judgment rarely or never appears from an inspection of the record. Hence, if this be a ground for vacating the judgment, it must necessarily be supported by extrinsic evidence, for none other can exist, and for this reason we approve those decisions which, when the term at which a judgment has been entered has expired, and there is no statute authorizing a party to apply for relief by motion after that term, hold that he should be required to proceed by a suit in equity: *Fowler v. Poor*, 93 N. C. 466; *Syme v. Trice*, 96 N. C. 243; *Sharp v. Danville etc. Ry. Co.*, 106 N. C. 308; 19 Am. St. Rep. 533. We confess, however, that our views upon this subject do not receive any considerable support from the reported decisions of the courts. A majority of them affirm that courts have an inherent authority to vacate their judgments, whether the term has lapsed or not, for fraud practiced in their procurement: *McIntosh v. Commissioners*, 13 Kan. 171; *Taylor v. Sindall*, 34 Md. 38; *Dial v. Farrow*, 1 McMull. 292; 36 Am. Dec. 267; *In re Fisher*, 15 Wis. 511; *In re O'Neill's Estate*, 90 Wis. 480; *Cannan v. Reynolds*, 5 El. & B. 301; *Phillipson v. Earl of Egremont*, 6 Ad. & E., N. S., 587; though in some of the states this authority is spoken of as being vested only in courts of record and as not capable of being exercised by courts of limited jurisdiction: *Stettauer v. Chicago etc. Co.*, 62 Ill. App. 31. In some instances in which relief has been granted, the motion to vacate the judgment necessarily involved an attack upon the cause of action, as where it was claimed that the notes for which judgment was confessed had been obtained from the makers by fraud in representing to them that the notes were ordinary promissory notes such as they had been in the habit of giving, whereas the notes were in fact, and unknown to them, judgment notes: *Kingman v. Reinemer*, 166 Ill. 208.

Collusion.—If a judgment is procured or suffered by collusion of the parties thereto for the purpose of affecting a third person, he can collaterally impeach it for such fraud or collusion, and may thereby escape its effect whether it is urged against him as *res judicata* or for some other purpose: *Freeman on Judgments*, secs. 250, 334, 336. There are probably few, if any, circumstances under which such a third person could procure the vacation of the judgment on motion, for such vacating would necessarily relieve the parties therefrom, and the court, finding that he against whom it was entered had suffered it for some fraudulent purpose, would not interfere in his behalf or for his protection. But a judgment is sometimes procured against a litigant by the collusion of his attorneys

or other agents representing him in the litigation with his adversary. A familiar instance of this exists when one of the parties is a corporation represented by its board of directors, or by some other agents who collude for the purpose of enabling plaintiff to procure a judgment against the corporation. In such cases and in every case in which it appears that a judgment is unjust and is due to collusion between one party and an agent or representative of the other, the latter, if innocent, is entitled to have the judgment against him vacated upon motion, for such collusion is but a species of fraud, and, as we have already shown, courts have inherent power to set aside judgments procured by fraud practiced by one litigant upon another: *Sturm v. School Dist.*, 45 Minn. 88.

Mistake is sometimes spoken of as a ground for vacating a judgment upon motion. As related to the subject here under discussion, mistakes may be divided into three classes: 1. Those of clerks of courts entering judgments without authority or in a manner different from that directed by the decision of the court; 2. Mistakes of the parties, or of some of them, or of their counsel inducing them to consent to or cause to be entered a judgment which, but for such mistake, would not have been entered at all, or, at least, not entered in the form in which it was assented to; and 3. Mistakes of the judge whereby he was induced to direct the entry of a judgment when otherwise he would have refrained from giving judgment at all, or would have given one substantially different from that directed to be entered. If a clerk enters a judgment when not authorized to do so, it is doubtless void, and may be vacated at any time for that reason: *Mickler v. Reddick*, 38 Fla. 341. If, through his mistake, the judgment as entered does not conform to the decision of the court, its entry may be corrected in the exercise of the authority of the court to amend its records so as to compel them to speak the truth, and there may be instances in which the court, instead of directing such amendment, may wholly vacate the judgment entry with a view of thereafter directing and having entered such a judgment as it deems proper: *Merrick v. Baltimore*, 43 Md. 219; *Petrie v. Hamilton College*, 92 Hun, 81; *United States v. McKnight*, 1 Cranch C. C. 84. No case involving mistakes of the second class named above has come within our observation, unless it be one where the mistake was of a very remarkable character and influenced both the counsel and the court. Jurors who were required to assess damages were furnished with blank forms of a verdict, one for the petitioners and another for the respondents. They agreed upon, and filled out, the verdict for the petitioners, but, through mistake, omitted to sign it and signed the verdict for the respondents. The petitioners, having received information from the jurors that the verdict was in their favor, so advised their counsel, and he, relying on the information and without inspecting the verdict, moved the court to accept it, and it was accepted and acted upon accordingly. At a subsequent term a petition was presented praying that the judgment founded upon such verdict be set aside. The court thought it was clear that it had power, in the exercise of a judicial discretion, to order the cause to be brought forward for the pur-

pose of vacating the previous erroneous order and making such disposition of the case as the rights of the parties might require: *Capen v. Stoughton*, 16 Gray, 365. In a case in one of the federal courts, a decree was vacated by the judge upon the ground that it was a final decree, but that when handed to him for signature it was represented to be interlocutory, and he signed it in that belief without reading it, and allowed it to be entered of record under a misapprehension as to its true character. In disposing of this case, it was said: "It may be conceded that if the decree had been expressed in terms which were known to the judge when he entered it, and he merely misconceived the import or legal effect of the language employed, then the mistake would have been one of law—an error of judgment—such as no court can correct, on a mere motion, after the lapse of the term, by modifying the erroneous judgment, or by setting the same aside. But such was not the case. The respondent did not read the proposed decree. He relied on the statement of counsel who had prepared it that it was an interlocutory order, and, on that representation, it was allowed to be spread on the records of the court. The judge acted under a mistake of fact; his judgment was not invoked, and was not expressed, with respect to any of the terms or provisions of the alleged decree, and for that reason it was not, in any proper sense, a judicial act. We think, therefore, that on the state of facts disclosed by the return, the respondent did not exceed his powers in vacating the final decree at the October term, 1893, when his attention was called to the character of that decree. We are of opinion that when, by a mistake of the judge, induced by erroneous statements of counsel, a decree has been entered of record, which the judge did not examine or approve, and did not intend to enter, such a decree may be set aside, on motion, after as well as before the expiration of the term. We can conceive of no reason why the parties to a suit, or the court, for that matter, should be bound to any greater extent by a decree of that kind than by a judgment or decree erroneously entered in consequence of a mistake of the clerk as to the character of a judgment directed to be entered. In both cases the record is affected with the same vice, and it is made to bear witness to judicial action that was never in fact taken": *United States v. Williams*, 67 Fed. Rep. 384.

Vacating for Error.—The courts substantially agree that a judgment ought not, after the lapse of the term, to be vacated on motion for error, except where such error is made the ground of a motion for a new trial or for some other revisory or appellate proceeding, and they agree quite as unanimously that a judgment may, after the lapse of the term, be vacated on motion for an irregularity. In irregularly entering a judgment there is necessarily error, and we may have difficulty in determining what the courts mean by an error, and what by an irregularity, in the sense in which they employ these words when discussing this topic. A motion to vacate a judgment is, nevertheless, not a corrective or appellate proceeding, nor is it intended that one aggrieved by an error or irregularity, such as is commonly corrected upon appeal, shall have an election

whether he will seek relief by an appeal or by a motion. In attempting to formulate a test by which to distinguish between error and irregularity the supreme court of North Carolina said: "An erroneous judgment is one rendered according to the course and practice of the courts, but contrary to law, as where it is for one party where it should be for the other, or for too little or too much. An irregular judgment is one contrary to the course and practice of the courts, as judgment without service of process": *Wolfe v. Davis*, 74 N. C. 597, 599; *Ricks v. Stancill*, 119 N. C. 99; *Orvis v. Elliott*, 65 Mo. App. 96. If a cause is brought regularly on for trial or is regularly submitted for decision, though upon default, and the court makes some erroneous ruling or decision during the progress of the trial, or draws an incorrect conclusion from the evidence or from the findings or conceded facts, or erroneously determines the pleadings of a party to be sufficient or insufficient, its action is not irregular, and its judgment may not be vacated after the close of the term on the ground that its action was in some respects erroneous: *Brown v. Bennett*, 55 Ga. 189; *Clements v. Empire etc. Co.*, 96 Ga. 319; *Sexton v. Rock Island etc. Co.*, 49 Kan. 153; *Green v. Hamilton*, 16 Md. 317; 77 Am. Dec. 295; *Alabama etc. Ry. Co. v. Bolding*, 69 Miss. 255; 30 Am. St. Rep. 541; *Harbor v. Pacific R. R.*, 32 Mo. 423; *Peake v. Redd*, 14 Mo. 79; *State v. Horton*, 89 N. C. 581; *Loomis v. Rice*, 37 Wis. 262; *McBride v. Wright*, 75 Wis. 306; *Gilbert-Arnold etc. Co. v. O'Hare*, 93 Wis. 194; *Bank of United States v. Moss*, 6 How. 31; *Assignees v. Dorsey*, 2 Wash. C. C. 433; *Charman v. Charman*, 16 Ves., Jr., 115. A judgment cannot, therefore, be vacated after the lapse of the term on the ground that the cause was dismissed on account of an erroneous ruling of the court that the complaint was insufficient to entitle the plaintiff to relief: *East Tennessee etc. Ry. Co. v. Greene*, 95 Ga. 35; nor, on the other hand, because the court erred in determining the complaint to be sufficient when it did not state facts disclosing a cause of action against the defendant: *State v. Tate*, 109 Mo. 265; 32 Am. St. Rep. 664; *Hall v. Lane*, 123 Mo. 633; or that the judgment was based upon an alleged mechanic's lien, and the statement or claim of lien was imperfect and not sufficient to support it: *Caldwell v. Carter*, 153 Pa. St. 310; nor because the court did not submit to the jury all the issues which ought to have been submitted: *May v. Stimson etc. Co.*, 119 N. C. 96. Of course, if the errors on account of which the party seeks to vacate the judgment have been committed after the questions involved were presented to a court or judge, and deliberately decided, no one would claim that he could revise his rulings after the lapse of the term by vacating the judgment on motion. Hence the cases in which those questions have been presented have been those in which the judgment assailed was upon default or given in such other circumstances that it did not appear that the question had actually been presented to the court, or that it had, after consideration, committed the errors complained of. We do not understand that a judgment regularly entered upon default or by confession is any more subject to attack by motion to vacate it than if it were the result of a trial and rendered after a most able and persistent defense. If, however, a

judgment upon confession or default is entered by a clerk of a court in a case where he is not authorized to enter it, it is irregular rather than erroneous. Hence, if an action is supported only by a note and a warrant of attorney to confess judgment thereon, and such warrant does not confer authority to act after the note is barred by the statute of limitations, the judgment may be vacated on motion: *Matzenbaugh v. Doyle*, 156 Ill. 331.

Irregularities.—It sufficiently appears from what we have already stated that a judgment may, after the close of the term, be vacated on motion for irregularity. Where this remedy is available, it should be resorted to instead of seeking relief by an independent suit or action: *Carter v. Rountree*, 109 N. C. 29; *Grant v. Harrell*, 109 N. C. 78. There are numerous decisions purporting to affirm the power of courts to vacate judgments for irregularity regardless of the lapse of the term: *Craig v. Wroth*, 47 Md. 281; *Downing v. Still*, 43 Mo. 309; *Doan v. Holly*, 27 Mo. 256; *Harkness v. Austin*, 36 Mo. 47; *Keaton v. Banks*, 10 Ired. 381; 51 Am. Dec. 393; *Dick v. McLaurin*, 63 N. C. 185; *Huntington v. Finch*, 3 Ohio St. 445; *O'Hara v. Baum*, 82 Pa. St. 416. We apprehend that this general statement must be received with caution. It is not, we suppose, sufficient that some irregularity has occurred during the progress of the proceeding not inducing or leading to the entry of the judgment at the time when and the circumstances under which it was entered. If, on the other hand, by the general law or the rules of the court, the party in whose favor judgment was entered was not then entitled to have it entered, its entry may operate as a surprise to his adversary, who, if not himself in fault, is entitled to have undone that which ought not to have been done. To say that a judgment may always be vacated for irregularity is, therefore, misleading. The irregularity for which relief may thus be granted is restricted to the taking or entering of a judgment at a time when the proceedings in the cause had not reached a stage at which the party taking judgment was entitled to do so, as where a clerk enters judgment by default in a class of cases in which he is not authorized to act: *Oliphant v. Whitney*, 34 Cal. 25; *Wharton v. Harlan*, 68 Cal. 422; or before the time for answering has expired: *Browning v. Roane*, 9 Ark. 354; 50 Am. Dec. 218; *Walters v. Walters*, 132 Ill. 467; *Branstetter v. Rives*, 34 Mo. 318; *Mailhouse v. Inloes*, 18 Md. 328; or before process has been returned or judgment is entered by the court: *Graff v. M. & H. Trans. Co.*, 18 Md. 364; as for want of an answer when an answer is at the time on file: *Norman v. Hooker*, 35 Mo. 366; *Knowles v. Fritz*, 58 Wis. 216; or in the absence of some notice which the plaintiff is required to give: *Fenton v. Garlick*, 6 Johns. 288; or when the cause is put down for trial and tried without notice to the adverse party, he being entitled to such notice under the rules of the court: *People v. Bacon*, 18 Mich. 247; *Edwards v. Woodruff*, 90 N. Y. 396; or judgment is entered while an order of reference remains unexecuted: *Stacker v. Cooper Circuit Court*, 25 Mo. 401. It has also been held that a judgment may be vacated because the court acted without a jury when the law entitled the party to a jury trial: *Cowles v. Hayes*, 69 N. C. 406. This, however, seems to partake more of the

character of an error than of that of an irregularity. The tendency of the more recent decisions is to limit the right to vacate a judgment for irregularity to those cases in which it appears that the moving party has been substantially prejudiced by the alleged irregular action: *Jones v. San Francisco etc. Co.*, 14 Nev. 172; *Roberts v. Allman*, 106 N. C. 391. Thus, where judgment was entered against an infant in an action in which there had been some irregularity in the service of process, but in which a guardian ad litem had been appointed for him, it did not appear that any injustice had been intended or resulted, and it was subsequently sought to vacate the judgment after the lapse of the term, the court said: "It is true, as the counsel for the appellant insisted upon in the argument, that a motion in the action to set aside the judgment for irregularity will be entertained by the court, if it shall be made within a reasonable period after it was granted. This, however, does not imply that every judgment infected in any degree, directly or indirectly, by some irregularity in the course of the action leading to it, will be set aside. Some irregularities are unimportant and do not affect the substance of the action, or the proceedings in it; there are others of more or less importance that may be waived or cured by what may take place or may be done in the action after that happens; and there are yet others so serious in their nature as to destroy the efficacy of the action and render the judgment in it inoperative and void. Whether the court will or will not grant such a motion in any case must depend upon a variety of circumstances and largely upon their peculiar application to the case in which the motion shall be made. Generally, a judgment will be set aside only when the irregularity has not been waived or cured, and it has been, or may be, such as to work, or may yet work, serious injury to the party complaining interested in it, or when the judgment is void": *Williamson v. Hartman*, 92 N. C. 236; *Peoples v. Norwood*, 94 N. C. 167; *Stancill v. Gay*, 92 N. C. 455; *Clemson etc. College v. Pickens*, 42 S. C. 511; *New York etc. Soc. v. Tabernacle etc. Church*, 10 App. Div. 288. Therefore, though an order confirming a sale of real property was made after the death of the defendant and without notice to his heirs, the court refused to vacate it, because it did not appear that the moving party had in any way been prejudiced by this irregular action: *Everett v. Reynolds*, 114 N. C. 366. If the alleged irregularity is one which was presented for the consideration of the court before judgment was entered, or is one which must be presumed to have been so presented, the court, in proceeding, committed an error which must be corrected, if at all, by some appellate or correctory proceeding, and relief from its erroneous action cannot be procured by moving, after the lapse of the term, for the vacation of the judgment: *Milwaukee etc. Assn. v. Jagodsinski*, 84 Wis. 35.

The Entry of Judgment for or against a Deceased Person is always irregular. If the court had not acquired jurisdiction over him in his lifetime, it is void; and there are decisions taking the extreme view that it is void whether the court had thus acquired jurisdiction or not: *Freeman on Judgments*, secs. 140, 153. If, by the decisions of the courts of the state where the question is presented, a judgment

rendered for or against a deceased person is absolutely void, it must necessarily be vacated on motion, regardless of the time of its entry. The better opinion, however, is that after a court has acquired jurisdiction of a party, whether plaintiff or defendant, it is authorized to proceed to judgment. If he dies, it cannot do this regularly without suggesting his death and the making of his representatives parties in his place. As jurisdiction, however, continues, an error or irregularity in its exercise cannot make the judgment void, but voidable only. Nevertheless, it is irregular to proceed without substituting his representatives, and a judgment for or against a deceased party instead of for or against his representatives may be vacated on motion, though interposed after the lapse of the term: *Lockridge v. Lynn*, 68 Ga. 137; *Holmes v. Honie*, 8 How. Pr. 384; *Lynn v. Lowe*, 88 N. C. 478; *Knott v. Taylor*, 99 N. C. 511; 6 Am. St. Rep. 547; *Grossman's Appeal*, 102 Pa. St. 137. More recent and better considered decisions do not affirm the absolute right to have a judgment vacated because of the death of a party prior to its rendition. They refuse to grant motions made for that purpose when the moving party does not represent the decedent and is not injuriously affected by the judgment, and also where he has been guilty of laches in not calling the attention of the court to such death before the judgment was entered: *Rogers v. McMillan*, 6 Colo. App. 14; *State v. Tate*, 109 Mo. 265; 32 Am. St. Rep. 664; *Wood v. Watson*, 107 N. C. 52.

Infants, Lunatics, and Married Women are, perhaps, more liable than other litigants to have judgments entered against them which are infected by collusion and other fraud as well as by irregularity in their rendition. The grounds upon which judgments against them may be vacated are the same as if they were under no disability, but, owing to such disability, they are not chargeable with laches on account of nonaction while it continues. If, by law or the rules of the court, judgment may not be entered against an infant or lunatic until a guardian ad litem has been appointed to represent his interest, its entry, in the absence of such appointment, is irregular, and on account of it the judgment may be vacated after the lapse of the term: *Powell v. Gott*, 13 Mo. 458; 53 Am. Dec. 153; *Randalls v. Wilson*, 24 Mo. 76; *Townsend v. Cox*, 45 Mo. 401; *Keaton v. Banks*, 10 Ired. 381; 51 Am. Dec. 393; *Levy v. Williams*, 4 S. C. 515. An irregularity is waived by nonaction for any considerable time after the disability is removed. Hence, a motion to vacate a judgment because of it will be denied, if there has been a failure to proceed against the judgment within a reasonable time after the infant reached its majority or the lunatic became of sound mind: *Eisenmenger v. Murphy*, 42 Minn. 84; 18 Am. St. Rep. 493; *Kemp v. Cook*, 18 Md. 130; 79 Am. Dec. 681.

A very remarkable difference of opinion exists respecting the effect of a judgment against a married woman in those cases in which there was no liability against her upon which such judgment ought to have been entered. In some of the states judgments of this character are pronounced void: *Freeman on Judgments*, sec. 180. We cannot agree to the conclusion that a judgment against a married woman

in a case in which the court had jurisdiction and in which process was served upon her can possibly be void, but, in those courts which hold otherwise, doubtless a judgment so entered against her may be vacated on motion, because, if void, it is not, in contemplation of law, a judgment: *United States v. Gayle*, 50 Fed. Rep. 169. In some of the states the presumption is against such judgment, and if any facts exist on account of which a judgment against a married woman may not be void, these facts must be disclosed by the record: *Cary v. Dixon*, 51 Miss. 593; *Hartman v. Ogborn*, 54 Pa. St. 120; 93 Am. Dec. 679; *Caldwell v. Waters*, 18 Pa. St. 79; 55 Am. Dec. 592; *Van Dike v. Wells*, 103 Pa. St. 49; *McKinney v. Brown*, 130 Pa. St. 365. As against this judicial aberration the legislature interposed, in Pennsylvania, and, by a statute enacted in 1887, a judgment entered against a married woman since that enactment has substantially the same effect and is attended with the same presumption of validity as if she were a feme sole. It will not be vacated after the lapse of the term on her motion to enable her to interpose a defense which she might have interposed before its entry: *Littster v. Littster*, 151 Pa. St. 474; nor, in any event, for any irregularity which does not appear on the face of the record: *Adams v. Grey*, 154 Pa. St. 258. In a later case in the same state, a judgment against a married woman was vacated, because the evidence showed that the contract on which it was based was signed by her husband alone, but, from the meager report and opinion, we are not able to ascertain whether the motion was made during the term or afterward: *Murdock v. Wasson*, 158 Pa. St. 295; and the same indefiniteness of opinion and report in a still later case opening a judgment against a married woman for the purpose of permitting her to defend on the ground that the bond upon which judgment had been given was executed by her as surety for her husband (*Harris v. Reinhard*, 165 Pa. St. 36), leaves us without any means of deciding whether the court has determined to disregard the statute or to retrograde it to its old position under which a judgment against a married woman was presumed to be void, and was therefore subject to every sort of attack, both direct and collateral, and without much regard to the lapse of time. In South Carolina, a married woman was sued, and there was nothing in the record to indicate either that she was a woman or was married, and judgment was entered against her by default in August, 1872. An action was brought against her upon this judgment in 1889, against which she, then being a widow, sought to defend on the ground of her coverture when the judgment was entered, but it was held that as the court which entered the judgment had jurisdiction of her and of the subject matter of the action, such judgment was conclusive against her: *United States v. Gayle*, 45 Fed. Rep. 107. After the entry of the second judgment she moved to have the first set aside "as absolutely void," and the motion was granted: *United States v. Gayle*, 50 Fed. Rep. 169. If the judgment was "absolutely void," we cannot understand why the court in the second action was compelled to hold it to be valid or to enter judgment thereon against the defendant, and the second judgment having been entered in effect affirming the validity and continuing force of the

first, we cannot comprehend how, where the principles of *res judicata* remain in force, the first judgment could subsequently be judicially held to have been void *ab initio*.

Decrees of Divorce are, perhaps, worthy of special consideration. The consequences of setting them aside are very serious, because marriages may have been contracted in good faith in the belief of their validity, and their annulment must follow as a necessary result from the vacating of such decrees, involving in common misfortune the parties to the decree vacated, the innocent spouse of the second marriage, and, perhaps, the still more innocent issue thereof. Because of these considerations some courts have been loth to vacate such judgments, and have construed statutes specially authorizing applications to open judgments or decrees which have not been rendered upon the merits, for the purpose of permitting the interposition of a defense to the original action or proceeding, as inapplicable to suits for divorce: *McJunkin v. McJunkin*, 3 Ind. 30; *Lewis v. Lewis*, 15 Kan. 181; *O'Connell v. O'Connell*, 10 Neb. 390; *Parish v. Parish*, 9 Ohio St. 534; 75 Am. Dec. 482. On the other hand, the temptation to fraudulent practices seems more irresistible in this class of suits than in any other, and if the courts refuse to interpose because of the hardship which may result to third persons, in the immunity thereby given, fraud and irregularity will, perhaps, lead to greater evils than those sought to be avoided. At all events, the decided weight of authority affirms the right to vacate decrees of divorce on the same ground that other judgments or decrees may be vacated, and will not permit decrees to remain in force which have been procured through misrepresentation or other fraud: *Morton v. Morton*, 16 Colo. 358; *Whitcomb v. Whitcomb*, 46 Iowa, 437; *Rush v. Rush*, 46 Iowa, 649; 26 Am. Rep. 179; *Holmes v. Holmes*, 63 Me. 420; *Edson v. Edson*, 108 Mass. 590; 11 Am. Rep. 393; *Olmstead v. Olmstead*, 41 Minn. 297; *Young v. Young*, 17 Minn. 181; *Mansfield v. Mansfield*, 26 Mo. 163; *Allen v. McClellan*, 12 Pa. St. 328; 51 Am. Dec. 608; *Crouch v. Crouch*, 30 Wis. 667. The supreme court of North Dakota, after referring to the decisions on this subject, said: "These cases establish beyond dispute the principle that—not less in divorce cases than in any other class of cases—courts of general jurisdiction possess, *ex necessitate*, the power to emancipate themselves from the effects of a deceit practiced upon them, and to expunge from their records that which has been spread thereon only through fraud or deception": *Yorke v. Yorke*, 3 N. Dak. 343. One against whom a decree of divorce has been obtained fraudulently or irregularly may, however, have been a party to the fraud or irregularity, or, at least, knowing of it, may have chosen not to complain, and, if so, the court will not, after long acquiescence, interpose in his or her behalf, especially where the object of the moving party is to secure property as the spouse of his or her husband or wife after having acted for years on the assumption that a valid divorce had been granted and their marital relations and obligations no longer existed: *Hubbard v. Hubbard*, 19 Colo. 13; *Zoellner v. Zoellner*, 46 Mich. 511; *Simons v. Simons*, 47 Mich. 253: In truth, where a party, knowing that a divorce has been obtained against him or her

through fraud or irregularity, treats it as valid, thereafter disregarding his or her marital obligations, and, perhaps, contracting a second marriage, he or she will be deemed to be estopped from contesting the legality of the decree of divorce, whether such contest is sought to be made by motion, by independent suit, or collaterally in some other proceeding in which it is insisted that the original marriage has never been legally annulled: *Arthur v. Israel*, 15 Colo. 147; 22 Am. St. Rep. 381; *Carr v. Carr*, 92 Ky. 552; 36 Am. St. Rep. 614; *Marvin v. Foster*, 61 Minn. 154; 52 Am. St. Rep. 586.

For Matters Occurring After the Entry of Judgment.—Where a party claims that a judgment has been satisfied, he may move the court in which it was rendered to have such satisfaction entered of record: *Freeman on Judgments*, sec. 480. Various causes occurring after the entry of a judgment, though it was in all respects regular and is not claimed to have been either erroneous or invalid, may render its further enforcement inequitable. Where such is the case, the party against whom it is may take proceedings to prevent its further enforcement, and to that end move that an entry of satisfaction be made, or that the execution of process be perpetually stayed: *Freeman on Executions*, sec. 32; and in some cases it has been held that the court may, on his motion, make an order vacating the judgment: *Chisholm v. State*, 42 Ala. 527; *Weaver v. Mississippi etc. Co.*, 30 Minn. 477; *Aetna Ins. Co. v. Aldrich*, 38 Wis. 107; *Heckling v. Allen*, 15 Fed. Rep. 196.

Vacating as to Some of the Parties Only.—It has been contended that a judgment is necessarily an entirety, and therefore, if void as to some of the defendants, is void as to all, and, if subject to reversal upon appeal or to a motion to vacate, that it must hence be wholly reversed or wholly vacated. We have considered this question elsewhere, and shall not re-examine it here. We think that it is not an entirety in this sense (*Freeman on Judgments*, sec. 136), and that if some cause for vacating it exists in favor of one of the parties, but not applicable to others, that it may be vacated as to that party and left in force as against the others: *Lewis v. Seipp etc. Co.*, 63 Ill. App. 345; *Neenan v. St. Joseph*, 126 Mo. 89.

Notice.—We have already suggested that during the continuance of the term at which a judgment was entered the power of the court to vacate it was largely of so discretionary a nature that it was rarely, if ever, subject to review upon appeal. In truth, until the close of the term a judgment could hardly be regarded as final according to the common-law practice, and, as the judge might vacate it upon his own motion, he doubtless might also vacate it upon the suggestion of either of the parties or of a third person, and hence might act without notice being given to the party whose judgment was to be vacated: *Rich v. Thornton*, 69 Ala. 473; *Desribes v. Wilmer*, 69 Ala. 25; 44 Am. Rep. 501; *Lake v. Jones*, 49 Ind. 297. If a judgment is void upon its face, the court may doubtless strike it off without any notice to either of the parties, and whether such action be regular or not, there can be no remedy upon appeal, for the reason that if a judgment is void upon its face, no one can be injured by striking it from the record. In all those cases in which any issue is really presented by the application for an order vacating a judgment, any

person who may be prejudiced by such order is entitled to be heard, and for that reason no order should be granted after the term unless notice first be given to all the persons appearing by the record to be interested in the judgment: *Vallejo v. Green*, 16 Cal. 161; *Burnside v. Ennis*, 43 Ind. 411; *Bajourin v. Ramelli*, 34 La. Ann. 554; *Lane v. Wheless*, 46 Miss. 666; *Molloy v. Batchelder*, 69 Mo. 503; *Coleman v. McAnnulty*, 16 Mo. 173; 57 Am. Dec. 229; *Morris v. Morris*, 60 Mo. App. 86; *Nuckolls v. Irwin*, 2 Neb. 60; *Hettrick v. Wilson*, 12 Ohio St. 136; 80 Am. Dec. 337. It is not necessary, however, that the notice be given to the parties personally. Notwithstanding the judgment has become final, the attorneys who represented the parties to the action are regarded as still representing them and acting for them, whether such is the fact or not, and therefore it is sufficient for the purpose of authorizing the court to act to show that the notice of the motion has been served upon the person or persons who by the record appear to be attorneys of the parties against whose interest the judgment is sought to be vacated: *Beach v. Beach*, 6 Dak. 371; *Lee v. Brown*, 6 Johns. 132; *Branch v. Walker*, 92 N. C. 87; *Doane v. Glenn*, 1 Colo. 454. By a sale of the property of the defendant under process issued on the judgment sought to be vacated, a third person may have become interested therein as a muniment of title. If so, and it is sought to affect his title, notice of the motion must be served on him. Otherwise the order vacating the judgment is not binding upon, and cannot prejudicially affect, him; nor can he be deemed a party bound by such order because an affidavit made by him is used on the hearing of the motion: *Hunter v. Ruff*, 47 S. C. 525; 58 Am. St. Rep. 907.

Laches.—As to the Time Within Which a Motion to vacate a judgment must be made where the court is authorized to act after the lapse of the term, no precise rule can be given. If the judgment is void on its face, no limitation can, with propriety, be interposed, for the reason that no amount of acquiescence can make the judgment valid, but in at least one state, we apprehend, even where the motion is upon this ground, that the court will not grant any relief after the lapse of several years: *People v. Thomas*, 101 Cal. 571; *People v. Dodge*, 104 Cal. 487. Where, on the other hand, the judgment is not void on its face, and may, therefore, be enforced, if permitted to stand upon the record, courts will, in many instances, refuse to grant relief where the applicant is chargeable with laches. This is particularly so if the ground of the motion is merely that the judgment was irregularly entered, or, in other words, was not entered according to the course and practice of the court. In one instance, where a motion to set aside a judgment was based on a mere clerical error in the copy of the summons served, it was held that the applicant could not be heard after the lapse of the term: *Day v. Mertlock*, 87 Wis. 577. In Missouri, on the other hand, the statute appears to justify, or even to require, the vacating of a judgment for irregularity, if the motion is made within three years after its rendition: *State v. Tate*, 109 Mo. 265; 32 Am. St. Rep. 664.

The most worthy object attained by the granting of motions to vacate judgments is that of allowing a full investigation of the matters in controversy in order that a disposition of the case, ac-

cording to the merits, may be made. Whenever that object does not appear to be the one sought, an application based on mere irregularity of proceeding will be treated with no favor: *Doan v. Holly*, 27 Mo. 256; *Hughes v. Wood*, 5 Duer, 601; *Hanson v. Wolcott*, 19 Kan. 207. The rule will be strictly applied, and any laches shown against the moving party will prove fatal to his desires: *Williams v. Buchanan*, 75 Ga. 789; *Ammerman v. State*, 98 Ind. 165; *Lee v. Basey*, 85 Ind. 543; *Nicholson v. Nicholson*, 113 Ind. 131; *McCormick v. Hogan*, 48 Md. 404; *Altman v. Gabriel*, 28 Minn. 132; *Foster v. Hauswirth*, 5 Mont. 566; *Sanderson v. Dox*, 6 Wis. 164; *Cagger v. Gardner*, 1 How. Pr. 142; *Kerr v. Bowle*, 3 U. C. L. J. 150. But what delay necessarily amounts to laches is uncertain. In an early case in New York, eight days' notice of trial being given, when the defendant was entitled to fourteen days' notice, he treated it as void, and judgment was given against him. A subsequent motion based on the irregularity, made after the intervention of a full term, was considered too late: *McEvers v. Markler*, 1 Johns. Cas. 248. In the same state, a third of a century later, an application based on an irregularity in giving too short a notice of an inquisition on a writ of inquiry, made after the lapse of two special terms, was refused, "as this was an attempt to deprive the plaintiff of his judgment on the ground of a mere irregularity, the defendant would be held to the strictest rules of proceeding, and having been guilty of laches in making his motion, he was not entitled to be heard": *Nichols v. Nichols*, 10 Wend. 560. This decision has been indorsed in Wisconsin by holding that a short notice, being sufficient to put a party upon inquiry, he must ascertain whether his adversary proceeds to judgment upon it; that a motion to set aside such judgment, there being no pretense of merits, must be made at the same term, unless he can show some good cause for his delay; and that where defendant waited more than two months, and until the expense of advertising real estate for sale had been incurred, he waived the irregularity: *Aetna etc. Ins. Co. v. McCormick*, 20 Wis. 265. The defendant must not, according to some of the authorities, take any step in the case after the irregularity occurs, or it will be deemed a waiver. Thus, where an appeal was taken because no notice of the motion for judgment was served, and the appellate court declined to interfere, on the ground that the appropriate remedy was by motion to vacate the judgment and the defendant then applied to the court where the judgment was rendered to have it set aside, the taking of the appeal was deemed to be such a proceeding as precluded him from taking advantage of the irregularity: *Jenkins v. Esterly*, 24 Wis. 340. It is said in England that the true rule is, that if there be an irregularity, the party suffering by it is not bound to have it set aside in any specific time; that he may reasonably presume that his adversary, discovering the error, will abandon the defective proceeding. But if the adversary take one step more, showing that he has not abandoned his process, then the movement to have the irregularity set aside must be commenced: *Fletcher v. Wells*, 6 Taunt. 191. Where a judgment is entered against a party without the court having jurisdiction over him, he may be left in ignorance of such entry for an indefinite period of time, in which event he is not guilty of any actual laches in not mov-

ing to vacate it during the continuance of such ignorance. On the other hand, where he is aware of the entry of a judgment, he must, we think, be regarded as guilty of laches if he takes no proceeding to have it set aside. Whether, however, in the latter case, he may be beyond relief because of his laches, and in the former granted relief, however great the lapse of time, we are unable to state. The authorities upon the subject, so far as they have come within our observation, while they have involved cases in which there had been a lapse of many years after the entry of the judgment sought to be vacated, and have affirmed, in general terms, that the great delay did not constitute any obstacle to the action of the court, when analyzed, do not go beyond affirming that under the facts of each particular case, the court did not regard the applicant as charged with such laches as precluded it from granting him relief, and have sometimes excused his delay upon the ground of his ignorance, until about the time he made the motion, of the existence of the judgment against him, and sometimes on the ground that, though he had been guilty of considerable delay after the knowledge of the judgment, the situation of the parties had changed in no substantial respect, and therefore that relief might still be granted: *Stocking v. Hanson*, 35 Minn. 207; *Peokert v. Wilson*, 38 Minn. 341; *Vilas v. Plattsburgh, etc. R. R. Co.*, 123 N. Y. 440; 20 Am. St. Rep. 771; *Koonce v. Butler*, 84 N. C. 221.

The Effect of an Order Vacating a Judgment may be considered:

1. With reference to the persons against whom the order is sought to be asserted; and 2. With reference to the cause on account of which the order was entered. So far as third persons are concerned, it seems clear that their acts, done by authority of a judgment which was not void, but voidable only, may be justified under the judgment, notwithstanding its subsequent vacation, except when they have been given notice of the motion, and the court, after giving them an opportunity to be heard, has determined that it should be set aside, notwithstanding their interests may be affected: *Schmidt v. Niemeyer*, 100 Mo. 207. This rule is specially applicable in favor of persons who have purchased property or otherwise acquired rights under a judgment when it and all the other proceedings shown by the record appear to be regular in all respects, and subsequently the judgment is vacated, even though such vacation is on the ground that summons was not served upon the defendant in the action: *Hunter v. Ruff*, 47 S. C. 525; 58 Am. St. Rep. 907. Thus, in a recent case, it appeared that a decree of sale was made of a tract of land, containing a recital that the nonresident defendant had been duly notified by publication to appear and answer, and that the resident defendant had been duly served with process. A sale was subsequently made and reported to, and affirmed by, the court. Afterward a motion was made in the proceeding in which the decree of sale had been entered, to vacate it on the ground that no service of process had been made, and the court entered an order adjudging the order of sale to be illegal and void as to certain designated defendants, and directed that such order be canceled, but added, "That all the orders heretofore made in this action shall be allowed to remain upon the records for the purpose of protecting purchasers and others, so far as in law

they afford protection." In a suit to recover the property so sold, the question therefore arose whether the decree, after it was set aside, afforded any protection to the purchasers. The judge who tried the cause instructed the jury that the order of sale could not be treated as having been set aside so as to affect the rights of persons purchasing without any notice that the process had not been served. Upon appeal, this ruling was sustained on the ground that the judgment was regular on its face, because the want of service of process was not shown by the record itself: *Harrison v. Hargrove*, 120 N. C. 96; 58 Am. St. Rep. 781. When the question arises between the parties to the suit as to what shall be the effect of an order vacating a judgment, it depends on the cause producing the vacation. If the judgment was regularly and properly entered, and its subsequent vacation was an exercise of mercy toward the defendant, the plaintiff having been guilty of no neglect or misconduct, he may, no doubt, justify all his acts done under the judgment before it was set aside. But where the order of vacation is made because of some fault or misconduct of the plaintiff in procuring the original judgment, a different rule may be invoked. "If the judgment or execution has been set aside for irregularity, the party cannot justify under it, for that is a matter in the privity of himself and his attorney; and if the sheriff or officer, in such case, join in the same plea with the party, he forfeits the benefit of his defense. The sheriff or officer, however, may justify under an irregular judgment as well as an erroneous one, for they are not privy to the irregularity; and, so as the writ be not void, it is a good justification, however irregular, and the purchaser will gain a title under the sheriff": *Tidd's Practice*, sec. 1032. The case of a judgment set aside for irregularity differs materially from that of one reversed upon appeal. In the latter case, the error for which the judgment is ultimately avoided is imputed to the court, and the parties are not left without protection for the acts which they have done, based upon the judgment, and upon their confidence in the correctness of the decision of the court. But a judgment obtained irregularly, and against law or the practice of the court, is tainted with vices liable to result in its destruction, and for which the party practicing the irregularity is alone responsible. When, on account of these vices, the judgment is vacated, the party guilty of the irregularity seems to be as completely without any means of justification as though no judgment had ever been entered: *Young v. Bircher*, 31 Mo. 136; 77 Am. Dec. 638; *Coleman v. McAnulty*, 16 Mo. 173; 57 Am. Dec. 229; *Nelson v. Guffey*, 131 Pa. St. 273; *Allen v. Huntington*, 2 Aiken, 249; 16 Am. Dec. 702; *Simpson v. Hornbeck*, 3 Lans. 54; *Barker v. Braham*, 3 Wils. 368; *Turner v. Felgate*, 1 Lev. 95.

MATTER OF McLARNEY.

[158 NEW YORK, 416.]

WILL, WHEN NOT REVOKED BY SUBSEQUENT MARRIAGE.—If a married woman makes a valid will, after which her husband dies and she contracts a second marriage, her will is not thereby revoked.

James P. Campbell and Joseph H. Fargis, for the appellant.

Abel Crook, for respondents.

418 O'BRIEN, J. The decree of the surrogate admitting the will of the deceased to probate is questioned upon one ground only, and that is, that the will was revoked prior to the death of the testatrix.

The will was made on the twenty-third day of July, 1884, and the deceased was then a married woman, the wife of one Brophy, who died on the 29th of January, 1889. On the 5th of February, 1894, the testatrix, being then a widow, married the contestant James E. McLarney, and she died on the 19th of April following the marriage. There was no issue of either marriage.

When the will in question was made, the deceased was a married woman living with her husband, and the contention is, that as she subsequently became a widow and remarried, her last marriage operated to revoke the will previously made.

That the deceased made a valid will in writing is not disputed, and, in order to show a revocation, the burden was upon the contestant to bring the case within some provision of the statute which defines the cases in which written wills are deemed to be revoked. The statute provides that "a will executed by an unmarried woman shall be deemed revoked by her subsequent marriage": 2 Rev. Stats., sec. 44. The deceased was not an unmarried woman when she made the will. She was a married woman who subsequently became a widow and remarried. The case is not, therefore, within the rule or the reason of the rule that the will of an unmarried female is revoked by her subsequent marriage. The statute on this subject is simply declaratory of the common law. The marriage, as a general rule, vested the husband with the title to the property of the wife, and she lost her capacity to dispose of it by will or otherwise. Since a testamentary instrument, from its very nature, can operate only after death, and is subject to change during life, it was wholly inconsistent with the relations of husband and wife as they existed at common law when made **419** by the wife before marriage. An instrument which disposed of her property after death, and which she was incapable of changing or revok-

ing during coverture, could not legally exist under the rules of law that governed the marriage relations. It was supposed to be destructive of that complete unity of husband and wife, which was the theory of the common law, and, therefore, upon her marriage it was deemed to be completely revoked. The reason of the rule was very clearly stated by Lord Chancellor Thurlow in *Hodsden v. Lloyd*, 2 Brown Ch. 534, as follows: "It is contrary to the nature of the instrument, which must be ambulatory during the life of the testatrix, and as by the marriage she disables herself from making any other will, this instrument ceases to be of that sort, and must be void." This rule was incorporated in our statute law (2 Rev. Stats., sec. 44, p. 64) at a time when a married woman was incapable of making a will, and, of course, it was not intended to have any application whatever to testamentary instruments made during coverture. Since the disabilities of married women to dispose of property by will have been removed in this state by legislation, the reason of the rule no longer exists, though it remains a part of the statute law. It has been held by this court that it was not abrogated by the subsequent legislation conferring testamentary capacity upon married women and removing the reason of the rule at common law. The courts cannot dispense with a statutory rule merely because it appears that the policy upon which it was established has ceased. The legislature might very properly remove it from the statute book by repeal, but in the mean time it cannot be disregarded by the courts: *Brown v. Clark*, 77 N. Y. 369.

But it would seem to be clear that we ought not to extend the operation of an ancient rule when all reasons upon which it was founded have passed away, or apply it to a case which was not originally within its terms or its general policy. After the long struggle in the courts, where it was assailed as a useless relic of the past that had been swept away in the current of modern legislation, there is no good reason for giving ⁴²⁰ it new life and vigor by deciding that it is still not only potent enough to annul the will of an unmarried female but that of a married woman as well.

The courts of this state, when dealing with the subject of wills and their revocation, have always adhered closely to the terms of the statute. This is illustrated not only by the case above cited, but by others, notably where it was held that the provision of the statute which revokes a will in favor of an after-born child had no application to the will of a married woman under the act of 1849: *Cotheal v. Cotheal*, 40 N. Y. 405. So, also, in a more recent case it was held that a will made

by a widow was the testamentary act of an unmarried woman and revoked by her subsequent marriage: *In re Kaufman*, 131 N. Y. 620.

In the case at bar, the testatrix could have revoked her will at any time before her death or could have made a new will, and hence none of the reasons upon which the statute was based have any application to this case.

The learned counsel for the contestant admits that he cannot succeed in this appeal unless the language of the act of 1849 removing the disabilities of married women sustains his contention. By that statute a married woman is enabled "to convey and devise real and personal estate . . . in the same manner and with like effect as if she were unmarried." The argument is, that since the will of a married woman is to be made in the same manner and with like effect as if she were unmarried, the instrument must carry with it all the incidents and qualities that pertain to the will of a feme sole, including the possibility of revocation by a subsequent marriage.

This, we think, would be straining the words of the statute to ingraft upon it an ancient rule of revocation that never had any application to the class of wills therein mentioned. The purpose of the act was to enable a married woman to make a will, and it had no reference to methods of revocation. A will has no effect whatever until death, and the words "like effect" relate to the instrument after it becomes effective by ⁴²¹ death. The meaning of the words is, that when the will of a married woman becomes operative by her death it shall have the same effect, that is, the same disposing power and legal operation as an instrument for the transfer of the title to property, that it would had she never been married. Nothing was said or implied with respect to revocation. That subject was left to the general rules of law applicable to all wills. If the legislature intended that her will should be deemed revoked in case of a second marriage, it would, no doubt, have said so. In the absence of some positive law, such a result cannot be ingrafted upon a statute, the primary purpose of which was to remove the common-law disabilities of marriage.

The judgment below was right and should be affirmed, with costs.

All concur, except Gray, J., absent, and Haight, J., dissenting.

WILLS—REVOCATION OF WOMAN'S WILL BY MARRIAGE.
In many of the states a woman's want of capacity to make wills has been removed by statute, and, if her marriage operated to revoke

her pre-existing will, she might, by republishing it, or by executing a will of like tenor, avoid the effect of such implied revocation; but in most of the states this removal of her want of capacity has been determined to be in effect the removal of all the reasons of the common-law rule and therefore to make the rule itself obsolete, and to leave her antenuptial will in full force: Monographic note to *Graham v. Burch*, 28 Am. St. Rep. 358. See *Roane v. Hollingshead*, 76 Md. 369; 35 Am. St. Rep. 438, and note; *Ward's Will*, 70 Wis. 251; 5 Am. St. Rep. 174.

BOWEN v. DELAWARE ETC. RAILROAD COMPANY.

[153 NEW YORK, 476.]

DEDICATION FOR ONE PURPOSE DOES NOT JUSTIFY USE FOR ANOTHER.—Land dedicated by one for a street or other way cannot be appropriated without his consent to the use of a railway, and one to whom the owner of a lot fronting upon a public street grants such lot acquires only the right to use the street for the ordinary purposes of a highway, and cannot justify its appropriation to a different purpose.

BANKRUPTCY, STATUTE OF LIMITATION IN ACTION BY ASSIGNEE.—A statute providing that no suit shall be maintained between an assignee in bankruptcy and a person claiming an adverse interest touching any property or rights of property transferable to, or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee, does not apply where no adverse claim existed prior to the adjudication in bankruptcy. Therefore, if the adverse claim or entry was not made until after such adjudication, the assignee's right of action is not barred by such statute, but only by the statute of limitations applicable to like actions brought by other persons.

S. C. Millard, for the appellant.

Louis Marshall, for the respondent.

478 ANDREWS, C. J. This is an action of ejectment, brought in 1888 by the assignee in bankruptcy of Anna N. Dwight, who was adjudged a bankrupt in 1878, to recover lands included in a way laid out by the bankrupt before her bankruptcy across lands in the city of Binghamton owned by her, which she had mapped and divided into lots abutting on the way twenty feet in width, extending from the west bank of **479** the Chenango river westerly to Front street, and also land under water. The bankrupt prior to her bankruptcy had mortgaged the lots, through the purchase of which, on the foreclosure of the mortgage, the New York, Lackawanna, and Western Railroad Company acquired title. In 1880, that corporation, claiming to have the right so to do, but without the consent of the bankrupt or her assignee, entered upon the way and built an embankment therein from Front street to the Chenango river, and laid thereon railroad tracks, and also constructed abutments in the river

at the termination of the way to support one end of a bridge which it erected across the river. Thereafter, in 1882, the New York, Lackawanna, and Western Railroad Company leased to the defendant, the Delaware, Lackawanna, and Western Railroad, and the latter corporation entered under the lease and has ever since used the bridge and the embankment and tracks thereon for railroad purposes. The plaintiff, prior to the commencement of this action, claiming that the title to the way and to the land in the river upon which the western abutments of the bridge were placed, was in the bankrupt at the date of the bankruptcy, and vested in him as assignee under his appointment in October, 1878, demanded possession of the lands so occupied by the defendant, which was refused.

Upon the admissions and findings in the record, it must be taken as an established fact that the title to the way and to the land under the water of the river occupied by the abutments of the bridge on the west side of the Chenango river was in Anna M. Dwight at the time of the adjudication in bankruptcy, and passed to the assignee upon his appointment, and was not covered by the mortgage under which the lessor of the defendant acquired title to the lots abutting on the way, and that the defendant's lessor wrongfully and without the consent of the plaintiff, who had acquired and then held a good title to the land embraced in the way, subject only to the easement of passage in favor of the owners of the lots abutting thereon for the ordinary purposes of travel, and to the land under water, entered upon the premises in question and appropriated ⁴⁸⁰ them for railroad uses. Upon these conceded facts a case was made which, under the general rule of law, entitled the plaintiff to judgment. Land dedicated by the owner for a street or way cannot be appropriated without his consent to the use of a railroad: *Williams v. New York Cent. R. R. Co.*, 16 N. Y. 97; 69 Am. Dec. 651; *Wager v. Troy Union R. R. Co.*, 25 N. Y. 526; and one to whom the owner of the soil in the way has conveyed a lot abutting thereon and bounded by the lot line acquires only the right to use it for the ordinary purposes of a highway, and can no more than a stranger justify an appropriation thereof for purposes inconsistent with the object of the dedication: *Uline v. New York Cent. R. R. Co.*, 101 N. Y. 98, 106; 54 Am. Rep. 661. The entry, therefore, by the lessor of the defendant was a trespass, and amounted to a disseisin of the plaintiff, and the defendant, who entered under the lease in 1882, was a trespasser also. By the general statute of the state, a right of entry upon lands wrongfully withheld from the true owner may be asserted at any time

within twenty years from the disseisin, and in the present case only eight years had elapsed from the entry of the lessor of the defendant and the commencement of the suit. But it was held by the trial court that the plaintiff was barred of his remedy to recover the land by force of section 5057 of the Revised Statutes of the United States, which enacts a limitation of two years for the bringing of an action by an assignee in bankruptcy in the cases embraced in the section, and which the trial court held precludes an assignee in bankruptcy from maintaining an action for the recovery of real property owned by the bankrupt against a person who, without right and after the title had vested in the assignee, had entered upon and taken possession thereof, provided the assignee had allowed two years to elapse after the wrongful entry before bringing his action. The correctness of the construction put by the trial judge upon this section is the only question now before us.

That section, which was incorporated into the revision of the United States statutes from the bankrupt act of March 2, 1867, chapter 176, section 2, in substantially the same words, is as ⁴⁸¹ follows: "No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to, or vested in, such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. And this provision shall not, in any case, revive a right of action barred at the time when an assignee is appointed." It does not, we suppose, admit of question that Congress, having plenary power over the subject of bankruptcy, may prescribe such limitations of time, binding both upon the state and federal courts, for the bringing of actions to enforce rights in favor of or against a bankrupt or his estate, as it may deem proper, consistent with affording a reasonable opportunity to litigants. But it is not, we think, going too far to say that, in applying a statute cutting down to so short a period as two years the right to enforce a title to real property, it should appear with reasonable certainty that the particular case is within its provisions, and that neither a subtle nor forced construction should be resorted to to deprive a party of a right which he has under the general rules of limitation. That section 5057 applies to actions respecting property in lands which become vested in the assignee in bankruptcy, and to actions of ejectment therefor, has been decided in several cases by the supreme court of the United States: *Gifford v. Helms*, 98 U. S. 248; *Wisner v. Brown*, 122 U. S. 214; *Adams v. Collier*,

122 U. S. 382; *Greene v. Taylor*, 132 U. S. 415. The section has been liberally construed in defining the meaning of the words "property" and "rights of property" and "adverse interest," and they have been held to include debts owing to or by the bankrupt: *Jenkins v. International Bank*, 106 U. S. 571; *Doty v. Johnson*, 6 Fed. Rep. 481; and while the section refers to suits between the assignee and another person, not naming the grantee or successor in interest of the assignee, it has been held, contrary to suggestions in some earlier cases (see *Banks v. Ogden*, 2 Wall. 57, and opinion of Mason, J., in *Stevens v. Hauser*, 39 N. Y. 302), that the ⁴⁸² grantee of the assignee is bound under section 5057, wherever the assignee was bound at the time of the purchase and although the sale was made under the order of the court: *Gifford v. Helms*, 98 U. S. 248; *Greene v. Taylor*, 132 U. S. 415.

There can be no doubt that the limitation in section 5057 applies to all causes of action and property rights and all adverse claims to property of the bankrupt existing in favor of or against the bankrupt at the time of the adjudication in bankruptcy and the appointment of an assignee, and if the lessor of the defendant had entered upon and taken possession of the lands in question under claim of title adverse to the bankrupt, before the bankruptcy, it does not admit of question under the adjudications, that after the lapse of two years from the appointment of the assignee before suit brought to enforce the bankrupt's title, the right of entry would be barred. But there was no adverse claim to the land made by the lessor of the defendant, or any other person, until 1880, nearly two years subsequent to the vesting of the title in the assignee, and the question is, whether the right of the assignee to assert his unquestioned title acquired from the bankrupt, against the defendant and its lessor, was cut off by the two years' limitation in section 5057. The bankrupt had no cause of action, because the unlawful entry was subsequent to the vesting of the title in the assignee, and it accrued solely in favor of the assignee by reason of the acts of the defendant and its lessor committed after the assignment.

The short limitation to actions by or against assignees in bankruptcy was not enacted for the first time in the bankrupt act of 1867. It had its origin in the eighth section of the bankrupt act of 1841: 5 U. S. Stats. at Large, 446. That section enacted that the circuit courts of the United States should have concurrent jurisdiction with the district courts "of all suits at law and in equity which may or shall be brought by any assignee of the bankrupt against any person or persons claiming an adverse

interest, or by any such person against such assignee touching any property or rights of ⁴⁸³ property of said bankrupt transferable to or vested in such assignee, and no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest touching the property and rights of property aforesaid in any court whatsoever, unless the same be brought within two years after the declaration and decree in bankruptcy, or after the cause of suit shall first have accrued." The first case where the court was called upon to construe this section was *In re Conant*, 5 Blatchf. 54. That case arose in the United States district court for the southern district of New York. A petition had been filed in the district court for the purpose of vacating an order of sale of a certain lot of land belonging to a bankrupt, obtained by the assignee, and under which a sale had been made. More than two years had elapsed between the sale and the making of the application, and it was insisted that the eighth section, above quoted, was a bar to the relief sought. This claim was overruled by Mr. Justice Nelson, who said: "It is obvious that the limitation applies only to suits growing out of disputes in respect to property and rights of property of the bankrupt which came to the hands of the assignee, and to which adverse claims existed while in the hands of the bankrupt and before the assignment," and after considering the policy upon which the limitation was founded he further said: "The limitation has no reference to suits growing out of the dealings of the assignee with the estate after it comes to his hands. These are matters for which he may be personally responsible, and no reason existed for changing the period of limitation, any more than in the case of any other trustee dealing with trust property. There certainly could be no reason for applying the short term in favor of persons dealing with the assignee in respect to the estate of the bankrupt, after it comes into his hands and the statute makes the limitation mutual." The next reported case where construction was given to section 8 of the act of 1841 is *Stevens v. Hauser*, 39 N. Y. 305. It was an action of ejectment brought in 1861 by the grantee of the assignee in bankruptcy of one Talmage, who was adjudicated ⁴⁸⁴ a bankrupt in 1842, to recover lands owned by the bankrupt at the time of the bankruptcy. The defendant's possession commenced four years after the title vested in the assignee. The adverse claim, if it existed at all, originated after the appointment of the assignee, and the suit was not brought until fifteen years after the defendant entered into

possession of the land. The defendant, among other defenses, pleaded the eighth section of the act of 1841 in bar of the action. The court, following the decision in *In re Conant*, 5 Blatchf. 54, overruled this defense. Three opinions were delivered, and in each opinion the judge delivering it expressed his approval of the construction of the act given by Judge Nelson, Woodruff, J., stating that it "was the necessary construction of the statute." The judges were also of the opinion that the case did not show that the entry by the defendant was adverse and that in accordance with the legal presumption it might be presumed to have been in subordination to the true title. But the first ground mentioned was the one on which the decision was primarily based. The case of *Stevens v. Hauser*, 39 N. Y. 302, is an explicit authority in this court that the eighth section of the act of 1841 had no application to wrongs against an assignee in bankruptcy or to the property of the bankrupt in his hands, originating after the appointment of the assignee. In *Esmond v. Apgar*, 76 N. Y. 359, the eighth section was held to apply in that case on the ground that the adverse claim existed before the assignment.

It is, however, insisted by the learned counsel for the respondent that the construction placed in the cases mentioned on the eighth section of the act of 1841 is not controlling in the construction of the second section of the act of 1867, re-enacted in section 5057 of the revision, by reason of the difference in the language of the two provisions. It will be observed that the words "of said bankrupt," before the words "transferable to and vested in such assignee," in the eighth section of the act of 1841, are omitted in the statute of 1867. The omission is said to be significant of an intention by the act of 1867 to broaden the scope of the limitation in the former act, so as to extend it to any ⁴⁸⁵ controversy between an assignee and a third person, whether originating before or after the bankruptcy. So, also, in place of the words "within two years after the declaration and decree in bankruptcy, or after the cause of suit shall first have accrued," in the act of 1841, are substituted in the act of 1867 the words "within two years from the time when the cause of action accrued for or against such assignee." The words "of said bankrupt" in the act of 1841 add nothing to the meaning of the clause in the second act, in which they are omitted. The words "transferable to or vested in such assignee" refer to the property or rights of property of the bankrupt which were transferred by the assignment. The act of 1867 omitted superfluous words in the act of 1841, but did not,

we think, change or enlarge the meaning of the act of 1841. Mr. Justice Miller, in the case of *Bailey v. Glover*, 21 Wall. 342, paraphrases the language of section 2 of the act of 1867, and in so doing introduces the omitted words "of the bankrupt" contained in the act of 1841. He says: "It [the section] applies to all judicial contests between the assignee and other persons touching the property, or rights of property, of the bankrupt, transferable to, or vested in, the assignee, etc. Such is almost the language in which the provision is expressed in section 5057 of the Revised Statutes." This is repeated in the opinion of Mr. Justice Clifford in *Gifford v. Helms*, 98 U. S. 248. In *Phelan v. O'Brien*, 13 Fed. Rep. 656, the court, in construing section 5057, referring to *In re Conant*, 5 Blatchf. 54, said that that case arose under the limitation clause in the act of 1841, "which is substantially analogous to the provision now under consideration": See, also, *Adams v. Crittenden*, 106 U. S. 576. We have found no case in which it has been suggested that section 5057 has a wider meaning than section 8 of the act of 1841. We think the decisions under the earlier section are applicable to the construction of section 5057 of the revision.

It is claimed that the case of *Banks v. Ogden*, 2 Wall. 57, tends to discredit the construction of the statute of 1841, given in the *Conant* case. The question there arose between the grantee of a purchaser under a sale by an assignee in bankruptcy, of land formed by accretion on the shore of Lake Michigan, and a grantee of the bankrupt whose conveyance antedated the bankruptcy, of a lot bounded on a street laid out by his grantor, partly on the land adjoining the lake and partly under the waters of the lake. The point upon which the controversy turned was whether the defendant derived title under his grant to the middle of the street as laid out on the map, or only to the center line of the dry land embraced in the street as laid out. The latter was held to be the true construction of the conveyance, and consequently that the bankrupt, at the time of the assignment in bankruptcy, owned the part of the land next to the water, and that the accretion followed his title. The defendant set up as a defense the limitation of two years in the statute of 1841. It did not appear when the defendant took possession of the land in controversy, but it must have been at some time after the assignment in bankruptcy, since the alluvion did not commence to form until after that time. The court, in respect to this defense, expressed a doubt whether the statute applied to sales made by an assignee under order of the court,

and added: "But it is not necessary now to pass upon this point. The limitation certainly could not affect any suit the cause of which accrued from an adverse possession taken after the bankruptcy, until the expiration of two years from the taking of such possession, and there is nothing in the record which shows when the adverse possession relied upon by the defendant in error commenced." The court gave no consideration to the question involved in the present case. It was unnecessary to decide it. Assuming that the limitation applied, it was a complete answer to the alleged limitation that it did not appear that the two years' adverse possession had run before the commencement of the action. The case is not, we think, an authority impugning the decision in the Conant case.

There are three decisions in the circuit courts of the United States which tend to support the contention of the respondent, ⁴⁸⁷ namely: Norton v. De La Villebeuve, 1 Woods, 163; Phelan v. O'Brien, 13 Fed. Rep. 656; Harvey v. Gage, 31 Fed. Rep. 275. In the first of these cases, while the opinion supports the claim that section 5057 applies to adverse interests, whether existing at the time of the assignment in bankruptcy or arising subsequently, the only point involved was as to the application to adverse claims originating prior to the bankruptcy, as to which there can be no doubt whatever. The other two cases are adverse to the ruling in *In re Conant*, 5 Blatchf. 54, although in one of them no reference is made thereto.

Subsequently to the decisions in the cases heretofore referred to, and subsequently also to the decision of the general term in the case now before us, the case of Dushane v. Beall, 161 U. S. 513, was argued and decided in the supreme court of the United States. The controversy was between Beall, a judgment creditor of one Tinstman, and the assignee in bankruptcy of Tinstman, who became bankrupt in 1876, in respect to the rights of the respective parties to a sum awarded to Tinstman in a judgment obtained in the name of one Shaw against the Pittsburgh & Connellville Railroad Company in 1887. The judgment was obtained in a suit brought by Shaw against the company in 1882 for the breach of a contract in relation to the working and maintaining of a telegraph line in which Tinstman was interested at the time of his bankruptcy, but which interest was not mentioned in his schedule of assets. Tinstman obtained his discharge in 1877. In 1885, he intervened in the Shaw suit, which was then pending, and he was awarded by the judgment therein the sum of nine hundred and forty-seven dollars and forty-three cents. After his discharge in 1877 he en-

gaged in business, and became indebted to Beall, who, in November, 1886, procured judgment against him for seven hundred and thirty dollars and fifty-four cents. June 9, 1888 (after the recovery of the judgment in the Shaw suit), Beall garnisheed the Pittsburgh & Connellville Railroad Company for the purpose of obtaining satisfaction of his judgment against Tinstman out of Tinstman's share of the Shaw judgment. August 10, 1888, McCullough, the original assignee in bankruptcy of 488 Tinstman, intervened in the garnishment proceeding, claiming to be entitled as assignee to the award made to Tinstman in the Shaw judgment. On McCullough's death, Dushane was appointed assignee in his place and continued the litigation. Beall, in answer to the claim of the assignee of Tinstman, set up the limitation in section 5057. The case came on for trial in the state court in Pennsylvania, and the claim of the assignee was overruled on two grounds: 1. That the assignee, by his omission to act for so long a period, had elected to abandon the claim against the railroad company; and 2. That he was barred by section 5057. On appeal taken by the assignee, the supreme court of Pennsylvania (Beall v. Dushane, 149 Pa. St. 439), sustained the judgment on the first ground, but in respect to the second ground said: "We do not rest our decision upon the act above cited (section 5057), as its application to the facts of the case are more than doubtful." The assignee then appealed to the supreme court of the United States, which reversed the judgment of the state courts, the opinion being written by the chief justice. The opinion commences with the following statement: "We concur with the supreme court of Pennsylvania that the limitation of section 5057 of the Revised Statutes did not apply. That limitation is applicable only to suits growing out of disputes in respect of property of the bankrupt which came to the hands of the assignee, to which adverse claims existed while in the hands of the bankrupt and before assignment": Citing *In re Conant*, 5 Blatchf. 54; *Clark v. Clark*, 17 How. 315; *Phelps v. McDonald*, 99 U. S. 298; *French v. Merrill*, 132 Mass. 525. In respect to the other point, the court held that the facts did not establish an election by the assignee to abandon the claim. It is obvious that the chief justice expressly affirms the doctrine of the case of *In re Conant*, 5 Blatchf. 54, and applies it to the construction of section 5057. The respondent seeks to avoid the force of the case as an authority upon the point, upon the ground that the facts did not show that an adverse claim to the fund had existed for the period of two years before the intervention of McCullough in the

proceeding of August 10, 1888. There ⁴⁸⁹ may be some ground for this contention. Beall first made his claim June 9, 1888, only two months before the intervention of McCullough. If Tinstman can be held to have made a claim when he intervened in the Shaw suit, October 2, 1885, it is a sufficient answer that it is held that the limitation in section 5057 does not protect the bankrupt against the claim of the assignee, although not made within the two years mentioned: *Clark v. Clark*, 17 How. 315; *Phelps v. McDonald*, 99 U. S. 298. The railroad company, if it could have defended against Tinstman's claim, submitted to the judgment rendered, and had no interest adverse to the assignee. But whether there was any adverse interest arising before or after the assignment in the fund in question, we do not feel at liberty to disregard the emphatic declaration of the opinion on the point in question, which, so far as appears, was concurred in by all the members of the court, that section 5057 only applies to adverse interests existing at the time of the assignment. If the rule in the Conant case is to be modified, it should, we think, be left to the ultimate authority to so determine.

The short limitation in the bankrupt act was doubtless intended to facilitate the settlement of bankrupt estates. If confined to disputes existing when the bankruptcy intervenes, the principal purpose of the statute will be attained, for the cases are comparatively infrequent of serious delays arising from controversies wholly originating after the bankruptcy, in respect to the property to which the bankrupt had an undisputed title at the time of the assignment.

We think the plaintiff was entitled upon the facts stated in the record to maintain his action, and the judgment below should, therefore, be reversed, and a new trial ordered.

All concur, except Gray, J., absent, and Martin, J., not sitting.

DEDICATION.—A dedication of land for a highway does not pass the fee, but only an easement or right of use: *Williams v. New York etc. R. R. Co.*, 16 N. Y. 97; 69 Am. Dec. 651. And as a dedication of lands can be for public purposes only, and as railway companies are private corporations, they cannot acquire lands or an easement therein, by common-law dedication: Monographic note to *Whitesides v. Green*, 57 Am. St. Rep. 750. Land dedicated to a public use must be accepted, and appropriated to the use intended: Monographic note to *Whitesides v. Green*, 57 Am. St. Rep. 753.

LIMITATIONS OF ACTIONS—WHEN STATUTE BEGINS TO RUN.—The statute does not run until there is some one in whom the right of action is vested: *Commonwealth v. McGowan*, 4 Bibb. 32; 7 Am. Dec. 737; *Ruff v. Bull*, 7 H. & J. 14; 16 Am. Dec. 290. See *Woolverton v. Taylor*, 132 Ill. 197; 22 Am. St. Rep. 521, and note.

CASES
IN THE
SUPREME COURT
OF
OHIO.

AULTMAN, MILLER & Co. v. WILSON.

[55 OHIO STATE, 138.]

PARTNERSHIP—INSOLVENCY—HOMESTEAD EXEMPTION.—The members of an insolvent firm are not entitled to a homestead exemption out of partnership property in the hands of an assignee for the benefit of creditors until the firm debts are paid.

PARTNERSHIP—INSOLVENCY—HOMESTEAD EXEMPTION—HUSBAND AND WIFE.—The members of an insolvent copartnership, composed of a husband and his wife, are not entitled, either jointly or severally, to an allowance in lieu of homestead, out of firm assets in the hands of an assignee for the benefit of creditors, until the firm debts are paid.

ASSIGNMENT FOR BENEFIT OF CREDITORS—INSOLVENT PARTNERSHIP—DISPUTED RIGHT TO HOMESTEAD EXEMPTION—DUTY OF ASSIGNEE.—When members of an insolvent firm assign for the benefit of creditors, and their right to claim an allowance out of firm property, in lieu of homestead, is disputed, the assignee's duty is to await an order of court to determine their right before turning over the allowance. He acts at his peril without such order, and the advice of counsel will not shield him from the consequences of a mistaken course.

Controversy over an allowance, in lieu of homestead, made to M. A. & C. S. Landis, a husband and his wife, who were copartners and who had made an assignment for the benefit of creditors. Wilson, the assignee, at the time of making the allowance, consulted with counsel, who advised that it was legal, but the attorney for Aultman, Miller & Co., plaintiffs in error, and one of the firm creditors, objected that the assignors were not entitled to the exemption. The allowance was made to the assignors before any exceptions were taken, and was consumed and disposed of by them. The exceptions of the plaintiffs in error to the final account of the assignee and to the inventory, challenging the right of the assignors, were determined in the probate court

against the assignee, who took an appeal to the court of common pleas, which found that the property set off to the assignors in lieu of a homestead ought not to have been so set off to them; and that they were not entitled to it out of the partnership property. The assignee was, therefore, charged with the amount set off, and, on his petition in error, the circuit court found that the court of common pleas erred, reversed its judgment, and rendered a final judgment in favor of the assignee. This petition in error was prosecuted to reverse the judgment of the circuit court and to affirm that of the common pleas.

W. H. Spence and A. H. Clark, for the plaintiffs in error.

H. R. Hill and Billingsley, Taylor & Clark, for the defendant in error.

¹⁴⁴ SHAUCK, J. However conflicting the decisions elsewhere may be, it is settled in this state that "the members of an insolvent firm are not entitled to the statutory exemptions out of partnership property after it has been seized in execution by partnership creditors, notwithstanding all the members join in demanding the exemptions": Gaylord v. Imhoff, 26 Ohio St. 317; 20 Am. Rep. 762. And it is manifest that the vesting of the partnership property in an assignee for the benefit of creditors is the legal equivalent of its seizure in execution.

It is said, however, that a different rule should apply here because the relation of husband and wife existed between the members of the insolvent firm, the ownership of the property and the right to demand the exemption being alike joint. Section 5441 of the Revised Statutes provides that "husband and wife living together, a widower living with an unmarried daughter or minor son, every widow and every unmarried female having in good faith the care, maintenance, and custody of any minor child or children of a deceased relative, residents of Ohio, and not the owner of a homestead, may, in lieu thereof, hold exempt from levy and sale real or personal property to be selected by such person, etc." Husband and wife living together by the terms of this section constitute a family for whose benefit the exemption is allowed, as do widowers, widows, and unmarried women, under the conditions named. But there is no reason to suppose that the general assembly was undertaking to impart a joint character to the ¹⁴⁵ right. Although a husband lives with his wife, he is the person upon whom is conferred the right of selection. The allowance provided for in this section is in lieu of the family homestead, which may be held exempt from

sale under the provisions of section 5435 of the Revised Statutes, where husband and wife, living together, are also constituted a family for whose use the exemption is made; yet the right to demand it is primarily that of the husband alone, the wife having no right to make the demand unless the husband fail or refuse to make it.

Nor is there anything in the legislation upon this subject showing an intention on the part of the general assembly to change the settled and familiar rule that homestead rights attach only to the individual property of the debtor, and that partnership property must, to the extent necessary, be devoted to the payment of partnership debts.

The facts found by the trial court show that when the goods were set off to the assignors upon their demand their right to the exemption was denied by counsel representing some of the creditors of the firm. In that situation it was the duty of the assignee to hold the property subject to the order of the probate court, which alone had original jurisdiction to determine the question of their right. In delivering the property without such order he acted at his peril, and the advice of counsel will not shield him from the consequences of a mistaken course.

Judgment of the circuit court reversed, and that of the common pleas affirmed.

PARTNERSHIP—RIGHT OF PARTNER TO EXEMPTION.—Partnership property is primarily liable to pay partnership debts; and the surplus, if any, belongs to the partners: *Miller v. Estill*, 5 Ohio St. 508; 67 Am. Dec. 305. Partners cannot claim and hold firm property as exempt from attachment or execution: *Green v. Taylor*, 98 Ky. 330; 56 Am. St. Rep. 375. Neither can they, during the existence of the partnership, claim an individual exemption in partnership property, when taken under legal process for partnership debts: *Aiken v. Steiner*, 98 Ala. 355; 39 Am. St. Rep. 58; note to *Dennis v. Kass*, 48 Am. St. Rep. 884. That a partner is entitled, as against creditors of the firm, to claim and hold a homestead in the partnership real estate, see *Ferguson v. Speith*, 13 Mont. 487; 40 Am. St. Rep. 459.

KELCH v. STATE.

[55 OHIO STATE, 146.]

CRIMINAL LAW.—INSANITY AS A DEFENSE TO CRIME is an affirmative one. Hence the burden of proof rests on the accused to establish his insanity.

CRIMINAL LAW.—INSANITY—DEFENSE—DEGREE OF PROOF.—One charged with murder, and who sets up his insanity as a defense, is bound to establish it, but he may do so by a bare preponderance of the evidence, and is not required to make any higher degree of proof.

CRIMINAL LAW.—MURDER—PROOF OF INSANITY PREPONDERATES, WHEN.—Whenever the existence of insanity is made probable after considering all of the evidence for and against it, there is a preponderance of evidence in favor of insanity.

CRIMINAL LAW.—MURDER—PROOF OF INSANITY—INSTRUCTION.—To instruct a jury, in a murder case, that the evidence introduced to establish insanity is insufficient if it merely shows it to have been probable; that the proof must be such as to overcome the legal presumption of sanity; and that it must "satisfy" them that the defendant is insane, is erroneous and prejudicial, because it requires more than a preponderance of the evidence to maintain the defense.

Foran & Dawley, for the plaintiff in error.

F. L. Strimple, for the defendant in error.

¹⁴⁶ **BRADBURY, J.** The plaintiff in error, Bushrod Kelch, in December, 1895, was indicted in the county of Cuyahoga for murder in the first degree for killing a woman who had been his wife, but who, shortly before the homicide, had procured a divorce from him. In February, 1896, he was placed on trial in the court of common pleas of said county for such offense, and in March following was convicted of murder in the first degree, and was adjudged to suffer death. Upon proceedings in error this judgment was affirmed by the circuit ¹⁴⁷ court; whereupon the cause was brought to this court for review.

That the defendant in error shot and killed the deceased was not denied or contested upon the trial; the chief contention being over the mental condition of the accused at the time the homicide was committed. Counsel for him contended: 1. That the evidence of the state did not sufficiently establish deliberation or premeditation; and 2. That his evidence was sufficient to show insanity, superinduced by the excessive use of alcoholic stimulants.

The question of the burden of proof, where insanity is set up as a defense in criminal causes, has been fruitful of discussion, and has occupied the attention of the ablest criminal jurists of this country, and of England. The contention has not so much concerned the degree of proof, as upon whom the burden rested.

Some authorities, entitled to great consideration, have steadily held that this burden rested upon the state; that while the presumption of sanity was sufficient to support this burden where the evidence did not suggest mental alienation, yet if the defense was made, the state was bound to establish sanity beyond a reasonable doubt. This view was founded upon the obligation which rests upon the state to establish beyond a reasonable doubt every fact necessary to create in the defendant criminal liability; criminal intent being one of such facts, it was included within the general obligation above stated, and to establish this criminal intent, a mental condition capable of entertaining it must be established. This course of reasoning would render immaterial the question whether the doubt of sanity arose upon the evidence of the state, or of ¹⁴⁸ the defendant, or upon that of both the state and the defendant. The doubt, however arising being available by the defendant. This view of the question finds support in numerous well-considered cases, among which may be cited *Hopps v. People*, 31 Ill. 385; 83 Am. Dec. 231; *Chase v. People*, 40 Ill. 352; *State v. Crawford*, 11 Kan. 32; *People v. Garbutt*, 17 Mich. 9; 97 Am. Dec. 162; *Cunningham v. State*, 56 Miss. 269; 31 Am. Rep. 360; *Bradley v. State*, 31 Ind. 492; *McDougal v State*, 88 Ind. 24; *Guetig v. State*, 66 Ind. 94; 32 Am. Rep. 99; *Wright v. People*, 4 Neb. 407; *Ballard v. State*, 19 Neb. 609; *State v. Pike*, 49 N. H. 399; 6 Am. Rep. 533; *State v. Bartlett*, 43 N. H. 224; 80 Am. Dec. 154; *State v. Jones*, 50 N. H. 369; 9 Am. Rep. 242; *People v. McCann*, 16 N. Y. 58; 69 Am. Dec. 642; *O'Connell v. People*, 87 N. Y. 377; 41 Am. Rep. 379; *Dove v. State*, 3 Heisk. 348; *State v. Patterson*, 45 Vt. 308; 12 Am. Rep. 200.

The logical consistency of this view of the question is its chief support. In the practical administration of criminal law, however, experience has found much to commend in that opposite view which treats the defense of insanity as independent and affirmative, and which, consequently, casts upon the accused who asserts it the burden of sustaining it by evidence sufficient to overcome the natural presumption of sanity. Among the cases that sustain this side of the contention may be cited *State v. Jones*, 64 Iowa, 349; *Ford v. State*, 71 Ala. 385; *State v. Lawrence*, 57 Me. 574; *Commonwealth v. Eddy*, 7 Gray, 583; *McKenzie v. State*, 26 Ark. 334; *Cavaness v. State*, 43 Ark. 331; *People v. Bell*, 49 Cal. 485; *Dejarnette v. Commonwealth*, 75 Va. 867; *Webb v. State*, 9 Tex. App. 490; *King v. State*, 9 Tex. App. 515; *Coyle v. Commonwealth*, 100 Pa. St. 573; 45 Am. Rep. 397; *Lynch v. Commonwealth*, 77 Pa. St. 205; *State v. Rede-*

meier, ¹⁴⁰ 71 Mo. 173; 36 Am. Rep. 462; State v. Gut, 13 Minn. 341; State v. McCoy, 34 Mo. 531; 86 Am. Dec. 121. This doctrine has prevailed in Ohio from an early period in its judicial annals: Clark v. State, 12 Ohio, 483; 40 Am. Dec. 481; Bond v. State, 23 Ohio St. 349; Bergin v. State, 31 Ohio St. 111; Loeffner v. State, 10 Ohio St. 598.

This being the established doctrine of this state, the burden of proving his insanity rested on the plaintiff in error. If this burden should be sustained, the law exonerates him from criminal responsibility for his act. It is apparent, therefore, that to him it was of prime importance that an accurate measure of this burden should be given to the jury. If the charge of the court, in this respect, imposed on him a greater burden than the law prescribes, it contained error prejudicial to this defense.

In most of the cases relating to the burden of proof of insanity in criminal causes, the contention was confined to the question of where it rested—whether on the state or on the defendant—and the quantum or degree of proof where made to rest on defendant, received little, if any, consideration, either by counsel or the court; and language was sometimes employed by the court which seemed to require of the defendant, to establish his insanity, more than a preponderance of the evidence.

In some of the cases, however, the question of the quantum of proof where the burden was placed on the accused, came directly before the court. Among them is the case of Coyle v. Commonwealth, 100 Pa. St. 573, 45 Am. Rep. 397, where it was held that a charge to the jury which required of the defendant, “clearly preponderating evidence,” instead of “fairly preponderative evidence” of insanity was error.

¹⁵⁰ In Commonwealth v. Rogers, 7 Met. 500, 41 Am. Dec. 458, in trial for murder, Shaw, C. J., presiding, the jury, after receiving the charge of the court, and consulting several hours, came into court for instructions respecting the degree of proof requisite to establish insanity, and were instructed that “if the preponderance of the evidence was in favor of insanity of the prisoner, the jury would be authorized to find him insane.

In Boswell v. State, 63 Ala. 326, 35 Am. Rep. 20, the supreme court of Alabama laid down the rule as follows: “We hold, then, that insanity is a defense which must be proved to the satisfaction of the jury by that measure of proof which is required in civil causes.”

In State v. Jones, 64 Iowa, 350, the charge was murder in the first degree. The supreme court held that “where one charged with murder relies upon his insanity as a defense, the burden

is on him to establish a preponderance of the evidence that at the time of the killing he was in such a state of insanity as not to be accountable for the act; but an instruction that, if the evidence goes no farther than to show that such a state of mind was merely probable, was not sufficient, was erroneous, because its effect was to require more than a mere preponderance of the evidence to establish the defense": See *People v. Bell*, 49 Cal. 485-488.

In *Bond v. State*, 23 Ohio St. 349, it is held "the burden of proof to establish the defense of insanity in a criminal case rests upon the defendant, but a bare preponderance of testimony is all that is necessary for that purpose." This rule is reasserted in *Bergin v. State*, 31 Ohio St. 111, a case like the one under consideration, of murder ¹⁵¹ in the first degree: *Loeffner v. State*, 10 Ohio St. 598. Self-defense, in Ohio, as well as insanity, is regarded as affirmative defense. In *Silvus v. State*, 22 Ohio St. 90, and *Weaver v. State*, 24 Ohio St. 584, both cases where self-defense was relied upon by the accused for justification, this court held that the defense should be shown by preponderating evidence. These cases relating to the burden and quantum of evidence required to establish a plea of self-defense, are, of course, only material as tending to show the steadiness with which this court has held to the rule that a preponderance of the evidence is sufficient to sustain an affirmative defense in a criminal cause.

We come now to the question whether the instructions given by the learned judge of the court of common pleas prescribing the quantum of evidence required to establish the defense of insanity imposed on the plaintiff in error a higher degree of proof than the settled doctrine of the state imposed. After the learned judge had stated to the jury the claim of the plaintiff in error respecting his mental condition at the time of the homicide, he proceeded to prescribe the measure of proof requisite to maintain such claim, as follows: "In the first place, the law presumes every person who has reached the age of discretion to be of sufficient capacity to be responsible for crime; and therefore the burden of establishing the defense of insanity of the accused affirmatively to the satisfaction of the jury rests upon the defendant. It is not required, however, that this defense be established beyond a reasonable doubt; but it is sufficient if the jury is reasonably satisfied by the weight or preponderance of the evidence that the accused was insane at the time of commission of the act."

152 This language extended the obligation resting on the accused to the extreme limits of the rule prescribed by the former decisions of this court, but we cannot say that it clearly went beyond them, and therefore, if it had halted there, error would not have intervened.

The learned judge, however, after stating to the jury the character and extent of mental aberration that must be shown to exonerate the accused from criminal responsibility, returned to the subject of the quantum of evidence necessary to establish that mental state, and instructed the jury as follows: "It is not enough, I say to you, that the proof barely show that such a state of mind was possible, nor is it sufficient if it merely show it to have been probable. The proof must be such as to overcome the legal presumption of sanity; it must satisfy you that he was not sane. Again I say to you, that if the proof satisfy you of his insanity at the time of the committing of the act, though such defenses are not uncommon in the law, yet it must be regarded by you as a full and complete humane defense when satisfactorily established. If not satisfactorily established, then it should not avail the prisoner at the bar as a pretext or means of escaping punishment imposed by law."

The quantum of evidence to establish insanity made necessary by this instruction is substantially greater than a preponderance. It is not sufficient, according to this instruction, that the fact of insanity be made probable; something more than that is required; the jury must be "satisfied" that it existed. To satisfy the mind according to the common notion of mankind is to free it from doubt; to set at rest. This is the primary **153** meaning of the word, according to all the lexicographers, when used in this connection. To accomplish this result—to "satisfy" a body of men of the truth of a disputed fact—requires much more than a preponderance of the evidence. Clear and convincing evidence must be adduced in its favor. Evidence of this potency is rarely attainable in cases where insanity is contested. There must be grounds to assert insanity, founded upon some peculiar conduct, natural or feigned of the party, or the claim will not be made. There also must be conduct consistent with mental soundness, or the claim will be conceded. Where a long course of conduct is established, or a large number of mental or physical acts of a party are adduced, and parts of his conduct, and some of the acts tend to establish mental aberration, while the others are consistent with mental soundness, the whole evidence might not satisfy a jury that the mind of the party was disordered to the extent of

rendering him criminally irresponsible for his acts, and yet might preponderate upon that side sufficiently to engender a belief that such mental condition was probable—that is, likely—or supported by evidence sufficient to incline the mind to that belief but which leaves some room for doubt: Webster's Dictionary.

Doubtless insanity is a defense that may be feigned, and frequently is where no other defense is available, but because artful criminals may adopt it as a last resort it is not a sufficient reason to impose upon the unfortunate, in whose behalf this humane defense is honestly interposed, a higher degree of proof than intrinsically belongs to it. The remedy for this mischief is a searching analysis by counsel, court, and jury of the conduct ¹⁵⁴ of the party wherever there is reason to suspect that the insanity is feigned.

The learned judge may have been misled as to the quantum requisite to establish the defense of insanity in a criminal case by a note found at the end of the case of *Clark v. State*, 12 Ohio, 483, 40 Am. Dec. 481, which purports to give the charge of Judge Birchard, who presided at the trial in the court of common pleas.

The language imputed to Judge Birchard by that note was disapproved by the circuit court of the second circuit in a well-considered case reported by Judge Shauck, now a member of this court: *Sharkey v. State*, 2 Ohio C. C. Rep. 101.

By what authority that language is ascribed to Judge Birchard does not appear. If such language was employed by that learned judge it was at a period in our judicial history before the question of the burden of proof in such case had been finally settled. In the charge referred to, Judge Birchard explicitly laid down the rule, still adhered to by this court, that the burden of proof rested on the accused to establish his insanity. Nothing appears in the case, however, to show that the degree of proof necessary to sustain this burden was discussed by counsel or specially considered by this court. Since then, in the case of *Bond v. State*, 23 Ohio St. 349, this court held that a bare preponderance of the evidence was sufficient to establish this defense. This rule was adhered to in *Bergin v. State*, 31 Ohio St. 111. The original contention, as we have seen, respected the party upon whom the burden rested. This court adopted the view of this question most unfavorable to the accused, by casting upon him the burden of proving his insanity, but ¹⁵⁵ we do not think this burden should be further increased by requiring of him more than a preponderance of the evidence. As the instructions given to the

jury by the learned judge who presided at the trial in the court of common pleas prescribed more than this, it was erroneous in this respect.

Other questions are raised by the record and discussed by counsel, but we think none of them contain substantial error.

Judgment reversed.

Minshall, J., dissents.

CRIMINAL LAW—INSANITY AS A DEFENSE.—The defense of insanity in a criminal case must be affirmatively proved: *Coyle v. Commonwealth*, 100 Pa. St. 573; 45 Am. Rep. 397; but this may be done by fairly preponderating evidence: *Commonwealth v. Gerade*, 145 Pa. St. 289; 27 Am. St. Rep. 689; *Coyle v. Commonwealth*, 100 Pa. St. 573; 45 Am. Rep. 397; *State v. McCoy*, 34 Mo. 531; 86 Am. Dec. 121; *Commonwealth v. Rogers*, 7 Met. 500; 41 Am. Dec. 458; *Boswell v. State*, 63 Ala. 307; 35 Am. Rep. 20. The accused is not required to prove his insanity beyond a reasonable doubt. He is bound only to prove it by a preponderance of credible evidence: *Commonwealth v. Gerade*, 145 Pa. St. 289; 27 Am. St. Rep. 689, and note. A "preponderance" of evidence means the greater weight of evidence: *State v. Trout*, 74 Iowa, 545; 7 Am. St. Rep. 499. It is reversible error to instruct that it must be "clearly proved," although substantially correct instructions as to the measure of proof required are subsequently given: *Commonwealth v. Gerade*, 145 Pa. St. 289; 27 Am. St. Rep. 689. Compare *State v. Alexander*, 30 S. C. 74, 14 Am. St. Rep. 879, and extended note to *L'arsons v. State*, 60 Am. Rep. 212-225.

THE H. B. CLAFLIN CO. v. EVANS.

[55 OHIO STATE, 188.]

ASSIGNMENT FOR BENEFIT OF CREDITORS BY MANAGING PARTNER.—When a partner resides out of the state where the partnership business is carried on, the managing partner in charge of the business may make a valid assignment of the firm effects for the benefit of its creditors, without the consent of the absent partner, as his assent will be presumed.

ASSIGNMENT FOR BENEFIT OF CREDITORS TAKES EFFECT WHEN—POSTPONEMENT.—An assignment for the benefit of creditors takes effect, under the statute of Ohio, from the time of its delivery to the probate judge of the proper county, who must indorse thereon the exact time of such delivery. He cannot postpone the time of its taking effect, or displace or interfere with rights accruing upon the delivery of the assignment, by his delay in making the indorsement required by statute as to the time of delivery, or by his indorsement of a date later than that of the delivery to him.

ASSIGNMENT FOR BENEFIT OF CREDITORS—EFFECT OF DELAY IN FILING.—Under a statute requiring the probate judge to indorse, on an assignment for the benefit of creditors, the exact time of its delivery to him, he cannot, where the assignment is delivered to him before executions are levied, give the execution creditors a prior lien over other creditors, by holding the assignment and not indorsing it filed until after the levies are made, though this is done in obedience to the assignor's instructions.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS—EVIDENCE OF FILING.—An indorsement, on an assignment for the benefit of creditors, of the exact time of its delivery to the probate judge is but *prima facie* evidence of the time of filing; and the true date of the delivery of the instrument to him may be shown by parties whose interests are affected.

Application for an order directing the assignee of the firm of Snodgrass Brothers to distribute funds in his hands to certain creditors who were asserting priority by virtue of liens alleged to have been acquired previous to the assignment. The application was first made in the probate court, and was resisted by the general creditors. An appeal was taken to the court of common pleas, where a special finding was made of the facts. The Snodgrass Brothers was a commercial copartnership, consisting of John F. Snodgrass, who had the actual charge of the partnership effects and the entire management and control of the business, and Samuel Snodgrass, who was a resident of the state of California, and who, at no time, took any active part in the business of the firm. The firm became insolvent and John F. Snodgrass assigned its effects for the benefit of creditors, without consulting his copartner who was then absent from the state. He handed the assignment to the probate judge with instructions not to file it until after certain executions should be levied. The judge followed instructions, and did not mark it filed until after levies of the executions were made. This was done to give the execution creditors priority over the general creditors. The assignee, having agreed with the execution creditors that the proceeds of a sale of the property should stand in the place of the property, and that the rights of the creditors, with respect to it, should be determined on distribution, sold it. The court adjudged the assignment to be valid, but held that it did not take effect until it was marked "filed" by the probate judge, which, being after the levies were made, entitled the execution creditors to priority in the distribution of the fund; and, as that was insufficient to pay all of them in full, there was an order made to distribute it among them in proportion to the amount of their respective claims. The circuit court affirmed that judgment, and the general creditors, who were excluded from participating in the fund, sued out a writ of error.

Powell & Minahan, for the plaintiffs in error.

McClure & Smyser, and W. A. Hall, for the defendants in error.

¹⁹⁰ WILLIAMS, C. J. The plaintiffs in error, it is conceded,

are entitled to share in the fund for distribution by the assignee, ratably with the creditors who were accorded priority by the judgment below, unless the assignment is invalid, or did not take effect until after the executions were levied.

The validity of the assignment is questioned on the ground that, though executed in the name of the firm, it was so executed by one of the partners only, and without having obtained the consent of the other.

That one member of an insolvent firm cannot make a valid assignment of the partnership effects to a trustee for the benefit of its creditors, against the expressed will of a copartner, or without his assent when he is present or accessible, was held by this court in *Holland v. Drake*, 29 Ohio St. 441.

That decision is placed upon the ground that the appointment of a trustee to dispose of the effects of the firm for the benefit of its creditors, is not within the contemplation of the ordinary partnership, or the usual course of its business, and therefore beyond the scope of the agency arising from the partnership relation. The contrary doctrine is maintained by high authority, and with much show of reason. It is not doubted that one partner may sell any part of the partnership property to one or more of the creditors in payment of the partnership indebtedness, or sell all of its effects to all of its creditors, and, if insufficient to satisfy their debts in full, the sale may be so made to them as to secure a pro rata division; and it is not surprising that authorities are found which strenuously maintain that the power of the partner to accomplish the same result by an assignment to a trustee to make such distribution is included in the ¹⁹¹ agency resulting from the partnership relation. The dissolution of the partnership ensues not less certainly from a sale of the whole of its effects directly to the creditors, than from the transfer to a trustee for their benefit. But we are not disposed to depart from the rule laid down in *Holland v. Drake*, 29 Ohio St. 441, nor are we disposed to extend it. It does not apply where the partner whose assent has not been obtained to the assignment was not accessible in the exigency which seemed to call for immediate action; nor, where his authority or assent may be fairly implied from the situation of the parties, or the manner of conducting the business. In the case referred to, the partner whose assent was lacking not only resided in the city where the partnership had its place of business, but he was the active managing member of the firm having control and management of its property and business. The circumstances were such

as to repel, rather than give rise to any inference of authority or assent by him to a final disposition of the firm effects by his copartner who had taken no active part in its affairs. The situation is reversed in the case we have before us. Here, the partner who executed the assignment was the active managing member of the firm, having the entire charge and control of the partnership business and custody of its property; and it is plainly inferable from the permanent absence of the other partner, and his total inattention to the business, that he intended to intrust the affairs of the firm wholly to the resident partner. The absent partner having withdrawn from participation in the conduct of the partnership affairs, and, being inaccessible for consultation and advice, might reasonably expect and be held to intend that the member placed in control ¹⁹² should not only exercise the implied powers of agency ordinarily possessed by a partner, but, in addition, should have the discretionary power in case of emergency to do what, under the circumstances, should appear to be just and proper in the disposition of the firm property. And, where a commercial house so situated is overtaken by financial distress amounting to obvious insolvency, the authority of the acting partner to appropriate the property to the creditors equally, by placing it in the hands of a trustee for that purpose, may well be presumed, in the absence of express dissent by the copartner, or of circumstances which would fairly indicate his dissent. Equality among creditors of equal merit is favored in equity, and accords with natural justice; and a disposition of the partnership assets, in case of insolvency, which secures that equality, the courts will not be eager to disturb.

The validity of an assignment of the partnership property, executed by one partner in the name of the firm, under circumstances similar to those existing in the present case, was sustained in an opinion by Chief Justice Marshall, in *Anderson v. Tompkin*, 1 Brock. 456, and also by the same learned judge, in *Harrison v. Sterry*, 5 Cranch, 289. And it was held in *McCullough v. Sommerville*, 8 Leigh, 415, that "when a partner resides out of the state where the partnership business is carried on, the managing partner in charge of the business may make a valid assignment of the firm effects for the benefit of its creditors."

We find no difficulty, therefore, in sustaining this assignment, both on reason and authority, without calling in question the decision in *Holland v. Drake*, 29 Ohio St. 441.

¹⁹³ There having been a valid execution of the assignment, the question is presented, When did it take effect so as to vest

the title to the property in the assignee? This question is answered by the statute, which provides that every assignment for the benefit of creditors shall take effect from the time of its delivery to the probate judge of the proper county, and such delivery may be made by the assignor to the probate judge, "either before or after its delivery to the assignee"; and the probate judge shall indorse thereon the exact time of its delivery and "note the filing on the journal of the court": Rev. Stats., sec. 6335. The instrument of assignment in question was delivered to the probate judge of Delaware county when it was handed to him by the assignor on the morning of the thirtieth day of June, 1892.

True, it was so handed to him, as shown by the findings of fact, with instructions not to indorse upon it the exact time of delivery, but to make the date of its delivery appear to be subsequent to the levies of the executions, and thus enable the execution creditors to secure a lien giving them priority over the other creditors. The assignment was nevertheless delivered to the probate judge when it was placed in his possession, and there was no condition attached to the delivery. It was the purpose and intention of the assignor that the instrument should become operative as an assignment, and it thereafter remained in the custody of the judge. There was no other delivery of it.

The assignee qualified under it, and has proceeded in the execution of the trust. By the positive terms of the statute, the assignment became effective from the time of such actual delivery; and the observance by the probate judge of the assignor's ¹⁹⁴ instructions to delay making the indorsement of the filing and so make it as to show its filing of a date later than its delivery, could not defeat or postpone its operation, nor change the legal consequences which resulted from its delivery. Upon receiving the instrument, the probate judge had a plain statutory and official duty to perform, which was to indorse thereon the exact time it was so received, and make a corresponding entry on the journal of the court. The presumption, of course, is that duty was performed, and the indorsement speaks the truth. The indorsement, however, is but *prima facie* evidence of the time of the filing, and the true date of the delivery of the instrument may be shown. It is established by the finding of the trial court that the deed of assignment in question was in fact delivered to the probate judge before the executions were levied, but was held by him and not indorsed filed until after the levies were made, in obedience to the instructions of the assignor: from which that court concluded, erroneously as we think, that as

a matter of law, there was not a delivery until the date of the filing was so indorsed thereon. It seems clear that any such understanding or arrangement must be wholly ineffectual to displace or interfere with the rights which accrued upon the delivery of the assignment.

The judgment below must be reversed, the application of the defendants in error overruled, and the cause remanded to the probate court for further proceedings.

Judgment accordingly.

ASSIGNMENT BY PARTNER FOR BENEFIT OF CREDITORS.

A managing partner may assign for the benefit of creditors, especially where his copartner is absent, or a nonresident, or has absconded. Note to Sullivan v. Smith, 48 Am. Rep. 359; Hennessy v. Western Bank, 6 Watts & S. 300; 40 Am. Dec. 560. Compare Shattuck v. Chandler, 40 Kan. 516; 10 Am. St. Rep. 227, and note. See, also, note to Bank of Little Rock v. Frank, 58 Am. St. Rep. 90.

FILING OF PAPERS—INDORSEMENT.—A paper is filed when it is delivered to the proper officer and by him received to be kept on file. The file marks are but evidence of its having been filed. The duty of filing usually includes that of putting on such marks. The failure of the officer to do his duty does not affect the validity of the filing: Note to Goodman v. Baerlocher, 43 Am. St. Rep. 900; or affect the rights of interested parties: Hook v. Fenner, 18 Colo. 283; 36 Am. St. Rep. 277. The indorsement is only evidence of the filing, but it is not the exclusive evidence: Hook v. Fenner, 18 Colo. 283; 36 Am. St. Rep. 277.

HALE v. STATE.

[55 OHIO STATE, 210.]

COURTS—INHERENT POWERS.—Powers necessary to the orderly and efficient exercise of jurisdiction are inherent. They do not depend upon express constitutional grant, nor in any sense upon the legislative will.

COURTS—INHERENT POWER—LEGISLATURE.—A power which the legislature does not give, it cannot take away. If power, distinguished from jurisdiction, exists independently of legislation, it will continue to exist notwithstanding legislation.

CONTEMPT—COURTS—LEGISLATURE.—A court created by the constitution has inherent power to punish contempts summarily. This power is necessary to the exercise of judicial functions, and it is not competent for the legislature to abridge it.

CONTEMPT—REMOVING WITNESS BEYOND JURISDICTION.—It is a contempt of court to remove a witness from the county of his residence, where he is under subpoena to attend upon the trial of a cause pending, for the purpose and effect of preventing his appearance upon the day of trial, as it is a wrongful act obstructing the administration of justice.

Information for contempt. Hale was under indictment for a felony, and knowing that a witness named was under subpoena, and would be a material witness against him, he induced her,

by promising to pay her expenses and other promises to leave the county, and prevented her appearance as a witness on the trial. Hale was found guilty, and his motions for a new trial and in arrest of judgment were overruled. The latter motion challenged the jurisdiction of the court and the sufficiency of the information. The judgment of the circuit court affirmed the judgment of the court of common pleas finding him guilty, and the plaintiff in error sought a reversal of these judgments.

Elmer C. Powell, for the plaintiff in error.

John W. Higgins and John T. Moore, for the defendant in error.

²¹¹ SHAUCK, J. The case submitted to us concedes that the evidence produced in the court of common pleas established the allegations of the information. The question of law presented by the record here is, whether that court erred in overruling the motion in arrest of judgment, which challenged the sufficiency of the information and the jurisdiction of the court to try the accused summarily.

We do not understand counsel for the plaintiff in error to deny either that the act charged was a contempt at common law or that the court may punish ²¹² summarily any act which, under the statute, is a contempt of court.

Their contention is, that it is within the authority of the legislature to abridge the power of courts in this regard, and that such authority has been exercised in the enactment of sections 6906 and 6907 of the Revised Statutes, which make certain acts, formerly punishable as contempts, punishable by indictment as "offenses against public justice." The former section provides for the punishment of persons who, in the manner pointed out, evade the service of subpoenas or refuse to appear and testify after service. It contains the express provision that "this section shall not prevent summary proceedings for contempt." The latter section provides for the punishment of persons who "corruptly, or by threats of force, endeavor to influence, intimidate, or impede, any juror, or witness . . . in the discharge of his duty, etc."; and it is not by any express provision made cumulative to summary proceedings for contempt. It is said that the actual removal of the witness from the jurisdiction of the court which this information charges is wholly comprehended within the attempt to influence to which the statute affixes a penalty; and that from the omission of words making the section cumulative to summary proceedings for contempt, it results that it is exclusive of such proceedings.

However justifiable this inference might be, if a proper view comprehended the provisions of the statute alone, it will, according to a familiar rule, be a sufficient reason for rejecting it, if it leads to such an interpretation of the statute as would impute to the general assembly an intention to exercise power which it does not possess.

²¹³ The difference between the jurisdiction of courts and their inherent powers is too important to be overlooked. In constitutional governments, their jurisdiction is conferred by the provisions of the constitutions and of statutes enacted in the exercise of legislative authority. That, however, is not true with respect to such powers as are necessary to the orderly and efficient exercise of jurisdiction. Such powers, from both their nature and their ancient exercise, must be regarded as inherent. They do not depend upon express constitutional grant, nor in any sense upon the legislative will. The power to maintain order, to secure the attendance of witnesses to the end that the rights of parties may be ascertained, and to enforce process to the end that effect may be given to judgments, must inhere in every court or the purpose of its creation fails. Without such power no other could be exercised.

When constitutional governments were established upon this continent, there was general familiarity with the course of judicial proceedings in the administration of the common law. This power had long been exercised by courts as inherent. It was within every conception of a judicial court. The view of the question then generally taken was stated by Chief Justice McKean in 1788: "Not only my brethren and myself, but, likewise, all the judges of England, think that without this power no court could possibly exist; nay, that no contempt could, indeed, be committed against us, we should be so truly contemptible. The law upon this subject is of immemorial antiquity; and there is not any period when it can be said to have ceased or discontinued": *Respublica v. Oswald*, 1 Dall. 319; 1 Am. Dec. 246. The power, therefore, arose ²¹⁴ upon the creation of a court because it was implied in every conception of a court.

A people does not lose majesty by achieving liberty. The powers of government are the same, whatever may be the form. Here, the people, possessing all governmental power, adopted constitutions completely distributing it to appropriate departments. They created courts, and, in some instances, authorized the legislatures to create others. The courts so created and authorized have all the powers which are necessary to their efficient action, or embraced within their commonly received definition.

The power in question was lodged permanently in the courts, to be exercised by those who, for the time being, may be charged with the performance of judicial duties. But judges may not remain in office and resign their functions. The suggestion that this power may be abused raises no doubt as to its existence. In the Virginia convention, assembled to adopt or reject the proposed federal constitution, John Marshall answered this suggestion, and anticipated every occasion upon which it may be urged: "All delegated power is liable to be abused. Arguments drawn from that source go in direct opposition to all government, and in recommendation of anarchy." In making the constitutional distribution of the powers of government, the people assumed that the several departments would be equally careful to use the powers granted for the public good alone. Accordingly, we have the familiar and generally accepted doctrine, that none of the several departments are subordinate, but that all are co-ordinate. It is not, therefore, within the discretion of the judicial department to refuse to enforce a criminal statute because to it the ²¹⁵ prohibited act may seem innocent or the prescribed penalty excessive. The power of commitment for contempt has long been regarded as inherent in legislative bodies. It is not expressly granted. If it were not inherent, it could not be created by the act of the legislature itself. The existence of that power was recognized by this court in *Ex parte Dalton*, 44 Ohio St. 142; 58 Am. Rep. 800. The power we now assert is correlative of that which was there recognized. That it is not competent for the legislature to abridge the power of courts to punish summarily such wrongful acts as obstruct the administration of justice has been held in well-considered cases. The conclusion is a necessary inference from the very numerous cases in which it has been held that the power inheres in courts independently of legislative authority. A power which the legislature does not give it cannot take away. If power, distinguished from jurisdiction, exists independently of legislation, it will continue to exist notwithstanding legislation.

From the numerous cases sustaining these views, the following are selected because of their elaborate review of the authorities or their clear and vigorous statement of the principles involved: *State v. Frew*, 24 W. Va. 416; 49 Am. Rep. 257; *Little v. State*, 90 Ind. 338; 46 Am. Rep. 224; *Yates v. Lansing*, 5 Johns. 282; *State v. Morrill*, 16 Ark. 384; *Arnold v. Commonwealth*, 80 Ky. 300; 44 Am. Rep. 480; *People v. Wilson*, 64 Ill. 195; 16 Am. Rep. 528; *In re Woolley*, 11 Bush, 95; *United States v. Hudson*, 7 Cranch, 32; *Watson v. Williams*, 36 Miss. 331;

Darby's case (Tenn. 1824), 3 Wheel, C. C. 1; Neel v. State, 9 Ark. 259; 50 Am. Dec. 209; State v. Matthews, 37 N. H. 450; Cartwright's case, 114 Mass. 230. In the case before us, a court created by the constitution punished summarily, as for a contempt, ²¹⁶ one guilty of a wrongful act which interfered with the exercise of its jurisdiction. Upon a careful examination of the reported cases, we find but one which seems to deny its power to do so. We are not concerned with cases which hold that the power may be exercised by courts or legislative bodies only when they are proceeding within the sphere of duty when the alleged contempt is committed. However clear it may seem from a consideration of the principles involved that the authority conferred by the constitution upon the legislature to create additional courts has reference only to courts with all the attributes and inherent powers that are requisite to the efficient performance of judicial duties, we are not now concerned with any reported case which holds that the legislature may create a judicial tribunal without power to enforce respect for its sessions, its writs or its process.

We are mindful that, in reviewing the judgment of the circuit court in this case, we are exercising jurisdiction conferred by the statute, as was the circuit court when it reviewed the judgment of the court of common pleas. This we do without doubt as to the validity of the statute which authorizes the review. It does not in any manner, or to any degree, limit the power of the judicial department of the government of the state. Its object is to diminish as much as may be, the liability of the power to abuse, but without assuming a revisory authority in another department.

The sections of the statute considered do not in terms seek to limit the judicial power considered, and it would be indecorous to place such construction upon them as would impute to the general assembly either ignorance of the limitations upon its ²¹⁷ authority or a purpose to transcend them. We conclude that the insertion of the provision in section 6906, making its provisions cumulative to summary proceedings for contempt, was not necessary to that end, and that its omission from section 607 is not significant.

In Baldwin v. State, 11 Ohio St. 681, without statement of reason or citation of authority, a conclusion is announced apparently in conflict with the views here expressed. That case is overruled.

Judgment affirmed.

Minshall, J., dissents.

CONTEMPT—JURISDICTION—INHERENT POWER OF COURTS—LEGISLATIVE RESTRAINT.—The power to punish for contempt, actual or constructive, is inherent in all courts of record, and is essential to the preservation of order in all judicial proceedings: *State v. Judge*, 45 La. Ann. 1256; 40 Am. St. Rep. 282. Courts have the inherent power, in the absence of constitutional limitation upon their powers, to punish as a contempt any act, whether committed in or out of their presence, which tends to impair, embarrass, or obstruct them in the discharge of their duties, and the legislature, while it may regulate the procedure and enlarge the power, cannot fetter it: *In re Shortridge*, 99 Cal. 526; 37 Am. St. Rep. 78.

CONTEMPT—DISSUADING WITNESS—CRIME.—Any act which obstructs the administration of justice, is a criminal contempt. It is a crime to dissuade, hinder, and prevent a witness from appearing before a court in obedience to a subpoena: *Note to In re Nickell*, 27 Am. St. Rep. 319.

STATE v. BODE.

[55 OHIO STATE, 224.]

ELECTIONS—BALLOTS.—A STATUTE prohibiting the name of a candidate for office from appearing more than once upon the official ballot is a valid law.

Mandamus by Bateman and others to compel the defendants, Bode and others, who constituted the board of elections of Hamilton county, and who were ex officio deputy state supervisors of elections in that county, to place the names of Alexander B. Huston and Alfred B. Benedict upon both the "Democratic Judicial Ticket," and upon the "Lawyers' Judicial Ticket," these two persons having been nominated by the parties representing those tickets. The board refused to place the names upon both tickets, but offered to place each man's name upon such ticket as he might designate, and, in case no designation was made, to place the names upon the democratic ticket, that having been the one first certified to the board.

E. W. Kittredge, L. C. Black, and William Worthington, for the relators.

August H. Bode, for the defendants.

228 BURKET, J. It is conceded by counsel for the relators that section 6 a of the act of April 17, 1896 (92 Ohio Laws, 185), prohibits the printing of said names twice on the same ballot, but it is insisted that said section, in that regard, is unconstitutional. The only question, therefore, to be determined in this case is, whether the general assembly has the power to pass an act providing, as this one does, that the name of a candidate for office shall appear but once upon the ticket or ballot prepared by the board of elections.

Full legislative power is vested in the general assembly by section 1 of article 2 of our constitution, and the power in question is included in that grant of power, unless taken away by some other provision of the constitution.

The only limitations upon the general grant of power cited by counsel for the relators in this case, are section 2 of article 1, which reads: ²²⁹ "All political power is inherent in the people. Government is instituted for their equal protection and benefit," and section 2 of article 5, which reads: "All elections shall be by ballot."

The relators seek to compel the board of elections to place the names of the two candidates upon both the Democratic and upon the Lawyers' Judicial Ticket. This necessarily concedes that those tickets are ballots within the meaning of the constitution, because, if they are not ballots, there is no right to have these or any other names placed thereon. If they are ballots when the names of certain candidates are on twice, they are equally ballots when the names are on but once. As the constitution is silent as to the number of times a candidate's name shall appear on a ballot, the matter is open to be regulated by the general assembly. The ballot now authorized by statute is different in form from that in use at the time of the adoption of the constitution, but it is nevertheless a ballot. No form of ballot is prescribed by the constitution, and therefore the general assembly is free to adopt such form as in its judgment shall be for the best interests of the state.

The election must be by ballot, but the form of the ballot, so long as it is a ballot, is left to the sound discretion of the general assembly. The ballot or ticket in question is clearly a ballot, and therefore does not contravene the second section of the fifth article of the constitution.

By the second section of the first article of the constitution it is provided, in substance, that government is instituted for the equal protection and benefit of the people. It seems clear that the placing of the name of each candidate upon the ²³⁰ ballot once, and only once, would be equal protection and benefit to all the candidates. To place the name of one on the ballot in two places, and the name of his opponent in only one place, would not be exactly fair. It would give the candidate whose name appears twice an advantage over the candidate whose name appears but once. So that the statute, instead of being in conflict with this section of the constitution, is in harmony with it, and may have been passed for the purpose of doing away with this advantage which existed under the former statute. It is a

proper regulation of the elective franchise, well calculated to avoid and prevent corruption and fraudulent practices, as well as undue advantage to one candidate over another.

But it is argued that the voters have a right to have the names appear upon both ballots, so that they may more easily vote for the candidates of their choice. No legislature and no court can know in advance how the electors desire to vote, and if an opportunity is given them to vote for the candidates of their choice, by placing the names once in plain print upon the ballots, it is all that can in fairness be required. The ballot is the same for all, and gives equal protection and benefit to all. There is no discrimination against or in favor of anyone; and if any inequality arises, it arises not from any inequality caused by the statute, but by reason of inequalities in the persons of the voters, and such inequalities are unavoidable. It is always much more difficult for some electors to cast their ballots than for others. Distance, bad roads, means of transportation, bad health, and many other considerations, may and do render it much more difficult for some men to cast their ballots ²³¹ than others. But these difficulties inhere in the men themselves, and not in the law. Before the law all stand equal, with equal protection and equal benefit, and, if their condition becomes such as not to enable them to enjoy the protection or reap the benefit, it is their fault or misfortune, and not the fault of the law.

The act in question was passed to secure purity in our elections. Certain evil practices had grown up by reason of placing the name of a candidate upon the same ballot more than once, and the general assembly attempted to prevent such practice by providing that the name of each candidate should appear on the ballot but once. This is a reasonable regulation of the elective franchise, and not in any sense a destruction thereof.

But grant, as is urged by the relators, that some voters may be somewhat inconvenienced by reason of the name of each candidate appearing but once upon the ballot, yet such voters are not thereby deprived of any protection or benefit in casting their ballot. The inconvenience is only that which is experienced by everyone who votes other than a straight ticket. Such slight inconvenience to the voter should be endured rather than permit the advantage which one candidate has over another, when the name of one is placed upon the ballot twice, and the name of the other but once.

The subject is clearly within legislative discretion, and that body has the power to provide that the name of each candidate shall appear but once upon the official ballot, or it may permit

the name to appear more than once. Whatever inconvenience there may be to either the candidate or voter in such cases does not arise to the importance of a failure of ²³² equal protection or benefit, and therefore does not conflict with the provisions of the second section of our bill of rights.

When rights secured by the constitution seem to conflict when applied to the practical affairs of men, the general assembly is at liberty to so adjust the matter as to cause the least injury to the conflicting interests, and thereby protect the rights of the community as a whole. The equal protection and benefit guaranteed by the constitution does not cover every little inconvenience which may be distorted or reasoned into a seeming inequality, but has reference rather to cases in which it is attempted by statute to grant rights or privileges to some which are withheld from others in the same substantial situation or relation.

The case of *Fisher v. Dudley*, 74 Md. 242, is cited by the relators and relied upon to show that the names of candidates may appear more than once on the official ballot. In that case, the power of the legislature to pass the act was not questioned, but the case involved the construction of a statute which did not prohibit the name from appearing more than once on the official ballot, and the court held that, not being prohibited, it might properly appear as many times as nominations of the same person had been made by different parties. Such was the practice in this state under a similar statute, before the enactment of the present statute.

The Maryland case would, therefore, be an authority to show that our practice was right under the former statute, but it can have no bearing upon the question as to whether the general assembly has the power to prohibit the names from appearing more than once upon the official ballot.

²³³ The case of *Todd v. Board of Election Commrs.*, 104 Mich. 474, is very much like the present case, and fully supports the conclusions here reached.

We regard the act in question as clearly within the power of the general assembly, and therefore a valid law.

Writ refused.

ELECTIONS—PRINTING NAMES ON OFFICIAL BALLOTS MORE THAN ONCE.—The Michigan statute, making it unlawful for the board of election commissioners to cause to be printed in more than one column, on the official ballot, the name of any candidate who shall have received the nomination of two or more political parties or organizations for the same office is a valid law: *Todd v. Boards of Election etc.*, 104 Mich. 474.

PENNSYLVANIA RAILROAD COMPANY v. SNYDER.

[55 OHIO STATE, 342.]

RAILROADS—CONNECTING LINES—NEGLIGENCE—DEFECTIVE CAR—LIABILITY FOR INJURY TO EMPLOYEE.—If a railroad company, having a traffic arrangement with a connecting line, transfers to it a car so defective as to be dangerous, to be hauled over the latter's road, without having made a proper inspection thereof, and putting it in a safe condition for transportation, and an employé of the latter company is injured, during the course of his employment, because of a defect in the car, either company, or both, may be held answerable at the election of the injured party. The company receiving the car is negligent because of its omission to have it properly inspected, and hauling it in its defective condition, but the negligence of the delivering company in transferring it without inspection and repair is the primary cause of the injury, and the contributory negligence of the receiving company cannot, with propriety, be said to have broken the connection between the original negligence of the company furnishing the defective car for transportation and the injury resulting from its use.

RAILROADS—CONNECTING LINES—DUTY AND ASSURANCE AS TO SAFETY OF CARS TRANSFERRED.—If a railroad company, having a traffic arrangement with a connecting line, transfers to it a car to be hauled over the latter's road, it owes the duty, to the employés of the receiving company, of using reasonable care in making an inspection of the car and putting it in safe condition for their use; and the delivery of the car for that purpose amounts to an invitation to such employés to go upon and handle it, as well as an assurance that they may safely do so.

RAILROADS—CONTRIBUTORY NEGLIGENCE—SUDDEN PERIL.—If a railroad employé, while ascending a defective ladder, attached to a car, for the purpose of managing brakes as his duties require, finds himself in a situation of sudden danger, he is not, as a matter of law, guilty of contributory negligence, because he fails to exercise the same deliberate judgment that prudent persons would where no danger is present, or because he fails to make the most judicious choice between hazards, and would have escaped injury if he had chosen differently. The question in such a case is not what a careful person would do under ordinary circumstances, but what would he be likely to do, or might reasonably be expected to do, in the presence of the existing peril, and is one of fact for the jury.

Action for damages brought by the defendant in error, Jesse Snyder, against the Pennsylvania Railroad Company, the plaintiff in error, and the Lake Shore and Michigan Southern Railway Company, in the common pleas. The two railroad companies had a traffic arrangement between themselves, whereby the former delivered to the latter certain freight-cars to be hauled over the latter's road. One of these cars was so defective as to be dangerous, on account of a ladder attached to it, which had one broken round, was loose and shaky, and had no "hand hold." After the delivery of the car to the Lake Shore & Michigan Southern Railway Company, one of the employés of the latter company, while in the performance of his duties, attempted to get on top of the car, by means of the ladder, to manage the

brakes, but, on account of the defective condition of the ladder, he was thrown to the ground, while the train was in motion, and seriously injured. The plaintiff dismissed the action as to the Lake Shore & Michigan Southern Railway Company, and it thereafter proceeded to trial upon the issues joined between him and the Pennsylvania Company. There was a verdict and judgment for the plaintiff. The judgment was affirmed by the circuit court, and the company prosecuted a writ of error to obtain the reversal of both judgments.

E. W. Tolerton, for the plaintiff in error.

Hurd, Brumback & Thatcher, for the defendant in error.

³⁵⁷ WILLIAMS, C. J. It is not disputed that the plaintiff below received the injury of which he complains, in the manner alleged in his petition; nor is it contended there is any sufficient ground for disturbing the finding of the jury that the plaintiff in error was guilty of the negligence with which it is charged. One contention of the plaintiff in error is, that its negligence was not the proximate cause of the injury; that the causal connection was broken by the intervening negligence of the Lake Shore Company which, it is claimed, is alone responsible for the injury. An instruction to that effect, which the court was requested to give in charge to the jury was refused, and in that way the question is presented. The record discloses that the Empire line of freight-cars, to which the car in question belonged, was owned and ³⁵⁸ operated by the plaintiff in error for the transportation of through freight collected on its Philadelphia & Erie Division, over the road of the Lake Shore Company, from its connecting point at Erie, to stations on its line and on other connecting lines, under a traffic arrangement between the companies by which they were to share in the earnings of the transportation according to the distance the cars should be hauled over their respective roads. Under the arrangement, the plaintiff in error, before delivering its cars to the Lake Shore Company, was to have them properly inspected and put in safe condition for hauling; and it was also understood that the company receiving the cars should have them inspected when received. The company hauling a car was required to provide the oil and other supplies for keeping it in running condition, and to repair any damage done to the car while in its possession; all other repairs to be at the expense of the plaintiff in error. The car in question, when delivered to the Lake Shore Company to be hauled over its road, was defective and unsafe in the respects described in the petition, which a proper inspec-

tion would have discovered; and the negligence of the plaintiff in error consisted in the failure to make such inspection, and delivering the car to the Lake Shore Company without having first put it in a safe condition for transportation; while the negligence of the latter company was its omission to have the car properly inspected, and hauling it in its defective condition. The liability of the latter company for that negligence cannot well be denied. It was under no obligation to receive and place in charge of its employes a car with defective and dangerous equipments; and the rule which requires the observance of due care on the part of the employer in providing machinery ³⁵⁹ and appliances that are safe and suitable for the use of the servant in the course of his employment is not limited to such as are the property of the employer. It is not any the less obligatory upon a railroad company, for the protection of its employes, to see that foreign cars run over its road are not so defective as to be dangerous, than it is to see that its own are free from dangerous defects. But it does not follow that because the Lake Shore Company is liable for the damages sustained by the plaintiff below, the plaintiff in error may not be also. To relieve the latter from the consequences of its negligence, it is not enough that the act of the Lake Shore Company was nearest in the order of events to the injury, nor that without it the injury would not have occurred; to have that effect it must have been the efficient, independent, and self-producing cause, disconnected from the negligence of the plaintiff in error. The causal connection is not broken, "if the intervening event is one which might, in the natural course of things, be anticipated as not entirely improbable, and the defendant's negligence is an essential link in the chain of causation": Shearman and Redfield on Negligence, 4th ed., sec. 32. It is not essential to the liability of the plaintiff in error that its negligence should be the sole cause of the injury; but if that result was produced by the negligence of both companies, each contributing a necessary condition to the result, either, or both, might be held responsible at the election of the party injured; neither could claim exoneration on account of the fault of the other. The negligence of the plaintiff in error was undoubtedly the primary cause. If it had not furnished the defective car, the injury could not have occurred. Neither could it, if ³⁶⁰ the Lake Shore Company had not run the car over its road; and it might not have done so, if that company had made a proper inspection of the car. But it was the act of that company in hauling the car over its road that contributed to bring about the injury, rather than its

failure to have it properly inspected; for if the car had not been so moved, no injury could have happened, however negligent the inspection may have been. The most that can be claimed from the omission of the proper inspection by the Lake Shore Company is, that it failed to cure or remove the previous negligence of the plaintiff in error, and thereby interrupt the consequences which were likely to and did flow from it. That failure cannot, with propriety, be said to have broken the connection between the negligence of the plaintiff in error and the injury resulting from the use of the defective car, or to have been the self-operating cause of the injury. That the car would be hauled over the road of the Lake Shore Company was contemplated by both of the companies when it was delivered; it was delivered for that purpose. The plaintiff in error knew it could not be so hauled without the services of brakemen and other employ  s of the company hauling it, and ordinary prudence would suggest that if it furnished a defective car, or failed to observe due care in providing cars that were reasonably safe and fit for the service contemplated, those employ  s might, and probably would, suffer injuries in consequence. The jury might therefore properly find, as they did under instructions to which no exceptions were taken, that while the negligence of the Lake Shore Company was a contributing condition to the injury sustained by the ³⁶¹ plaintiff below, the negligence of the plaintiff in error was the culpable and proximate cause.

It is further claimed that the plaintiff in error was under no obligation or duty to the employ  s of the Lake Shore Company to exercise care in the inspection of cars furnished the latter company, or in making repairs necessary to have them in proper condition; and, as both companies were mutually in fault with respect to the car in question, so that neither could be made liable to the other, the plaintiff below was without remedy against the Pennsylvania company, because his injury was received while acting exclusively under the employment of the Lake Shore Company, the servant being bound, it is argued, by the act of the master. We think this position is not tenable. It was not necessary to the liability of the plaintiff in error that a contractual relation should exist between it and the plaintiff below, nor that the injury should be one resulting from the violation of a duty it owed the general public. Whenever a person should reasonably apprehend that, as the natural and probable consequences of his act or neglect, another will be placed in a situation of danger of receiving an injury, a duty of exercising due

care to prevent such injury arises; and if the injury results from the failure to use such care, a liability to the person injured will generally exist, in the absence of any other controlling fact. As said in Bishop on Noncontract Law, section 528: "One's responsibility for his acts is not limited to their immediate effects. He is liable also for their natural and probable consequences. . . . Nor is it material whether those consequences come from the acts alone, or from them and subsequent independent forces ³⁶² operating with them, provided those forces are of a sort reasonably to be anticipated." The test is to be found in the probable injurious consequences to be anticipated, and not in the number of subsequent events and agencies that may arise. It has already been observed that the traffic arrangement between these two railroad companies contemplated that cars furnished by the plaintiff in error to the other company would be handled by the employés of the company receiving them, and a prudent person would reasonably anticipate and foresee that such employés would be exposed to the danger of receiving injuries in handling a defective car so furnished, or one with defective appliances; and, therefore, the plaintiff in error owed a duty to such employés operating a train in which such a car might be placed, which was to use reasonable care in making inspection of the cars and putting them in safe condition, before they should be placed in charge of the employés. The services of such employés being necessary to accomplish the transportation intended, the delivery of a car to be transported over the road amounts to an invitation to the employés to go upon and handle it, and an assurance that they may safely do so in the course of their employment in transporting it to its destination. The case of *Moon v. Northern Pac. R. R. Co.*, 46 Minn. 106, 24 Am. St. Rep. 194, is quite like the one before us in its features thus far considered, and presents substantially the same questions. That is a well-considered case, and the decision is in harmony with our view of the law.

Another ground urged for the reversal of the judgment is, that the evidence, without conflict, establishes negligence on the part of the defendant in error which contributed to the injury he sustained. ³⁶³ Without entering into a general review of the evidence relating to the manner in which the injury was caused, or the conduct of the defendant in error, it is sufficient to say that, without his fault, and while in the performance of his duties in handling the car in question, he found himself in a situation of danger, on account of a defective ladder attached to

the car which, at the time, he was attempting to ascend in order to manage the brakes as his duties required. The ladder had one broken round and was loose and shaky; but that was not discovered by him until after he had got up on it and was in the effort to reach the top of the car. While engaged in that effort, and in a very brief time after he stepped on the ladder, he was thrown to the ground and injured. It is claimed that when he discovered the danger he was in, he should have stepped to the ground, and that he could have done so with safety. By his failure to do that, it is contended, he brought about the injury, or at least contributed to produce it. When confronted with his peril, two ways of escape would naturally be suggested: one to leap from the car to the ground, and the other to do as he did, strive to reach the top of the car. It is not certain that the adoption of the former course presented by the alternative would have proven better than the latter; it might seem so from a deliberate survey of the situation after the disaster had occurred; but when it is considered that it occurred in the darkness of the night, while the car was in motion, without opportunity of accurate observation of the condition of the ground, it is little more than conjecture that the defendant in error could, or would, by leaping to the ground, have escaped injury. And, in the exigencies of the situation in which he ³⁶⁴ was placed, it could neither be expected nor required that he should exercise the same deliberate judgment that prudent persons would exercise where no danger is present, nor make the most judicious choice between hazards. The question in such case is not what a careful person would do under ordinary circumstances, but what would he be likely to do, or might reasonably be expected to do, in the presence of the existing peril; and is one of fact for the jury. Measuring the conduct of the defendant in error by this rule, the jury have found he was not guilty of contributory negligence, and our duty does not lead us into an inquiry to ascertain on which side the preponderance of the evidence may be found.

Judgment affirmed.

RAILROADS—CONNECTING LINES—LIABILITY FOR DELIVERY OF UNSAFE CAR.—If connecting railroads mutually agree to transport the loaded freight-cars of each other over their respective lines, each is under obligation to exercise due diligence in providing reasonably safe cars for the service contemplated. Such duty is not limited to the corporations as such, but extends to and is owed to their servants who must necessarily handle the cars, and who may be exposed to danger arising from their unsafe or defective condition. The company neglecting this duty is liable in

damages for its negligence. So the delivery of a car by one company to the servants of the other line is an affirmation that the car is fit for use, and the latter are entitled to repose confidence in the implied assurance that such is the fact. The receiving company is answerable to its employes, if it undertakes to use the cars of the other company without due inspection, and they turn out to be defective and unsafe by reason of defects ascertainable by reasonably careful inspection; but the neglect of the receiving company to perform this duty does not excuse or relieve the delivering company from liability for injuries resulting from its negligence in delivering unsafe and defective cars. Its negligence is the proximate cause of the injury: *Moon v. Northern Pac. R. R. Co.*, 46 Minn. 106; 24 Am. St. Rep. 194.

NEGLIGENCE—SUDDEN PERIL.—A person placed by the negligence of another in a place of sudden danger, and who, under the influence of great terror, does an act which may contribute to his injury or death, cannot be charged with contributory negligence, so as to bar a recovery by him: *Consolidated Traction Co. v. Scott*, 58 N. J. L. 682; 55 Am. St. Rep. 620. The law does not require one confused and surprised by a sudden danger to act according to any fixed rule: *Note to St. Louis etc. Ry. Co. v. Murray*, 29 Am. St. Rep. 39.

PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY v. REYNOLDS.

[55 OHIO STATE, 370.]

RAILROADS—WRONG TRAIN—EXPULSION—LIABILITY FOR TORT.—If, by the fault of an agent of a railroad company, a passenger takes the wrong train, or is without a ticket, or has one imperfectly or erroneously stamped, and is ejected, for this or any similar reason, by the conductor of a train, in pursuance of the rules of the company, it is liable to him as for a tort.

RAILROADS—WRONG TRAIN—EXPULSION—TORT AND CONTRACT—DAMAGES.—If a passenger having a railroad ticket which is good only on trains stopping at his destination is, by the fault of the company's station agent, induced to take a wrong train, which does not, under the schedule, stop at such place, and, as a consequence, is ejected by the conductor on calling for his ticket, and before reaching his destination, he may recover damages as for a tort, and is not limited to such damages as would be proper in a mere breach of contract.

Action to recover damages for being wrongfully ejected from a railroad train. The plaintiff's petition was dismissed by the court of common pleas, the judgment of dismissal was reversed in the circuit court, and error was brought to reverse the judgment of the last-named court. The only question was, whether, on the facts, the case made in the petition was sustained.

Charles Darlington, for the plaintiff in error.

William McDonald and W. F. Eltzroth, for the defendant in error.

378 MINSHALL, J. We think there can be no question but that the petition states a cause of action founded on tort—the wrong of the defendant by its agent in ejecting the plaintiff and his son from the train. Then do the facts contained in the agreed statement support the complaint? We think they do. The plaintiff and his son were at Loveland, and each had a ticket which required the company to carry them to South Lebanon that day, on any train stopping at that place. He inquired of the agent at the station if a train then approaching was the train for him to take. The agent said it was, and that it was the only train that would stop at his destination that afternoon. He then with his son boarded the train. It proved to be a wrong one. This was the fault of the company; and he and his son were, afterward, and before reaching their destination, ejected, because, under the instructions the conductor had from the company, it was his duty to do so. The argument in support of the company's claim is, that the agent, under the circumstances, had the right to eject them, as the tickets did not authorize the plaintiff and his son to ride on that train, because it did not, under its schedule, stop at the plaintiff's destination. And, therefore, the plaintiff's remedy was for a breach **379** of the contract, and a different measure of damages would apply in such case.

It may be observed that under the code this was not a sufficient reason for the judgment of the common pleas dismissing the action. For if the agreed statement showed the plaintiff entitled to any relief upon the averments of the petition, the court should have awarded it. It makes no difference what the plaintiff may regard the nature of the wrong of which he complains, if the facts stated show that it is a wrong for which he should be compensated in damages, and the proof supports his petition. But this is not material here, as we regard the facts disclosed by the agreed statement as constituting a tort, and for which damages should have been assessed him by the court under the case made in his petition.

There are some cases which seem to support the contention of the plaintiff in error, but they, as does the reasoning of the plaintiff in error, depend upon what seems to be an evident fallacy. They assume as a premise that the act of the conductor in putting the plaintiff off was rightful, and, therefore, the company cannot be held guilty of a tort. But the act of the conductor is immaterial except as it affects the liability of the company. The suit is not against him but against the company. As between the conductor and the company, the latter may have no right to complain of him. He violated no duty he owed to the company.

He simply obeyed his instructions, as received from the company, applicable to such a case. Therefore it may well be said that as between him and the company, the conduct of the conductor was rightful. But as between the company and the passenger, the question is wholly a different one. ³⁸⁰ Where a company, by the act of a proper agent, causes a passenger, as in this case, to take the wrong train—one that does not stop at his station—it must be held to have contemplated that, under the instruction given its conductor, the passenger would be put off the train as soon as the error should be discovered by the conductor, unless he should, as demanded, pay additional fare and be carried beyond his station. The act of the first agent of the company, misdirecting the passenger, is the wrongful act for which the company becomes liable in tort, and the act of the conductor in ejecting him is a consequence of the first wrongful act—is the proximate cause of the passenger being ejected; and, as against the passenger, the act of the conductor in ejecting him, being the act of the company, is wrongful. The fallacy, as before stated, arises out of the mistaken assumption that the act of the conductor is rightful as against the passenger. This can in no instance be the case where the company is responsible for the mistake of the passenger in taking the wrong train. All the cases cited in support of the contention of the plaintiff in error that in any way do so are based on the fallacy that the conductor had the right to eject the passenger, when, as a matter of law, the real question is, whether the act of the company done by its agent is rightful as against the ejected party. The question may be simplified by eliminating the fact of agency in each instance; that is, by supposing that the common carrier in each instance acts for himself or itself. Here no mind would doubt but that the carrier, having instructed the passenger to take one of his trains, with knowledge of his destination, would be a wrongdoer, should he, on discovering his own mistake, ³⁸¹ eject him from the train, on the ground that he had taken the wrong train. But the intervention of an agent, by whom the act is done in each instance, does not change the case. For each act of the agent done in the scope of his agency must be imputed to the principal—is in law, the act of the principal. To use the language of Chief Justice Ryan, in *Craker v. Chicago etc. Ry. Co.*, 36 Wis. 674: "Quoad this contract and this passenger, the corporation was present on this train to care for her [the passenger] represented by the officers of the train, who possessed pro hac vice the whole power and authority, and were the living embodiment of the real ideal entity which made the contract, was bound

to keep it, and is appellant here to contend that it has no responsibility for the flagrant violation of the contract, which the respondent paid it to make and to keep, as its sole present representative appointed to keep it on its behalf."

The plaintiff in error claims that the case of *Shelton v. Lake Shore etc. Ry. Co.*, 29 Ohio St. 214, is decisive of this. There the plaintiff on a commutation ticket had gone on the train from his home to Cleveland. For some claimed irregularity in the ticket, it was taken up by the conductor of that train and returned to the general agent of the company, of which he notified the plaintiff. "In the afternoon of the same day," as stated in the report of the case, "the plaintiff not having recovered the commutation ticket, nor provided himself with a ticket, entered the defendant's cars at Cleveland, which were then in charge of another conductor, to return to Vermillion, and was put off the cars at Berea, a regular station on the line of defendant's railway, by the conductor then in charge of ³⁸² the train, for refusing to pay the fare prescribed by the defendant for a passage from Cleveland to Vermillion, for which last-mentioned injury the action was brought." The court held that the plaintiff could not, under these circumstances, maintain an action for being put off the train; and that his remedy was for the wrongful taking up of the ticket by the first conductor. When he took the train at Cleveland he knew his ticket had been taken up, and must have known that he would be put off before reaching his home. He took the train to return, with this knowledge, and his ejection was the result of his own fault. He should either, in this case, have purchased a ticket to return on or have paid fare when demanded. A party cannot, as a rule, recover damages for the aggravation of an injury caused by his own fault. In the case before us, the plaintiff, when he took the train at Loveland, did so by the fault of the company, and could not then have anticipated that he would be put off before reaching his destination. His right of action, then, is for the wrongful expulsion.

The case of *Atchison etc. R. R. Co. v. Gants*, 38 Kan. 608, 5 Am. St. Rep. 780, cited by the plaintiff in error, and quoted from, is not in point, for the reason that there it was by his own fault that the passenger took the wrong train and was ejected; he made no inquiries as to the train he should have taken.

Most of the cited cases are, for like reasons, not in point. They go no further than to require the passenger to submit to the enforcement of the reasonable rules of the company, and deny to

him the right to resist expulsion and recover for such injuries as he may receive thereby, yet allow a recovery for all other damages resulting from his expulsion, where wrongful on the part of the ³⁸³ company. Thus in *Pennsylvania R. R. Co. v. Connell*, 112 Ill. 295, 54 Am. Rep. 238, it is said: "We entertain no doubt that appellee was entitled to recover the amount of the cost of a ticket from the place where he was ejected from the cars to New York. He was also entitled to recover such damages as he sustained on account of the delay occasioned by the expulsion and all additional expenses necessarily occasioned thereby, as well as reasonable damages for the indignity in being expelled from the train; but we perceive no ground upon which he can recover for the personal injuries received unless the expulsion was malicious or wanton."

Not only the better reason, but the greater weight of authority are to the effect that when a passenger is ejected in a case like the present, he may recover damages as for a tort, for though the relation of the parties had its origin in contract, the ejection is in the nature of a tort, and he is not limited to such damages as would be proper in a mere breach of contract. In such cases it can make no difference to the passenger, so far as his injury is concerned whether the wrong resulted from the breach of an obligation imposed by contract, or from the breach of a duty imposed by the law; the loss, inconvenience, delay, and humiliation will be the same to him, and his damages should be measured by a like rule in either case.

On the question of the character of the plaintiff's right of action and the measure of damages, and, also, on the liability of a company to a passenger ejected from one of its trains, where, by the fault of its agents he took the wrong train, we refer to the following cases: *Central R. R. etc. Co. v. Roberts*, 91 Ga. 513; *McGinnis v. Railway Co.*, 21 Mo. App. 399; *Gorman v. Southern Pac. Co.*, 97 Cal. 1; 33 Am. St. Rep. 157; *Pittsburgh etc. Ry. 384 Co. v. Hennigh*, 39 Ind. 509; *Hufford v. Grand Rapids etc. R. R. Co.*, 64 Mich. 631; 8 Am. St. Rep. 859; *Northern Pac. Ry. Co. v. Pauson*, 70 Fed. Rep. 585. In the last case the decisions are pretty fully collected and reviewed: *Pennsylvania Co. v. Bray*, 125 Ind. 229.

The general principle derived from the cases is, that where, by the fault of an agent of the company, a passenger takes the wrong train, or is without a ticket, or one imperfectly or erroneously stamped, or for any similar reason, and is ejected by the conductor of the train, in pursuance of the rules of the company,

it is liable to him as for a tort. The rule concedes to the company the right to make reasonable rules for the conduct of its business and to require their enforcement by its agents. The contingency that in certain cases the company will be made liable by the act of its conductor in following its rules, where the appearances on which he acted were created by the fault of another agent, of which he had no knowledge, is a risk incident to the privilege enjoyed of making rules, and it should suffer for the fault of the agent that caused the mistake, rather than an innocent person.

Judgment affirmed.

RAILROADS.—AN ACTION OF TORT will lie to recover damages for the wrongful expulsion of a passenger from a railway car, and though the complaint alleges a contract for carriage, the action is not for breach of the contract, but for tort by breach of duty: *Gorman v. Southern Pac. Co.*, 97 Cal. 1; 33 Am. St. Rep. 157.

RAILROADS—EXPULSION—FAULT OF COMPANY.—A person not having a proper ticket, though this happens through a fault of the company's agent, may be lawfully ejected if he refuses to pay fare: See monographic note to *Chicago etc. R. R. Co. v. Parks*, 63 Am. Dec. 571, discussing the expulsion of passengers from railroad trains. Compare *Yorton v. Milwaukee etc. Ry. Co.*, 54 Wis. 234; 41 Am. Rep. 23.

GERMAN FIRE INSURANCE COMPANY v. ROOST.

[55 OHIO STATE, 581.]

INSURANCE—PROXIMATE CAUSE OF LOSS.—In determining the liability of an insurance company for a loss, the proximate and not the remote cause of the loss is to be regarded. Hence, if a powderhouse, in which neither the company nor the insured has any interest, is struck by lightning, which results in an explosion that destroys an insured house and furniture on the other side of the street, seventy-one feet distant, the loss of the house and furniture is caused by explosion, and not by lightning.

INSURANCE—CONSTRUCTION OF CONTRACT.—The meaning of a contract of insurance is to be gathered from a consideration of all its parts; and no provision is to be wholly disregarded because it is inconsistent with other provisions, unless no other reasonable construction is possible.

INSURANCE—SPECIAL AND GENERAL PROVISIONS.—A special provision in a policy of insurance will be held to override a general provision only where the two cannot stand together. If reasonable effect can be given to both, then both are to be retained.

INSURANCE—LIGHTNING AND EXPLOSION CLAUSES—CONSTRUCTION.—If a policy of insurance on a house and furniture contains a lightning clause, followed by a provision distinctly excluding liability for loss by explosion, it is plain that a loss by explosion is not contemplated by the parties as being embraced within the protection of the policy. Hence, if lightning strikes a powderhouse, in which neither the company nor the insured has any interest, on

the other side of a street from the insured property, seventy-one feet distant, and which stroke is followed by an explosion that destroys the house and furniture, the company is not liable.

Action upon a policy of fire insurance. The property covered was a house and furniture. The policy provided that: "This insurance does not apply to or cover any loss caused by explosion, unless fire ensues, and then the loss or damage by fire only." It also had a special clause attached, providing that: "This policy insures against any loss or damage caused by lightning to the interest of the assured in the property described, not exceeding the sum insured, and subject in all other respects to the terms and conditions of the policy." Lightning struck a powder-house, in which house neither the company nor the insured had any interest, and which stood on the opposite side of the street, seventy-one feet distant from the property insured. The stroke was followed by an explosion which destroyed the house and furniture insured on the other side of the street. The court found as a conclusion of law: "That said damage was not caused by the explosion, as contemplated by the exception contained in said policy, but that said loss was caused by an explosion, occasioned by lightning, and was included in the risk." There was a judgment for the plaintiff, which was affirmed by the circuit court, and the company brought a writ of error to reverse these judgments.

John H. Doyle and Jenner & Weldon, for the plaintiff in error.

Donnell & Marriott, for the defendant in error.

583 SPEAR, J. The plaintiff in error urges two propositions, either one of which being found in its favor would result in a reversal of the judgments: 1. That the proximate cause of the fire was the explosion, the lightning being only the remote cause, and the loss is, therefore, not within the terms of the lightning clause of the policy; 2. That whether the lightning clause, taken alone, would, under the facts, create a liability or not, yet when that provision is considered in connection with the entire policy, it is plain that the loss which occurred was not, within the contemplation of the parties at the time of the making of the contract, one which was intended to be covered.

1. Respecting the first proposition, it may be said that undoubtedly the rule is, that the proximate and not the remote cause of the loss is **584** to be regarded in determining liability. As said by Lord Bacon: "It were infinite for the law to judge the causes of causes, and their impulsions one of another; there-

fore, it contenteth itself with the immediate cause, and judgeth of acts by that without looking to any further degree." And it is contended here, with much effect, that the true rule is, that where a new cause has intervened between the fact accomplished and the alleged cause, such new cause must be considered the real cause; that in this case the lightning striking the powder-house was inadequate to produce the disruption of the insured property without the intervention of some other and nearer cause; that the force and energy which produced the mischief came, not from the lightning, but from the explosion, and therefore the explosion was a new cause which intervened and hence must be regarded as the proximate cause. While, on the other hand, it is insisted that the law seeks the first efficient cause, which will be regarded as the *causa proxima*, however many other agencies may have intervened, and that, in this case, the lightning was the efficient cause and the other merely incidental, and, therefore, the mere agent or instrument through which the cause operated.

Attention has been called to a formidable array of decisions, pro and con, giving a review of the question of proximate and remote cause as the same has arisen and been decided in a great variety of cases, and these decisions bring before the mind, as a subject of study, the general doctrine of proximate and remote causes. But we would regard it as unprofitable labor to seek through the cases for a satisfactory expression of the rule, since no general rule will be found suited to all ⁵⁸⁵ conditions, and each case, as it arises, must, after all, be decided upon the special facts belonging to it, and often upon the very nicest discriminations. And it seems not worth while to pursue the point in considering the present case, because, as it appears to us, there is no necessity for such inquiry, inasmuch as the case may be satisfactorily disposed of upon the second proposition.

2. It is contended, in support of the judgment below, that inasmuch as the lightning clause is not a part of the original policy, but is attached thereto as a modification, it must, therefore, control where it is inconsistent with other portions of the policy, and that it is inconsistent with that part of section 2 which relates to loss by explosion.

It is a rule of construction, founded in reason and resting upon abundant authority, that the meaning of the contract is to be gathered from a consideration of all its parts, and that no provision is to be wholly disregarded because inconsistent with other provisions unless no other reasonable construction is possible; and

that a special provision will be held to override a general provision only where the two cannot stand together. If reasonable effect can be given to both, then both are to be retained. Are the two provisions referred to irreconcilably inconsistent? The lightning clause insures against loss or damage caused "by lightning to the interest of the assured in the property described"; but it is "subject in all other respects to the terms and conditions of the policy." That is, while affording protection to the property insured from the lightning, the other terms of the policy are to have full effect. Recurring now to the other provision involved, ⁵⁸⁶ we find that the insurance "does not apply to or cover any loss caused by explosion, unless fire ensues, and then the loss or damage by fire only." Here there was no fire.

We think that these two clauses are not inconsistent, but that each can be given effect without destroying the other. Construed together, they make the company liable for any damage to the building and contents in case the same were injured by lightning, but that in no event would the company be liable if the loss were occasioned by an explosion. The provision is against loss by lightning to the property insured, subject to the terms of the policy; i. e., provided the loss is not occasioned by an explosion. This, it seems to us, gives a reasonable construction to each clause, and does no violence to any part of the contract. We think, also, without stopping to refine upon the doctrine of proximate and remote causes, that, within the meaning of these provisions, the loss in this case was by explosion, and not by lightning.

And this, it is reasonable to assume, must have been the understanding of the parties in the making of this contract, for, while it is unlikely that either had actually in mind the extent of the peril from the proximity of the powderhouse across the way, yet no more apt language could have been used to exclude liability for this very peril had the parties contracted with full knowledge of its existence and dangerous character. Construed with reference to the subject matter, the language used is equivalent to a declaration on the part of the company that it will not be held for any loss, whether it comes within the general peril of lightning or not, and without undertaking to consider whether it does or not, if such loss ⁵⁸⁷ occurs by explosion, unless fire ensues. If fire follow an explosion, then liability attaches; if not, there is none. Nor can it reasonably be urged that the insured did not understand the meaning of the language of this provision, for it is obvious.

He could not, as a reasonable man, in the face of such an exception, have expected the company to be liable for any loss, save from consequent fire, if such loss should accrue from explosion. Although the explosion of gunpowder by means of lightning happens but rarely, yet it is a possible peril and sometimes occurs, which fact may account for the company declining to take such risk, while its infrequency may account for the willingness of the insured himself to bear it. But whether the latter actually had the extent of this risk in mind or not, when he entered into the contract, he must be held in law to have assented to an exception which, upon its face, takes risks by explosion out of the perils insured against.

That destruction by explosion, of a house seventy-one feet away from one struck by lightning, should be deemed a natural result of the lightning, is at least a doubtful proposition. But be that as it may, when there follows in a policy after a lightning clause, a provision which distinctly excludes liability for loss by explosion, it appears plain that, within the contemplation of the parties at the time of the making of the contract, a loss by explosion could not have been understood to be embraced within the protection of the policy.

The conclusions stated are sustained by abundant authority. True it is that cases are to be found which declare principles of construction which, if applied here, would make the company ⁵⁸⁸ liable for this loss, if its liability were measured wholly by the lightning clause. But in no case which has come within our observation, and we have examined a great many, has a liability been found to attach where there was a provision excluding liability for loss by explosion and the loss was caused by fire, or, as here, by lightning taking effect in a distant building, and the damage being wrought to the insured property by an explosion, produced by the fire or the lightning without either of the latter agencies coming in contact with the insured property: *Everett v. London Assurance*, 19 Scott N. R. 126; *Caballero v. Home Mut. Ins. Co.*, 15 La. Ann. 217; *St. John v. American Mut. etc. Ins. Co.*, 11 N. Y. 516; *Briggs v. North American etc. Ins. Co.*, 53 N. Y. 446; *Montgomery v. Firemen's Ins. Co.*, 16 B. Mon. 427; *Heuer v. North Western etc. Ins. Co.*, 144 Ill. 393.

Judgments of the circuit court and of the court of common pleas reversed, and judgment for plaintiff in error.

INSURANCE—CONSTRUCTION OF CONTRACT.—In construing contracts of insurance, the intention of the parties must govern, which is to be ascertained from the terms and conditions of the con-

tract: *Renshaw v. Missouri etc. Ins. Co.*, 103 Mo. 595; 23 Am. St. Rep. 904; *Weldert v. State Ins. Co.*, 19 Or. 261; 20 Am. St. Rep. 809; *Continental Ins. Co. v. Kyle*, 124 Ind. 132; 19 Am. St. Rep. 77. The whole contract is to be considered, and, when one clause stands with others, its sense may be gathered from those which immediately precede or follow it: *Renshaw v. Missouri etc. Ins. Co.*, 103 Mo. 595; 23 Am. St. Rep. 904; *Straus v. Imperial Fire Ins. Co.*, 94 Mo. 182; 4 Am. St. Rep. 368.

INSURANCE — PROXIMATE CAUSE — LIGHTNING — EXPLOSION.—Insurers are answerable for the direct and immediate, but not for consequential and remote, losses from the peril insured against: *Hillier v. Allegheny etc. Ins. Co.*, 3 Pa. St. 470; 45 Am. Dec. 656. The direct and proximate cause is not, however, necessarily, the cause or agency nearest in point of time or place to the result. The direct and proximate cause in such cases is the active efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new and independent source: *Lynn Gas etc. Co. v. Meriden etc. Ins. Co.*, 158 Mass. 570; 35 Am. St. Rep. 540. Under a clause exempting the insurer from liability for explosions he cannot be held for damage produced by an explosion of any kind: See monographic notes to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 858, on proximate and remote cause; *Dows v. Faneuil Hall etc. Ins. Co.*, 34 Am. Rep. 389. If the damage done by an explosion is remote, as where the injury to the insured building is caused by the concussion occasioned by the explosion of a powdermill situated at a considerable distance, no recovery can be had: See monographic note to *Uillier v. Allegheny etc. Ins. Co.*, 45 Am. Dec. 657, on what is included in a loss by fire. Insurance against all loss or damage by fire or lightning will cover all loss arising from all known effects of lightning, and not merely those arising from combustion: See monographic note to *Renshaw v. Missouri etc. Ins. Co.*, 23 Am. St. Rep. 916, on what is included in a loss by fire. Compare note to *Hillier v. Allegheny etc. Ins. Co.*, 45 Am. Dec. 659, touching upon loss by lightning.

LAKE SHORE AND MICHIGAN SOUTHERN RAILROAD COMPANY v. ORNDORFF.

[55 OHIO STATE, 589.]

RAILROADS—REFUSAL TO PAY FARE OF CHILD—EXPULSION.—If a mother, with a stopover ticket, boards a railroad train with her little boy, who is old enough to require the payment of fare, she is answerable for his fare, and, upon her refusal to pay, both may be ejected at the next station, but the conductor, if he has canceled the ticket, must first either pay her its unused value over and above the fares of both for the distance already traveled, or give her a stopover check instead of money. If he expels both without doing this, the company is answerable in damages.

RAILROADS—EXPULSION—LIABILITY THOUGH PASSENGER IS FIRST IN WRONG.—The fact that a passenger on a railroad train commits the first wrong by refusing to pay fare does not exonerate the railroad company from its liability for damages for an unlawful expulsion of the passenger from its train.

Action for damages for an unlawful expulsion from a railroad train. The defendant in error, Sarah B. Orndorff, purchased a stopover ticket for herself from Kendallville, in the state of

Indiana, to Wauseon, in the state of Ohio. She boarded one of the company's regular passenger trains and took her little boy, nine years of age, into the car with her. The conductor took up her ticket and punched it. He then demanded half fare for the boy, which she refused to pay, and he informed her that she must pay half fare for him, or both get off at the next station, Corunna, six miles east. She still refused to pay, upon arriving at Corunna, and also refused to get off. The conductor thereupon removed her and the boy as gently as possible, using no unnecessary force. She demanded, at the same time, the return of her ticket, which the conductor refused as it was already canceled. After she and the boy had been put out upon the platform of the station, she offered to pay the boy's fare. So they again got upon the train and she paid his fare. She recovered a judgment in the common pleas for seven hundred dollars, which was reduced by the circuit court to four hundred, and then affirmed. After a motion for a new trial was overruled, a petition in error was filed to reverse the judgments below.

E. D. Potter, Thomas Emery, and George C. Green, for the plaintiff in error.

W. W. Touville, for the defendant in error.

592 BURKET, J. If the charge of the court, as given, was right, there was no error to the prejudice of the railroad company in the refusal to charge as requested. In the charge as given, the court fully concedes the right of the conductor to eject the defendant in error for nonpayment of fare for her boy, but held it to be his duty, before **593** ejecting her, to restore, or offer to restore, to her the unused value of her ticket over and above the fare of both from Kendallville to Corunna. While the court held the conductor to this duty, it gave him the option to perform the duty, either by returning the ticket and demanding the fare of both for the distance already traveled, or by tendering a stopover check for herself from Corunna to Wauseon, and demanding fare for the child from Kendallville to Corunna or by tendering her the difference in money between the price of the ticket and the fare of both from Kendallville to Corunna.

This charge concedes to the company all its rights, if not more. Upon her refusing to pay fare for the boy, the company had a right to put both off the train at the next station, and collect fare for the boy to that station, but it had no right to confiscate her ticket to Wauseon, and appropriate the same to its own use without compensation to her. Before putting her off the cars, the

conductor should have returned to her the unused value of her ticket, either by paying such value to her in money, or by giving her a stopover check and collecting fare for the boy for the distance already traveled. If the ticket was already canceled so as not to avail her on another train its return would have been of no value to her, and this company knew, while she may not have known it. In such case, it was the duty of the conductor to give her a stopover check, or compensate her in money to the amount of the difference between the cost of the ticket and the fares of both to Corunna. As between her and the company, the conductor represented the company, and the rights and liabilities⁵⁹⁴ of the parties were the same as if the company had been present and transacted the business through its highest officers; and, therefore, neither the inconvenience of making change, nor the want of authority on the part of the conductor to pay the unused value of the canceled ticket can shield the company from liability. As the ticket was such as to entitle the holder to a stopover at any station, the contract of carriage was not an entire, but a severable, contract, and, upon notice to the conductor that she desired to stop at an intermediate station, it was his duty to give her a stopover check; and when he was about to forcibly eject her from the train, it was still more his duty to give her such check. It was his duty, before commencing to eject her from the train to either pay her the unused value of her ticket over and above the fares of both for the distance already traveled or give her a stopover check and demand the fare of the boy, and, if this had been done, she would most likely have paid the boy's fare and avoided the disagreeable scene which followed. At all events, it was her right to have the unused value of her ticket restored to her before being ejected from the train. True, she was in the wrong in refusing to pay fare for the boy, but the company was also in the wrong in retaining the unused value of her ticket, and in ejecting her before returning, or offering to return to her such value, either in money or stopover check. Her wrong did not warrant the company in expelling her from the train without returning to her the remaining value of her ticket. The expulsion was, therefore, unlawful, and the company became liable to respond in damages.

⁵⁹⁵ There is always liable to be more or less friction between the traveling public and transportation companies, and while railroads should be fully protected in the enforcement of their reasonable rules, passengers must be protected in their rights of property, and against unreasonable annoyances.

The case of *Philadelphia etc. R. R. Co. v. Hoefflich*, 62 Md. 300, 50 Am. Rep. 223, and *Wood's Railway Law*, section 353, cited by plaintiff in error, only go to the extent that upon refusal to pay fare for a child, both the child and person having it in charge may be ejected from the train. Nothing is there said as to the right to have the unused fare returned. The charge of the court in the case at bar fully conceded all that is covered by these two authorities.

The following cases are in point, and throw some light upon the question under consideration in this case: *Wardwell v. Chicago etc. Ry. Co.*, 46 Minn. 514; 24 Am. St. Rep. 246; *Bland v. Southern Pac. R. R.*, 55 Cal. 570; 36 Am. Rep. 50; *Vankirk v. Pennsylvania R. R. Co.*, 76 Pa. St. 66; 18 Am. Rep. 404.

We find no error in the record.

Judgment affirmed.

RAILROADS—EXPULSION FOR NONPAYMENT OF FARE—RETURN OF UNUSED FARE.—A railroad company has no right to eject a passenger for nonpayment of full fare without first returning the money paid, less the fare between the starting point and the point of expulsion: *Wardwell v. Chicago etc. Ry. Co.*, 46 Minn. 514; 24 Am. St. Rep. 246; *Bland v. Southern Pac. R. R. Co.*, 55 Cal. 570; 36 Am. Rep. 50; note to *Toledo etc. Ry. Co. v. Wright*, 34 Am. Rep. 284. Compare monographic notes to *Commonwealth v. Power*, 41 Am. Dec. 477, and *Chicago etc. R. R. Co. v. Parks*, 68 Am. Dec. 570, discussing the expulsion of passengers from railroad trains.

EWAN v. BROOKS-WATERFIELD COMPANY.

[55 OHIO STATE, 596.]

NEGOTIABLE INSTRUMENTS—MAKER'S INDORSEMENT OF NOTE PAYABLE TO HIS OWN ORDER.—A note payable to the order of the maker is incomplete in its execution until it is indorsed by him and delivered to another for value. It is then, in legal effect, payable to the bearer, and the maker is liable only as maker, without demand and notice. He is not liable as an indorser.

NEGOTIABLE INSTRUMENTS—THIRD PERSON'S INDORSEMENT OF NOTE PAYABLE TO MAKER'S ORDER.—When the name of a third person appears in blank on the back of a negotiable promissory note, at the time it takes effect, his undertaking rests upon the consideration which supports the note. It is, therefore, presumed that he intended to be liable as surety for its payment, and he is answerable accordingly, unless he can show that there was a different agreement or understanding between the parties, which it is competent for him to do.

NEGOTIABLE INSTRUMENTS—IRREGULAR INDORSEMENTS—EFFECT.—Neither the indorsement of the maker's name on the back of a note payable to his own order to complete its execution, nor that of a third person in blank before or at the time of its execution and delivery, constitutes a regular indorsement of com-

mercial paper. Neither does it create the contract arising from a regular indorsement in blank, the terms of which are distinctly defined by law, and which cannot, therefore, be varied by parol.

NEGOTIABLE INSTRUMENTS—IRREGULAR INDORSEMENTS—PAROL EVIDENCE.—A third person's indorsement on the back of a note payable to the maker's order belongs to that class known as irregular or anomalous indorsements, whose obligation depends upon the agreement of the parties, and, being ambiguous in that respect, parol evidence is admissible to show the terms of the agreement as actually made by the parties, or other facts showing their intention at the time.

NEGOTIABLE INSTRUMENTS—EFFECT OF INDORSEMENTS WHERE PAPER IS FOR MAKER'S ACCOMMODATION. Neither the order in which names appear on the back of commercial paper, nor the order in point of time in which they were placed there, is conclusive of the relation of the parties to the paper, or to each other, or of the liability incurred, where the paper is for the accommodation of the maker.

Action by Emma V. Ewan against George W. Cox and the Brooks-Waterfield Company on a promissory note, executed by George W. Cox, payable to the order of himself for the sum of three thousand five hundred dollars. The maker's name was indorsed on the back of the note, and under it, in blank, appeared the following name: "The Brooks-Waterfield Co., L. H. Brooks, President." Among payments indorsed on the note was one made by the company's check several months after the maturity of the note. Judgment was taken against Cox by default leaving the action to proceed against the company. The note was received by the plaintiff with the signature, not only of Cox, but with that of the company written on its back. It was so received on the day of its date, and the plaintiff paid the maker its full value. The company denied that it was a joint maker with Cox, but alleged that it occupied the position of indorser, and denied that it had received any notice of the maturity and nonpayment of the note. There was a judgment for the defendant, and the plaintiff appealed.

Thomas McDugal, Willis M. Kemper, and Richards & Richards, for the plaintiff in error.

Ramsey, Maxwell & Ramsey, for the defendant in error.

004 **WILLIAMS, C. J.** The allegation of the answer, that the Brooks-Waterfield Company, by signing its name on the back of the note, assumed the position of an indorser, is an admission of the due execution of the note, and of the genuineness of the company's signature thereon; but the nature of the obligation the company thus contracted must be determined from the facts attending the transaction, which, as shown by the record, are, substantially, that the name of the company was signed on the back

of the note when it was delivered to the plaintiff, and it was purchased and received by her from the maker on the day of its date, without information of any agreement concerning the company's obligation, other than that derived from the note itself. The note, being payable to the order of the maker, was incomplete in its execution until indorsed by him and delivered ⁶⁰⁵ to another for value; and it was so indorsed when received by the plaintiff, who paid the maker its full value. The execution of the note being thus completed, then, for the first time, became a valid obligation, and in legal effect was payable to the plaintiff or bearer. At that time it bore the signature of the company written on its back. There is here no room for any inference that the note had been previously transferred by the maker to the company, and thereafter indorsed by it in order to transfer the title. If the company had thus become the indorsee, the note, in due course of business, could only have found its way back into the hands of the maker upon its surrender on payment or other satisfactory discharge, and its indorsement by the company on such surrender would be so entirely out of the usual course of business as to raise a presumption against it. The note being found in the hands of Cox on the day of its date with the company's name indorsed upon it is inconsistent with the theory that it had been indorsed and transferred to the company as the owner of the note, or that it had been taken up by payment. A more reasonable inference would be that the note was then in the maker's hands with authority from the company to negotiate it for his accommodation. "If a holder produce a note having a blank indorsement of one not the payee, the presumption is that it was made at the inception of the instrument": *Good v. Martin*, 95 U. S. 90. So that, upon presentation of this note to the plaintiff, she was authorized to deal with it as belonging to Cox, with the signature of the company indorsed thereon at the time of its execution in order to give it credit and aid in its negotiation, she not having ⁶⁰⁶ been informed of any different agreement or understanding between the parties.

Precisely what is the nature of the legal obligation contracted by a stranger who indorses his name in blank on the back of a negotiable promissory note before or at the time it takes effect, is a question upon which the courts have widely differed, some holding that his obligation is that of a second indorser; others have held him liable as a guarantor; and still others as a maker with the rights of a surety. The rule established in this state is, that when the name of such third party appears upon

the note at the time it takes effect, his undertaking rests upon the consideration which supports the note, and the presumption is, he intended to be liable as surety for its payment, and is held accordingly, unless he can show that there was a different agreement or understanding between the parties, which it is competent for him to do: *Bright v. Carpenter*, 9 Ohio, 139; 34 Am. Dec. 432; *Champion v. Griffith*, 13 Ohio, 228; *Robinson v. Abell*, 17 Ohio, 36; *Seymour v. Leyman*, 10 Ohio St. 284; *Seymour v. Mickey*, 15 Ohio St. 515; *Castle v. Rickly*, 44 Ohio St. 490; 58 Am. Rep. 839. And it is said in *Randolph on Commercial Paper*, section 831, that: "The view which finds most support is probably that which holds the indorsement of a negotiable note by a stranger before or at the time of its delivery to the payee to be prima facie an original undertaking as joint maker with an implied liability as such to the payee and all holders for value." The present case must be governed by this rule, unless it is rendered inapplicable by the fact that the note in suit is payable to the order of the maker and his name appears indorsed thereon above that of the defendant in error. There are cases in which that distinction ⁶⁰⁷ is made: *Bigelow v. Colton*, 13 Gray, 309; 74 Am. Dec. 633; *Dubois v. Mason*, 127 Mass. 37; 34 Am. Rep. 335; *First Nat. Bank v. Payne*, 111 Mo. 291; 33 Am. St. Rep. 520; *Chicago Trust etc. Bank v. Nordgren*, 157 Ill. 663. These decisions are placed upon the grounds that the nature of the liability of the parties whose names appear on the back of a negotiable note is conclusively determined by the position of the signatures with reference to those of the other parties when the note takes effect, and that as a note payable to the maker's order cannot take effect until indorsed by him, a third person, in placing his name on the back of the note previous to its indorsement by the maker, intends to become liable only as a second indorser; he understands that to be the nature of his liability, it is said, and a different intention or agreement cannot be shown by parol proof. In one of these cases (*Chicago Trust etc. Bank v. Nordgren*, 157 Ill. 663), the reason of the decision is stated as follows: "Inasmuch as the note can never have validity until the name of the payee appears upon it as an indorser, the person writing his name in blank upon the note understands that when the note takes effect his name will appear upon it as a second indorser, and it is reasonable to conclude that such was the position which he intended to occupy." The real foundation on which these decisions appear to rest is, that the maker, by placing his name on the back of the note to give it effect,

becomes the first indorser, and the third person who places his signature on it, though done before that of the maker is indorsed on it, contracts the obligation of a second indorser. It is undoubtedly true that such a note is without any validity so long as it remains in the hands of the maker, and its indorsement and transfer by him to a holder for value is necessary to give it obligatory effect. ⁶⁰⁸ But it is equally true that, by indorsing his name on the back of the note and delivering it in that form to the holder, the maker does not become an indorser in the commercial acceptation of that term. He is, nevertheless, the maker of the note, his signature on its back being an essential part of its execution, and his liability continues to be that of a maker only. He does not thereby enter into the contract of an indorser, which is to pay the note if the maker upon demand fail to do so at maturity, and due notice thereof be given. It would be a useless ceremony, if not a palpable absurdity, to require the holder to make demand of the maker and give him notice of his own default, in order to charge him with the payment of the note. He is liable as maker, without demand and notice, and sustains no other legal relation to the paper; which relation, it must be presumed, is within the knowledge of third persons who place their names on the note while in the maker's hands. It is no less true that such third person, whose name appears on the back of a note of that kind before or at the time its execution is completed by the indorsement of the maker's name thereon, is not an indorser in the proper and legal sense of the term. There is a popular sense in which the term is used that is sufficiently comprehensive to include any person who lends his name in any form to another on commercial paper. But courts do not use it in that sense. In its well-understood legal and commercial meaning, the indorsement of a note in blank amounts to a contract on the part of the indorser with and in favor of the indorsee and every subsequent holder to whom the note is transferred that the indorser had a good title to the instrument at the time of its indorsement, ⁶⁰⁹ and was competent to transfer that title, which he undertook to do by the indorsement and delivery of the instrument to his indorsee; so that, to give rise to the contract and relation of an indorser, it is necessary that he should have been the payee or indorsee of the paper: *Beckwith v. Angell*, 6 Conn. 317; *Story on Promissory Notes*, sec. 135. Hence, neither the indorsement of the maker's name on the back of a note payable to his own order to complete its execution, nor that of a third

person in blank before or at the time of its execution and delivery, constitutes a regular indorsement of commercial paper, nor creates the contract arising from a regular indorsement in blank, the terms of which are distinctly defined by law, and are, therefore, not subject to be varied by parol; the indorsement of the third person, in such case, belongs to that class known as irregular or anomalous indorsements, whose obligation depends upon the agreement of the parties, and, being ambiguous in that respect, parol evidence becomes admissible to show the terms of the agreement as actually made by the parties, or other facts showing their intention at the time.

The assumption that the stranger who places his name in blank on the back of a negotiable note payable to the order of the maker intends to contract as a second indorser is based upon the supposition that he knows the note cannot become effectual without the indorsement thereon of the maker's name. But he must also know the latter does not become the first indorser, nor contract the liability of an indorser at all, and that his own signature placed on the note before or at the time of its delivery creates no such contract; and since he does not thereby contract ⁶¹⁰ the liability of a regular indorser, the presumption that he did not intend to do so would be quite as reasonable and legitimate as that he intended to do what he knew his act would not accomplish. It is not doubted that such third person may, by proper stipulation, prescribe the extent of the liability he intends to incur by his indorsement, and make it that of a second indorser, or whatever else he chooses; but, in the absence of such stipulation, the nature of his undertaking, like that of other irregular indorsers, must be determined from the circumstances of the case. That neither the order in which the names appear on the back of the paper, nor the order in point of time in which they were placed there, is conclusive of the relation of the parties to the paper, or to each other, or of the liability incurred where the paper is for the accommodation of the maker, was held in the early case of *Douglass v. Waddle*, 1 Ohio, 413, 13 Am. Dec. 630, and in the late case of *Castle v. Rickly*, 44 Ohio St. 490; 58 Am. Rep. 839. In the first case, a note drawn by Barnes, payable to the order of Waddle, was indorsed by Waddle, and afterward by Douglass, and then discounted for the maker's benefit. Douglass paid half of the note after maturity, and sued Waddle for reimbursement, claiming that as second indorser he had recourse on Waddle, the first indorser, and that parol evidence was inadmissible to show any different relation between the parties. But

the court sustained Waddle in his claim that, as the indorsements were made before the discount of the paper, to give it credit, for the maker's accommodation, the obligation of Waddle and Douglass was that of cosureties for the maker, and, therefore, Douglass, having paid no more than his share of the debt, was not entitled to ⁶¹¹ recover against Waddle. The court said that: "When a note is indorsed and transferred by a payee, the indorsement is an actual contract between the indorser and indorsee of the note, that the latter received it for a consideration paid, and therefore the indorsement, like the making, is evidence of a debt due from the indorser to the indorsee, and the former is bound to pay if the maker, upon demand, fails to do so, and the requisite notice is given the indorser. But when the transaction between the parties is different, when it is a mere accommodation transaction, neither the reason of the rule nor the justice of the case admits of its application." And the court further said that: "Douglass knew that Waddle did not in fact own the note, but had indorsed it for the accommodation of Barnes, as surety. He knew that he himself indorsed it for the same purpose, and not as owner; it was intended to pay a debt due from Barnes, who, and not Waddle, was the person benefited. Douglass himself never had a beneficial interest in the note, and the money paid by him was paid for Barnes." So it may be said in this case the defendant in error must have known, when it placed its name on the back of the note in suit while in the hands of Cox, that its indorsement by him could have no other effect than to complete its execution, and that he would not thereby become a regular indorser of the paper, and that the defendant in error was not the owner of the note, nor had any beneficial interest in it, and therefore could not, and did not, become a regular indorser, but that the effect of its signature on the note was to give it credit, and enable Cox to negotiate it for his benefit. Speaking of irregular indorsements of this character, ⁶¹² and of the understanding of parties to them, the court, in *Douglass v. Waddle*, 1 Ohio, 413, 13 Am. Dec. 630, said: "In this country, the parties to this description of paper have usually understood their relation to be that of principal and surety, and upon this understanding have generally acted both in creating the paper and adjusting their liabilities upon it." And in *Randolph on Commercial Paper*, section 888, that author says: "That in a great majority of instances the purpose of all the original parties to such irregular indorsements was to furnish additional security by way of guarantor or surety to the actual or nominal payee."

That the defendant in error intended and understood its liability to be that of a surety, and not of a second indorser, is manifest from its subsequent conduct. The payment of five hundred dollars on the note by the defendant in error was made long after the maturity of the note, and after the failure to make the demand and give the notice necessary to charge the company as an indorser. It then was aware that, if its liability originally was that of an indorser only, that liability had then ceased; and it was under no obligation to make any payment to the plaintiff. It is not to be supposed that the check was given the plaintiff as a gratuity; the evidence shows that it was a payment on the note, which is a recognition of the validity of the demand. The payment, therefore, is at variance with the claim that the liability of the company was conditional, dependent upon proper demand and notice, and amounts to an unequivocal acknowledgment of an absolute and unconditional liability at the time of the payment. And this construction by the defendant in error of its obligation is in harmony with what we have considered ⁶¹³ it to be, both on principle and in view of the former adjudications of this court, that of a surety for the payment of the note. This conclusion has not been reached without a careful consideration of the cases which hold otherwise. But we have found ourselves unable to concur in their holdings, reluctant as we are to differ with the courts by which they were decided, and desirable as it is that there should be uniformity of decision on so important a question of commercial law.

Judgment reversed.

NEGOTIABLE INSTRUMENTS—EFFECT OF DRAWER'S INDORSEMENT OF NOTE PAYABLE TO HIS ORDER.—If the drawer of a note, who is also the payee, indorses his name upon it and delivers it to a third person, it is treated as his note payable to bearer: *First Nat. Bank v. Payne*, 111 Mo. 291; 33 Am. St. Rep. 520; *Jenkins v. Bass*, 88 Ky. 397; 21 Am. St. Rep. 344, and note; *Norfolk Nat. Bank v. Griffin*, 107 N. C. 173; 22 Am. St. Rep. 868.

NEGOTIABLE INSTRUMENTS—THIRD PERSON'S INDORSEMENT OF NOTE PAYABLE TO MAKER'S ORDER—ACCOMMODATION.—One who indorses a note made payable to the order of the drawer cannot be charged as maker, and can only be charged as indorser when the contract is perfected by the indorsement of the drawer's name as payee: *First Nat. Bank v. Payne*, 111 Mo. 291; 33 Am. St. Rep. 520. A note made payable by the maker to himself and signed by others as accommodation paper, to enable such maker to raise money thereon, and indorsed by him for that purpose, may be enforced, not only as against such maker and indorser, but also as against the other accommodation makers: *Norfolk Nat. Bank v. Griffin*, 107 N. C. 173; 22 Am. St. Rep. 868. Compare monographic note to *Altoona Second Nat. Bank v. Dunn*, 31 Am. St. Rep. 745-757, on the rights and liabilities of makers and indorsers of accommodation paper.

NEGOTIABLE INSTRUMENTS—PAROL EVIDENCE TO SHOW RELATION OF PARTIES—INDORSEMENT IN BLANK.—Parol evidence is always competent to show the real agreement and relation of the parties to a note: Note to Jenkins v. Bass, 21 Am. St. Rep. 348. If the indorsement upon the back of a note is in blank, or the names of the parties are so placed upon it, or the contract is so ambiguous upon its face, as to leave it doubtful what the real intention of the parties is, parol testimony may be resorted to in order to establish the true relation of the parties to the note and to each other: Note to Adrian v. McCaskill, 14 Am. St. Rep. 793.

IRWIN v. LOMBARD UNIVERSITY.

[56 OHIO STATE, 9.]

NEGOTIABLE INSTRUMENTS—CONSIDERATION—PROMISE TO MAKE GIFT.—A note executed by a private individual to an incorporated college as an endowment, and to aid it in the accomplishment of the defined purposes for which it is incorporated is based upon a sufficient consideration.

Action by Irwin, as administrator of one Gilpin, to recover the amount of a note executed by the latter in his lifetime in aid of the endowment fund of Lombard University. Judgment for the defendant, and plaintiff appealed.

Irwin & Murry, for the plaintiff in error.

Paxton, Warrington & Boutet, for the defendant in error.

¹⁸ SHAUCK, J. It does not appear that anything of value passed from the university to Gilpin as a consideration for the note, nor that he requested it to expend money on the faith of his promise; nor that he requested others to contribute to the endowment and support of the university, except as such requests are to be inferred from the circumstances of himself and others when they made donations and executed obligations of this character, and from the nature of the enterprise which he and other donors and obligors were alike desirous of promoting, and from the character and objects of the obligee. It does, however, appear that Gilpin and many others were interested in maintaining ¹⁹ Lombard University as an institution of learning, and that, a charter having been obtained from the legislature of Illinois, they undertook to contribute the funds necessary to the accomplishment of their purpose, some making donations in cash, others executing obligations of the character of that executed by Gilpin. It also appears that these donations and obligations were sufficient in amount and character to encourage the corporation to expend money and incur obligations in carrying out the purposes of its creation. The enterprise to which Gilpin

and others contributed and subscribed did not fail, but went forward.

In view of these facts counsel for the plaintiff in error contend that the note is a mere gratuity, void for want of consideration; and they invoke the general rule that a consideration is necessary to support a promise, relying especially upon *Johnson v. Otterbein University*, 41 Ohio St. 527, *Presbyterian Church v. Cooper*, 112 N. Y. 517, 8 Am. St. Rep. 767, and *Cottage Street etc. Church v. Kendall*, 121 Mass. 528, 23 Am. Rep. 286, as applying that rule to contracts of the character of this.

That a promise which does not secure a benefit to him who makes it or loss or detriment to him to whom it is made or in any manner influence the conduct of others is not enforceable, is a recognized general rule of the law. According to familiar definition, a consideration is a benefit to the promisor or a loss or detriment to the promisee; and this definition is sufficiently comprehensive to determine the validity of the promises which are usually the foundations of actions. But the cases are not infrequent in which to avoid arbitrary exceptions it has been found necessary to define more accurately and comprehensively. In the case of *Currie v. Misa*, L. R. 10 Ex. 153, it is said: ²⁰ "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." In Addison on Contracts, page 2, the author adopts the definition of the Indian act: "When, at the desire of the promisor, the promisee, or any other person, has done, or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing, something, such act or abstinence or promise is called a consideration for the promise." Certainty of adjudication is promoted by the nearest possible approach to scientific accuracy. The comprehensiveness of the definition lastly given is required by well-considered cases in which contracts have been enforced, especially the class of contracts commonly called subscriptions. It would not aid the present inquiry to show that decisions of unquestionable authority have affirmed the validity of contracts resting upon considerations not embraced in any of the foregoing definitions. For present purposes it is sufficient that all the alternatives embraced in the definitions quoted are required by the adjudications.

Tested by either of the comprehensive definitions quoted, the contract under consideration is valid and enforceable. By the

desire of Gilpin, many other persons made donations in money and executed obligations to the university of like character with his, and his promise was an inducement to their donations and promises. It is true that this doctrine is rejected by the supreme court of Massachusetts in *Cottage Street etc. Church v. Kendall*, 121 Mass. 528; 23 Am. Rep. 286. But in that state, one for whose benefit a contract is ²¹ made by others cannot maintain an action on it for want of privity. While in this state it has long been established that one for whose benefit others contract, upon a consideration sufficient as between themselves, may maintain an action for its enforcement: *Crumbaugh v. Kugler*, 3 Ohio St. 544; *Thompson v. Thompson*, 4 Ohio St. 333; *Emmitt v. Brophy*, 42 Ohio St. 82.

It is equally apparent that, prompted by the promises and gifts of Gilpin and others, "responsibility has been undertaken" by the university. It did not abandon the educational enterprise which these donors and promisors were desirous of promoting. Whether the object of the promisors was to secure the opportunity of educating their own children under such influences as they desired, or more generally, to contribute to the public welfare by increasing the facilities for higher education, it has been accomplished. It has been accomplished by the expenditure of money and the incurring of obligations in reliance upon their promises and similar promises from others.

Institutions of this character are incorporated by public authority for defined puposes. Money recovered by them on promises of this character cannot be used for the personal and private ends of an individual, but must be used for the purposes defined. To this use the university is restricted not only by the law of its being but as well by the obligations arising from its acceptance of the promise. A promise to give money to one, to be used by him according to his inclination and for his personal ends, is prompted only by motive. But a promise to pay money to such an institution ²² to be used for such defined and public purposes rests upon consideration.

The general course of decisions is favorable to the binding obligation of such promises. They have been influenced, not only by such reasons as those already stated, but in some cases, at least, by state policy as indicated by constitutional and statutory provisions. The policy of this state, as so indicated, is promotive of education, religion, and philanthropy. In addition to the declarations of the constitution upon the subject, the policy of the state is indicated by numerous legislative enactments pro-

viding for the incorporation of colleges, churches, and other institutions of philanthropy, which are intended to be perpetual, and which, not only for their establishment, but for their perpetual maintenance, are authorized to receive contributions from those who are in sympathy with their purposes and methods—the only source from which, in view of their nature, their support can be derived. Looking to the plainly declared purpose of the law-making department, promises made with a view to discharging the debts of such institutions, to providing the means for the employment of teachers, to establish endowment funds to give them greater stability and efficiency, and whatever may be necessary or helpful to accomplish their purposes or secure their permanency must be held valid. A view which omits considerations of this character is too narrow to be technically correct.

It is not contemplated by the parties, nor is it required by the law, that in cases of this character the institution shall have done a particular thing in reliance upon a particular promise. Not only do the law and the parties contemplate the ²³ permanency of the institution, but all promisors understand that the proceeds of their promises will be mingled with prior and subsequent donations and together constitute the financial support of the enterprise. The cases must be rare indeed in which such contributions or promises would be made if others had not been made before, and rarer still, in which they would be made but for the belief that others will be made afterward.

The requirements of the law are satisfied, the objects of the parties secured, and the perpetration of frauds prevented, by the conclusion that the consideration for the promise in question is the accomplishment, through the university, of the purposes for which it was incorporated and in whose aid the promise was made. The defense properly failed because there was neither allegation nor proof of abandonment of those purposes.

From the very numerous cases in which these views are sustained by adjudications in other states, the following are selected: *Troy etc. Academy v. Nelson*, 24 Vt. 189; *Marine Cent. Inst. v. Haskell*, 73 Me. 140; *Simpson etc. College v. Bryan*, 50 Iowa, 293; *Collier v. Baptist Educational Soc.*, 8 B. Mon. 68; *Garrigus v. Home etc. Missionary Soc.*, 3 Ind. App. 91; 50 Am. St. Rep. 262; *Barnett v. Franklin College*, 10 Ind. App. 103; *Amherst Academy v. Cows*, 6 Pick. 427; 17 Am. Dec. 387; *Roche v. Roanoke etc. Seminary*, 56 Ind. 198; also, *Beach on Contracts*, sec. 179, note 2.

In this state the reported cases, with but one exception, are

consistent with these views. Indeed, the validity of such promises is supported by all the cases in which it has been held that subscriptions for public purposes of such a nature are enforceable. For the law, regarding the substance rather than the form, permits no distinction ²⁴ because of the promises being in one instrument or several instruments. And the mutuality of the interests of the several promisors is not to be determined as a matter of time from the dates of their promises but from the continuity and perpetuity of the object to be accomplished. In *Commissioners v. Perry*, 5 Ohio, 56, this court established the validity of subscriptions to the accomplishment of a material purpose. The case of *Ohio etc. College v. Love*, 16 Ohio St. 20, shows that the purposes of philanthropy are entitled to the same regard, and that the character of the obligation as a subscription is not affected by the fact that it is a separate paper. It also establishes the enforceable character of an instrument differing in no legal sense from that before us.

An examination of the digest of the decisions of the various courts of the state will show that there has been a uniform adherence to these views until the case of *Johnson v. Otterbein University*, 41 Ohio St. 527, was decided by the commission. A majority of the court are of the opinion that there is not such identity of facts in that case and this that we are required here to overrule it.

Judgment affirmed.

SUBSCRIPTIONS—VALIDITY OF—CONSIDERATION.—A note given for a subscription to build and endow a college, upon the faith of which the payee has incurred expense, is valid: *Philomath College v. Hartless*, 6 Or. 158; 25 Am. Rep. 510. But no action can be maintained upon a promise contained in a subscription paper to pay money to "such persons as may be appointed trustees" for the erection of an academy, such promise being without consideration: *Farmington Academy v. Allen*, 14 Mass. 172; 7 Am. Dec. 201, and note. It is a sufficient consideration for a promissory note that it was given to the trustees of a charitable institution, after a subscription for charitable purposes, payable to such trustees, the note reading for value received, and expressly referring to the subscription whose purposes were in process of execution: *Amherst Academy v. Cowls*, 6 Pick. 427; 17 Am. Dec. 387.

PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS
RAILWAY COMPANY v. SHEPPARD.

[56 OHIO STATE, '68.]

CONTRACTS—CONFLICT OF LAWS.—If a contract is made in one state to be performed in part in another, and an action is brought for a breach of that part of the contract, the rights of the parties must be determined according to the law of the latter state.

CONTRACTS—CONFLICT OF LAWS—PLACE OF PERFORMANCE.—If a carrier makes a contract and receives livestock in one state to be transported to a designated place in another, and the stock are injured during transportation in the latter state, through the negligence of the carrier, the rights of the parties, in an action to recover for the injury, are governed by the laws of the latter state.

CONTRACTS—PLACE OF PERFORMANCE—PAYMENT OF FREIGHT.—If a contract of carriage is silent as to the time and place of payment of the freight, it is payable at the time of the delivery of the property to the consignee, and necessarily at the place of delivery. Hence the place of delivery is the place of performance of such contract.

CONTRACTS—CONFLICT OF LAWS—PLACE OF PERFORMANCE.—A contract made in one state, to be performed in another, is governed by the laws of the latter. They determine its validity, obligation, and effect.

CARRIERS—NEGLIGENCE—LIMITATION OF LIABILITY. A common carrier cannot, by special agreement, relieve himself from the consequences of his own negligence, nor limit his liability for losses resulting therefrom.

DAMAGES TO LIVESTOCK—EVIDENCE OF VALUE.—In an action to recover for injury to a horse, evidence of his pedigree and that some of his blood relations were celebrated trotters, is competent and admissible as affecting his value.

EVIDENCE—RECORD OF SPEED.—The annual reports of the "American Trotting Association" are themselves admissible in evidence as records of speed made by horses; but information obtained by a witness from such published reports is not admissible in evidence.

WITNESSES—EXPERTS—DEFECTS IN CAR-WHEELS.—One who has been engaged in building railroad cars for ten years, and during that time has given particular attention to carwheels and their construction, is competent to give an opinion on the value of the hammer test as a means of detecting breaks in car wheels.

Action to recover damages for injury to livestock during transportation through the alleged negligence of a common carrier. Sheppard delivered a carload of horses at Lovington, Illinois, to the Terre Haute & Indianapolis Railroad Company which the latter agreed to transport over its line to Indianapolis, Indiana, and there deliver to the plaintiff in error for transportation to Columbus, Ohio. The contract with the first carrier was in writing, and contained a stipulation that, "in case of any loss or damage, the liability of said company, and of any connecting line, shall not exceed one hundred dollars per head."

The horses were safely delivered to the plaintiff in error at Indianapolis, but while being transported over its line in Ohio, a defective wheel on one of its cars gave way, and one of the horses was killed and the others injured. Sheppard brought suit in Ohio to recover damages for the injury, and recovered more than the amount limited by the contract of carriage. That judgment was affirmed by the circuit court. The railroad company brought error to reverse both of such judgments.

Watson, Burr & Livesay, and F. M. Sackett, for the plaintiff in error.

J. W. Mooney, for the defendant in error.

77 WILLIAMS, C. J. It is not contended that there is sufficient ground for disturbing the judgments below for lack of evidence tending to prove that the negligence charged against the defendant was the cause of the plaintiff's loss; but it is claimed the evidence did not establish gross or willful negligence, and that under the law of Illinois, where the contract for the transportation of the horses was made, it was competent for a common carrier of goods to limit his liability, by special agreement, except as against his negligence of that character. And the principal contention of counsel for the plaintiff in error is, that the trial court erred in its charge concerning the law of Illinois on that subject; the complaint being that the charge, in substance was a statement of the rule established in this state, instead of that which obtains in Illinois. The parties put in evidence several decisions of the supreme court of that state to prove the law of the state, and counsel in argument seek to maintain different interpretations of those decisions favorable to their respective clients. But if the rights of the parties are to be determined by the laws of this state, and not by those of Illinois, the charge was not erroneous or prejudicial, though given as the law of that state.

There is nothing to show that any traffic arrangement existed between the two railroad companies, nor any agency or authority of one to contract for the other; and assuming that the plaintiff in error, by accepting the horses from the other company, and undertaking to transport them over its line, became a party to the contract with the plaintiff below, it did so at Indianapolis; and its contract was to carry the horses from that point to their destination. No part of its performance of the contract **78** was to take place in the state of Illinois; and if the carriage of the property over that part of its road which is located in Indiana

could be considered as a performance having the effect of making the rights of the parties under the contract subject to the laws of that state, none differing from those of this state were pleaded or proven, and there is no presumption that they were different. But if the law of Indiana were shown to be the same as that of Illinois is claimed to be, it would not be the law governing this contract. We understand the rule to be, that where a contract is made in one state to be performed in part in another, and an action is brought for a breach of that part of the contract, the rights of the parties must be determined according to the law of the latter state: Story on Contracts, sec. 655; *Barter v. Wheeler*, 49 N. H. 9; 6 Am. Rep. 434. It is apparent, however, from the face of this contract that it was to be wholly performed in this state. The property was to be transported to Columbus, where the consignee was entitled to receive it from the carrier; the latter was bound to deliver it at that place. The contract could be performed by the company nowhere else. Carrying the property through a portion of the state of Indiana did not constitute performance; that was merely a means of enabling the company to perform by delivery of the property at its destination. And the contract being silent as to the time and place of payment of the freight, it was payable at the time of the delivery of the property to the consignee, and necessarily at the place of delivery; so that the place of performance by both parties to the contract was in this state. And the rule is, that when it appears from a contract made in one ⁷⁹ state or country that it is to be performed in another, the presumption is, that it was entered into with reference to the laws of the latter, and those laws determine its validity, obligation and effect: *Kanaga v. Taylor*, 7 Ohio St., 142; 70 Am. Dec. 62. Other cases on this subject are largely collected in the briefs of counsel.

It is also the well-settled law of this state that a common carrier cannot, by special agreement, relieve himself from the consequences of his own negligence, nor limit his liability for losses resulting therefrom. This rule is laid down in *Welsh v. Pittsburg etc. R. R. Co.*, 10 Ohio St. 65; 75 Am. Dec. 490, as follows: "A railroad company, acting as a common carrier of livestock, cannot, by special contract, procure exemption from responsibility for losses arising from its own neglect of the duties incident to such employment. Such common carrier is liable for damages resulting from defective and unsafe cars or vehicles of transportation, notwithstanding an express contract to the contrary": And see *Davidson v. Graham*, 2 Ohio St.

132; *Graham v. Davis*, 4 Ohio St. 362; 62 Am. Dec. 285; *Cleveland etc. R. R. Co. v. Curran*, 19 Ohio St. 3; 2 Am. Rep. 362; *Cincinnati etc. R. R. Co. v. Pontius*, 19 Ohio St. 221; 2 Am. Rep. 391; *Knowlton v. Erie Ry. Co.*, 19 Ohio St. 263; 2 Am. Rep. 395; *United States Exp. Co. v. Backman*, 28 Ohio St. 144; *Express Co. v. Schwab*, 53 Ohio St. 659.

We find no error in the charge of the court that could operate to the prejudice of the defendant below.

One of the animals injured while in transit over the defendant's road was a mare called Mora; and the plaintiff was allowed to give evidence of her pedigree, showing her blood relationship to the celebrated trotting horse, Jay Eye See, and other noted horses. This evidence was⁸⁰ objected to by the defendant, and the objection here urged against it is, that it was too remote. But the pedigree of a horse usually enters into the estimate of its value; and that of horses kept for racing purposes is considered of importance among dealers in horses of that kind; and we think the evidence was competent as affecting the value of the mare.

For the purpose of proving the speed of Jay Eye See, and other horses to which Mora was related in trotting and pacing, the plaintiff was permitted to testify to information he obtained from the annual reports of the American Trotting Association which, it appeared, keeps a record of extraordinary speed made by horses at races held under authority of recognized racing organizations; and it further appeared that the record is issued by the association in published volumes which are accepted and acted upon by handlers and dealers in trotting, pacing and running horses, and persons interested in that kind of stock, as the authentic and official record of the speed shown by noted horses. The defendant objected to this testimony, particularly to that purporting to be information obtained by the witness from the published record. There would seem to be no serious objection to evidence of the fact that the horses had a record for extraordinary speed, nor to proof of that fact by the production of the record. It might be impracticable, if not impossible, to prove the speed of a horse by eye-witnesses of the races, especially after the lapse of a long time. If such witness were called he could scarcely do more than testify to the speed as that was announced by the judges, or as shown by the published account; and it would become necessary for the witness to⁸¹ refer to the record kept by those in charge, or published under their authority. And when that record is published by such au-

thority, and as so published is accepted and acted upon by those interested in, and conversant with, such matters as authentic and official, we see no reason why it may not be admissible whenever the original would be. The fact that there is such published record, so acknowledged and recognized, enters into the estimation of the value of the horse, and that of his descendants and relatives, among dealers in horses of that kind. The speed of the horse, if that were not generally known, might not be so important as affecting the value. But while such evidence was admissible, it was clearly incompetent for the witness to testify to information which he claimed to have obtained from reading the record as published by the Trotting Association; and for this error the judgments below must be reversed.

Another question made relates to the qualification of a witness by the name of Cox who was permitted to give an opinion on the value of the hammer test as a means of detecting breaks in car wheels. The witness testified that he had been engaged in the business of building railroad cars for ten years and during that time had given particular attention to car wheels and their construction. The testimony was competent, its weight was for the jury.

Judgment reversed.

CONTRACTS—CONFLICT OF LAWS—CARRIERS.—The obligation of a contract made and to be performed in another state must be determined by the laws of that state: *Crumlish v. Central Imp. Co.*, 38 W. Va. 390; 45 Am. St. Rep. 872, and note. Where the parties to a contract reside in different states or countries, the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the laws of the place of performance: Monographic note to *McGarry v. Nicklin*, 55 Am. St. Rep. 48, on the place of the contract. See *Forepaugh v. Delaware etc. R. R. Co.*, 128 Pa. St. 217; 15 Am. St. Rep. 672. A contract with a common carrier, to be performed partly in the state wherein it was made and partly in another state, is governed by the laws of the former, when it does not appear that the parties intended to be bound by the law of any other state: *Davis v. Chicago etc. Ry. Co.*, 93 Wis. 470; 57 Am. St. Rep. 935, and note.

CARRIERS—CONTRACTS LIMITING LIABILITY FOR NEGLIGENCE.—A railroad company while performing its duty as a common carrier cannot protect itself by contract from liability for negligence to a passenger: *Louisville etc. Ry. Co. v. Keefer*, 146 Ind. 21; 58 Am. St. Rep. 348, and note. A carrier may restrict its liability by special contract, although it cannot thus exonerate itself from the consequences of its own negligence: Note to *Davis v. Chicago etc. Ry. Co.*, 57 Am. St. Rep. 943.

CARRIERS—FREIGHT—WHEN EARNED.—A common carrier receiving goods for carriage without requiring prepayment of freight charges is not entitled to demand such charges until its duty of carriage has been performed, either by delivery or an offer to deliver at the place of destination: *Grand Rapids etc. R. R. Co. v. Diether*,

10 Ind. App. 206; 53 Am. St. Rep. 385, and note. See monographic note to Crawford *v.* Williams, 60 Am. Dec. 149-154, on the nature of freight and when recoverable.

WITNESSES—COMPETENCE AS EXPERTS—RAILROAD EMPLOYÉES.—As to what questions railroad employés have been allowed to give expert testimony upon, see monographic note to Hammond *v.* Woodman, 66 Am. Dec. 243; Lewis *v.* Seifert, 116 Pa. St. 628; 2 Am. St. Rep. 631; Gutridge *v.* Missouri Pac. Ry. Co., 94 Mo. 468; 4 Am. St. Rep. 392.

HEATON *v.* ELDRIDGE.

[56 OHIO STATE, 87.]

CONTRACTS—CONFLICT OF LAWS.—The law of the state where a contract is executed and is to be performed, enters into, and becomes a part of, the contract, in the sense that its validity and obligatory effect are to be determined and controlled by that law; and when valid there the contract will be sustained everywhere, and accorded the interpretation required by the law of the place where made, when that law is properly brought to the attention of the court, unless the contract is against good morals, or contravenes a settled policy of the state in whose tribunals its enforcement is sought.

CONTRACTS—CONFLICT OF LAWS.—PRINCIPLES OF COMITY, as applied to contracts, do not extend so far as to require that the remedial system and methods of procedure by one state shall yield to those of another, nor that either shall recognize or enforce those of the other.

CONTRACTS—CONFLICT OF LAWS—INTERPRETATION AND REMEDY.—Contracts receive their sanction and interpretation from the law of the place where they are made and to be performed; but the remedy upon them must be pursued according to the law of the place where they are sought to be enforced.

CONTRACTS—EVIDENCE.—The evidence by which a contract shall be proved is no part of the contract itself, but its admission or rejection becomes a part of the proceeding on the trial, where its competency and sufficiency must be determined; and, when the required evidence is lacking, the court must refuse the enforcement of the contract.

EVIDENCE.—STATUTORY REGULATION prescribing the mode or measure of proof necessary to maintain an action or defense pertains to the remedy, and constitutes a part of the procedure of the forum in administering the remedy.

STATUTE OF FRAUDS—CONFLICT OF LAWS.—Under the Ohio statute of frauds, an agreement which by its terms is not to be performed within one year from the time that it is made cannot be enforced in that state, unless the agreement, or some memorandum thereof, is in writing signed by the party to be charged or by some one authorized by him to sign it, although such agreement is made in another state where it might be proved by parol evidence.

STATUTE OF FRAUDS—EVIDENCE—MEASURE OF PROOF.—The statute of frauds prescribes a rule of procedure to be observed by the court in which the enforcement of the contract is sought; and the mode and measure of proof required by such statute must be produced in order to establish the contract, no matter in what state or country it may have been made.

Action to recover on promissory notes. The answer set up a counterclaim for damages resulting from the breach of an oral agreement between the parties litigant, whereby the plaintiff agreed to employ the defendants as her agents for the sale of cigars for a stated compensation and for a specified time longer than one year. This agreement was made and to be performed in Pennsylvania, where the law did not require such agreements to be written, nor a memorandum thereof to be signed by one of the parties, nor forbid the bringing of an action thereon. Plaintiff specifically denied the allegations of such answer, and pleaded the statute of frauds of Ohio. Plaintiff had judgment in the trial court, which was reversed in the circuit court, and a writ of error was then prosecuted to this court.

Holmes & Huling and H. H. McMahon, for the plaintiff in error.

S. N. Owen and Powell, Ricketts & Black, for the defendants in error.

⁹⁷ WILLIAMS, J. It is provided by section 4199 of the Revised Statutes that: "No action shall be brought . . . upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged therewith, or some person thereunto by him or her lawfully authorized."

There is no doubt that the law of the state or country where a contract is executed and is to be performed enters into and becomes a part of the contract, in the sense that its validity and obligatory ⁹⁸ effect are to be determined and controlled by that law; and when valid there, the contract will be sustained everywhere, and accorded the interpretation required by the law of the place where made, when the law is properly brought to the attention of the court, unless the contract is against good morals, or contravenes a settled policy of the state or country in whose tribunals its enforcement is sought. The rule is founded on the presumption that parties contract with reference to the laws to which they are subject at the time, and on the principles of comity prevailing among civilized nations. But it does not extend so far that the remedial system and methods of procedure established by one state or country will yield to those of another, nor that either will recognize or enforce those of the other. Each provides and alters at will its

own rules and regulations in the administration of justice, to which those seeking redress in its courts must conform.

So that the solution of the question presented involves the inquiry whether the provision of the statute above quoted appertains to the remedy on contracts to which it refers, or goes to their validity. We have found no expression on the question by this court, though it has been the subject of repeated adjudications both in England, and in several of the states. This provision of our statute is copied from the fourth section of the English statute of frauds; and in the case of *Leroux v. Brown*, 12 Com. B. 801, where the precise question we have before us arose, it was held that the section affected the remedy only, and was so applied as to defeat a recovery on a parol contract not to be performed within a year, which was made in France, where it was capable of proof by ⁹⁹ parol evidence. The case appears to have been thoroughly argued and considered, and the decision has since been adhered to by the English courts, and followed or cited with approbation by many American cases, and generally accepted by text-writers, as the established law: *Bain v. Whitehaven*, 3 H. L. Cas. 1; *Williams v. Wheeler*, 8 Com. B., N. S., 316; *Madison v. Alderson*, L. R. 8 App. Cas. 467, 488; *Pritchard v. Norton*, 106 U. S. 127; *Downer v. Cheesbrough*, 36 Conn. 39; 4 Am. Rep. 29; *Townsend v. Hargrave*, 118 Mass. 326; *Bird v. Munroe*, 66 Me. 337; 22 Am. Rep. 571; *Emery v. Burbank*, 163 Mass. 326; 47 Am. St. Rep. 456; *Wald's Pollock on Contracts*, 604-607, and notes; *Anson on Contracts*, 79; *Brown on the Statute of Frauds*, secs. 115 a, 136; *Agnew on the Statute of Frauds*, 64-66; *Wood on the Statute of Frauds*, sec. 166; *Wharton on Conflict of Laws*, sec. 690. And while the case of *Leroux v. Brown*, 12 Com. B. 801, has been criticised, those criticisms have been directed chiefly to the distinction drawn between the fourth and seventeenth sections of the statute, and the opinion expressed that the language of the latter section was such as to render invalid contracts within its provisions, for which reason it did not, as did section 4, constitute a regulation affecting the remedy. This distinction has not met with general approval, and has been repudiated in some of the latter cases, which hold that the seventeenth section relates to the remedy, like section 4, and that the difference in the phraseology of the two sections is not such as to warrant a different interpretation in that respect but that both sections prescribe rules of evidence which courts, where the remedy is sought, are required to observe: *Townsend v. Hargrave*, 118 Mass. 326; *Bird v. Monroe*, 66 Me. 337, 343; 22 Am. Rep. 571; ¹⁰⁰ *Pritch-*

ard v. Norton, 106 U. S. 127; Madison v. Alderson, L. R. 8 App. Cas. 467-488; Brown on the Statute of Frauds, sec. 136, note.

In Story on the Conflict of Laws, section 262, a different view of the question was taken, which has been adopted by some courts; but the decided weight of authority is in accordance with the decision in Leroux v. Brown, 12 Com. B. 801. The views of Judge Story were brought to the attention of the court in that case; and, in an edition of his work published after that case was decided, a section was added, in which it is said that "the statute of frauds is, like the statute of limitations, a matter affecting the remedy merely; and if by the law of the forum no action can be maintained on a particular oral contract, if made in that country, the like rule will obtain as to a contract made elsewhere, although it was valid by the law of the place where made": Story on Conflict of Laws, 7th ed., sec. 576.

The question being an open one in this state, we are not disinclined to consider it on principle. The principle which must control its decision is the fundamental one that contracts receive their sanction and interpretation from the law of the place where they are made and to be performed; but the remedy upon them must be taken and pursued according to the law of the place where they are sought to be enforced; and a decision of the question will be reached when it is ascertained within which of these rules the statute of frauds finds its appropriate place. The language of the statute under consideration, that no action shall be brought on any agreement therein mentioned unless it, or "some memorandum or note thereof, is in writing and signed by the party to be charged," fairly imports ¹⁰¹ that the agreement precedes the written memorandum, and may exist as a complete and valid agreement, independent of the writing. The memorandum, which is merely the evidence of the contract, may be made and signed after the completion of the agreement, and even a letter from the party to be charged, reciting the terms of the agreement, is sufficient to satisfy the requirements of the statute; but it cannot be said that the letter constitutes the agreement; that was made when the minds of the parties met with respect to its terms, and the letter furnishes the necessary evidence to prove the agreement in an action for its enforcement. And, generally, when parties reduce their contracts to writing, the writing becomes the evidence of the agreement which they had previously entered into; and, having adopted

that mode of evidencing their agreement, the parties are not allowed to make proof of it by verbal testimony. This statute, in plain terms, forbids the maintenance of an action in any of the courts of this state, on any agreement which, by its terms, is not to be performed within a year, unless the action is supported by the required written evidence. The evidence by which a contract shall be proved is no part of the contract itself, but its admission or rejection becomes a part of the proceeding on the trial, where its competency and sufficiency must be determined. When the required evidence is lacking, the courts must refuse the enforcement of the contract. And it seems clear that such a statutory regulation prescribing the mode or measure of proof necessary to maintain an action or defense pertains to the remedy, and constitutes a part of the procedure of the forum in administering the remedy. The statute contains ¹⁰² no exception or limitation on account of the place where the contract was entered into, or to be performed; but denies remedy on any contract of the kind designated by it, wherever made, which cannot be established by the evidence required.

That such was the intended scope of the statute is manifest when the purpose of its enactment is considered. Its well-known design was, as declared in the English statute of frauds, after which ours and those of most of the states are patterned, to prevent perjuries and fraudulent practices which were the outgrowth of the general admission of parol testimony to prove almost every kind of contract, and by means of which people were often stripped of their estates, and burdened with liabilities by testimony of alleged conversations and verbal declarations. The opportunities thus afforded for the perpetration of frauds constituted temptations so strong for the commission of perjuries that legislation excluding that kind of evidence in a large number of cases became or was considered a necessity. These mischiefs, to remedy which was the chief aim of the statute, arose from the admission of oral evidence in trials of actions and suits, and in the course of judicial procedure; and, obviously, the opportunity and temptation for the commission of frauds and perjuries, by admitting parol proof to establish the contracts with which the statute is concerned, are not any the less in cases where the agreement was made in another state or country than in those where the agreement involved is one made in this state; the mischief is the same in either case, and to allow the former to be so proved would, that far at least, prevent the accomplishment of the salutary purposes of the stat-

ute. ¹⁰³ The statute is founded on considerations of public policy, and those of a moral nature, and declares a peremptory rule of procedure which the courts of this state are not at liberty to disregard in deference to the laws of any other state or country.

The agreement set up in the defendant's answer could not, according to its terms, be performed within one year from the time it was made. An action upon it could be supported only by evidence which complied with the statutory requirements; and to be available as a counterclaim, which is a cross-action, such evidence was indispensable. It was not offered, and the court, we think, properly excluded the parol evidence relied on to prove the agreement. The judgment of the circuit must therefore be reversed, and that of the common pleas affirmed.

Judgment accordingly.

CONTRACTS—CONFLICT OF LAWS—ENFORCEMENT OUTSIDE JURISDICTION WHEREIN MADE.—The place of the contract regulates its validity, interpretation, and the nature of its obligation: *Schultz v. Howard*, 63 Minn. 196; 56 Am. St. Rep. 470, and note; *Peet v. Hatcher*, 112 Ala. 514; 57 Am. St. Rep. 45, and note. The laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to and incorporated in its terms: *Miller v. Willson*, 146 Ill. 523; 37 Am. St. Rep. 186, and note; *Falls v. United States Sav. etc. Co.*, 97 Ala. 417; 38 Am. St. Rep. 194. But while a contract valid where made is valid everywhere, it is not necessarily enforceable everywhere (*Emery v. Burbank*, 163 Mass. 326; 47 Am. St. Rep. 456, and note), because matters respecting the remedy, such as the bringing of suits, admissibility of evidence, and statutes of limitation, depend upon the law of the place where the suit is brought: *Ruhe v. Buck*, 124 Mo. 178; 46 Am. St. Rep. 439, and note. See monographic notes to *Gist v. Western Union Tel. Co.*, 55 Am. St. Rep. 774-778; and *McGarry v. Nicklin*, 55 Am. St. Rep. 44. As to such portions of a contract as pertain to and affect the remedy, the principle is applicable that all matters pertaining to the remedy, and to the proper course of enforcing the contract, are determinable by the law of the place where the suit is brought: *Seay v. Palmer*, 93 Ala. 381; 30 Am. St. Rep. 57, and note.

WEBER v. SHAY.

[56 OHIO STATE, 116.]

CONTRACTS—ILLEGALITY—AGREEMENT TO PREVENT INDICTMENT.—A contract by an attorney at law to render his services in preventing the finding of an indictment against one accused or suspected of crime is against public policy, illegal, and void as matter of law, regardless of the belief of the attorney as to the guilt or innocence of the accused, and cannot be recovered upon.

Action by Shay & Cogan, attorneys at law, against Weber to recover upon a contract entered into by defendant with plaintiffs, by which it was agreed that they should protect the interests of Weber and one Anderson in certain criminal actions then and there threatened and suggested and pending in the court of common pleas and in the United States circuit court against said Weber and Anderson for alleged violation of the criminal laws. The services were to be rendered in preventing an indictment or indictments, against said Weber and Anderson, and in defending said Anderson against an indictment against him for burglary already found. In consideration for such services Weber agreed to pay the plaintiffs one thousand dollars. At the close of the evidence, the defendant requested that the following charge be given to the jury: "If plaintiffs had knowledge that a person was guilty of felony, they had no right thereafter to use any means to prevent the indictment of such person for such felony, and any effort to do so would be unlawful on their part, and they could not recover on a contract to do so." The court refused to so charge and defendant excepted. Plaintiffs recovered judgment in the trial court, which was affirmed in the circuit court, and the defendant prosecuted a writ of error to this court.

F. Brandon, G. A. Burr, and Clark & Dechant, for the plaintiff in error.

Runyan & Stanley, for the defendants in error.

123 SHAUCK, J. In view of the verdict, the overruling of the motion for a new trial, and the judgment of affirmance in the circuit court, the making of the contract is to be regarded as established. And although the defense of Anderson on the trial of indictments found against him would have been the subject of a valid contract if not connected with any other agreement, the jury were properly instructed that the contract was entire and there could be no recovery if the services to be rendered in behalf of Weber were illegal. Whether they were illegal or not is, therefore, the only question for consideration

here. Upon this subject it is said that the trial court erred in refusing to give the instruction requested and in overruling the motion for a new trial because the verdict was contrary to law.

It is obvious that the instruction requested was more favorable to Weber than that which the court gave upon the same subject. According to the request, if the plaintiffs had knowledge of Weber's guilt, the law gave to such knowledge the conclusive effect to defeat a recovery for services rendered to prevent the finding of an indictment against him. According to the instruction given, it had no conclusive effect, but might be considered by the jury, in connection with other evidence, in determining whether the plaintiffs had acted in good faith in what they did under their employment.

¹²⁴ The considerations of public morals and policy involved, and the authorities upon the subject, lead to the conclusion that the instruction requested was more favorable to the plaintiffs than the law permits. The services in behalf of Weber were to be rendered for the purpose of influencing the action of grand juries whose proceedings are secret, and thus impede the usual course of justice and prevent the orderly inquiry into the alleged commission of an offense against the public. The contract differs from the ordinary illegal agreement to stifle a prosecution only in that the element of restitution is wholly absent, and the plaintiffs were prompted by hope of reward unmixed with any motive less base.

Public policy requires that all offenses against the law shall be punished and all contracts which tend to suppress legal investigations concerning them are immoral and void. Courts are charged with the duty of administering the law, and they should not lend their aid to the enforcement of any contract which looks to its subversion. This would seem obvious, and it has the sanction of more authorities than it is practicable to cite: *Roll v. Raguet*, 4 Ohio, 400; 22 Am. Dec. 759; *Hinesburgh v. Sumner*, 9 Vt. 23; annotated 31 Am. Dec. 599; *Shaw v. Reed*, 30 Me. 105; *Ormerod v. Dearman*, 100 Pa. St. 561; 45 Am. Rep. 391; *Arrington v. Sneed*, 18 Tex. 135; *Averbeck v. Hall*, 14 Bush, 505; *Crisup v. Grosslight*, 79 Mich. 380; *Tool Co. v. Norris*, 2 Wall. 45; *Barron v. Tucker*, 53 Vt. 338; 38 Am. Rep. 684; *Ricketts v. Harvey*, 106 Ind. 564.

It is not material whether the plaintiffs knew or believed that Weber was guilty or not. The inquiry into their knowledge or belief which the requested instruction contemplated would have

¹²⁵ been impracticable and irrelevant. Their belief in his innocence would not have made the contract valid: *Schultz v. Culbertson*, 46 Wis. 313.

Nor should it have been left to the jury to determine whether there had actually occurred the secret and corrupt practice which the contract encouraged. As said by Justice Field in *Tool Co. v. Norris*, 2 Wall. 45, "the decision has not turned upon the question whether improper influences were contemplated or used, but upon the corrupting tendency of such agreement.

Judgment of circuit and common pleas courts reversed.

CONTRACTS BETWEEN ATTORNEY AND CLIENT—WHEN VOID.—Among contracts which tend to interfere with the due administration of justice and are therefore held to be void, as contrary to public policy, is an agreement by an attorney at law to procure the quashing of a criminal prosecution for a contingent fee: *Monographic note to Bowman v. Phillips*, 13 Am. St. Rep. 298, on contracts of attorneys which are void as against public policy.

BALTIMORE AND OHIO RAILROAD Co. v. STANKARD.

[56 OHIO STATE, 224.]

CONTRACTS OUSTING COURTS OF JURISDICTION.—Parties cannot by contract take away the jurisdiction of courts to determine their rights and liabilities; and an attempt to do so is void.

CONTRACTS OUSTING COURTS OF JURISDICTION—RELIEF RULES OF RAILWAY.—A rule of the relief department of a railway company providing that all claims of beneficiaries shall be submitted for determination to the superintendent of the company, whose determination shall be final and conclusive unless appealed from to the advisory committee, and, if appealed from, the decision of such committee shall be final and conclusive upon all parties without appeal, is void in so far as it attempts to oust the courts of jurisdiction to determine the liabilities of the parties; and a beneficiary whose valid claim has been rejected by such advisory committee may maintain an action to recover thereon.

J. H. Collins and H. L. Peeke, for the plaintiff in error.

Phinney & Merrill, for the defendants in error.

²²⁹ BURKET, C. J. The questions as to whether or not Michael Stankard was in the employ of the company at the commencement and during the time of his sickness, and at his death, and whether or not the company was properly notified of his sickness, are questions of fact submitted to the jury upon testimony competent in character, meager and unsatisfactory in substance, but from which a jury might find, as this jury did, in favor of the plaintiff below.

The only matter in the case deemed worthy of report, is as to the validity and scope of rule 11. The following is a copy of the rule:

"Rule 11. All claims of members of the relief feature, their beneficiaries or other representatives, or of depositors or borrowers of the savings feature, or of pensioners, arising under these regulations, and all questions or controversies of whatsoever character arising in any manner, or between any parties, or persons, in connection with the relief department or the operation ²³⁰ thereof, whether as to the construction of language or meaning of the regulations, or as to any writing, decision, instruction, or acts in connection therewith, shall be submitted to the determination of the superintendent of the relief department, whose decisions shall be final and conclusive thereof, subject to the right of appeal in writing to the committee directly or through the advisory committee within thirty days after notice to the parties interested in the decision.

"When an appeal is taken to the committee, it shall be heard by them without further notice at their next stated meeting, or at such future meeting or time as they may designate, and shall be determined by vote of the majority of a quorum, or of any other number not less than a quorum of the members present, and the decision arrived at thereon by the committee shall be final and conclusive upon all parties, without exception or appeal."

The claim was presented by the parents to the superintendent of the relief department, who did not allow it, but referred it to the advisory committee, and that committee declined payment of the claim, "because of his failure to report in accordance with the regulations," and so notified plaintiff below.

The reference of the claim to the advisory committee, and its action thereon and notice of such action to the parents, was the equivalent, and took the place of an appeal, so that the case stands as if an appeal had been taken and the claim rejected by the advisory committee.

It is claimed by the railroad company that the decision arrived at by the superintendent if no appeal is taken, or by the committee in case of an appeal, is ²³¹ final and conclusive, and a complete bar to an action for the recovery of the benefits.

If the superintendent had rejected the claim, and so notified the parents, and they had failed to take an appeal to the advisory committee, it may well be doubted whether they could have sustained an action in court upon the claim, because in

such beneficial associations it is held that the claimants must pursue to the full extent the remedy provided by the rules and regulations before resorting to actions at law. This is for the benefit of both parties, and is reasonable: *Supreme Council etc. v. Forsinger*, 125 Ind. 52; 21 Am. St. Rep. 196.

But in the case at bar the equivalent of an appeal was had, and the advisory committee acted upon and rejected the claim, and then the parents were compelled to either abandon the claim, or resort to an action at law.

Does rule 11 bar such action? We think not. A long line of decisions hold that parties cannot by contract take away the jurisdiction of the courts in such cases, and that the attempt to do so is void: *Supreme Council etc. v. Forsinger*, 125 Ind. 52; 21 Am. St. Rep. 196; *Whitney v. National etc. Assn.*, 52 Minn. 378; *Insurance Co. v. Morse*, 20 Wall. 445; *Stephenson v. Piscataqua etc. Ins. Co.*, 54 Me. 55; *Mentz v. Armenia etc. Ins. Co.*, 79 Pa. St. 478; 21 Am. Rep. 80; *Reed v. Washington Ins. Co.*, 138 Mass. 572.

While courts usually base their decisions upon the ground that parties cannot, by contract, in advance oust the courts of their jurisdiction of actions, a more satisfactory ground is, that under our constitution all courts are open, and every person, ²³² for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law: Const., art. 1, sec. 16.

Courts are created by virtue of the constitution, and inhere in our body politic as a necessary part of our system of government, and it is not competent for anyone, by contract or otherwise, to deprive himself of their protection. The right to appeal to the courts for the redress of wrongs is one of those rights which is in its nature under our constitution alienable, and cannot be thrown off, or bargained away.

There is a class of contracts which provide that the value of certain property, the amount of loss sustained, the quantity, quality, character, and value of work performed on improvements, and the acceptance of a building by an architect, and other like matters, shall be determined by a certain person named in the contract, and his determination shall be final. Such contracts are lawful, and are usually upheld. They do not oust the courts of their jurisdiction over the subject matter, but only provide a safe and speedy manner of fixing definitely some fact which is usually of a complex and difficult nature, and one that

it would not be easy to establish by evidence. Such fact, when ascertained and fixed by the person, and in the manner provided by the terms of the contract, is conclusive between the parties, in the absence of fraud or manifest mistake; but the parties are at liberty, after so fixing such fact, to go into court and litigate such differences as may still exist between them. In such contracts, the person selected to determine the particular fact becomes the agent of both parties for that purpose, and what is done by such agent is, in legal effect, done by the parties ²³³ themselves, and therefore there is no hardship in holding them conclusively bound thereby, in the absence of fraud or mistake. The following cases are examples of such contracts: *Easton v. Pennsylvania etc. Canal Co.*, 13 Ohio, 81; *Mansfield etc. R. R. Co. v. Veeder*, 17 Ohio, 385; *Mundy v. Louisville etc. R. R. Co.*, 67 Fed. Rep. 633; *Kane v. Stone Co.*, 39 Ohio St. 1; *North Lebanon R. R. Co. v. McGrann*, 33 Pa. St. 530; 75 Am. Dec. 624; *Faunce v. Burke*, 16 Pa. St. 469; 55 Am. Dec. 519; *Monongahela Nav. Co. v. Fenlon*, 4 Watts & S. 205; *Hamilton v. Liverpool etc. Ins. Co.*, 136 U. S. 242. See, also, 33 Cent. L. J. 168.

The following cases also throw some light upon the question involved in this case: *Guaranty etc. Co. v. Green Cove etc. R. R. Co.*, 139 U. S. 137; *Gittings v. Baker*, 2 Ohio St. 21; *Conner v. Drake*, 1 Ohio St. 166; *Kill v. Hollister*, 1 Wils. 129.

Such contracts are in their nature only applicable to cases wherein it becomes necessary to fix some facts, leaving the question of law to be settled by the courts upon proper proceedings. The ultimate question to be determined—the liability or non-liability of the parties—must be left to the courts. The construction of a written contract is a question of law for the court, and a provision in the contract that the construction of such contract, or the meaning of rules or regulations, shall be finally determined by some designated person, is void, because the court cannot be robbed of its jurisdiction to finally determine such questions. In insurance and other like cases, where the ultimate question is the payment of a certain sum of money, certain facts may be fixed by a person selected for that purpose in the contract, but the ultimate question as to whether ²³⁴ the money shall be paid or not may be litigated in the courts, and a stipulation to the contrary is void. The fixing of the particular fact by the person or persons named in the contract, and in the manner therein provided, is usually a condition precedent to the bringing of an action on the contract, and the performance of

such condition should be averred in the petition, or some good excuse given for its nonperformance: *Viney v. Bignold*, 20 Q. B. Div. 172.

In the case at bar, the claim having gone through the course provided by rule 11, and having been rejected, the parents had the right to go into a court of justice and establish their claim; and in the trial, the fact that the claim had been so rejected was not a bar to a recovery. In so far as rule 11 attempts to cut off the right of action in court, it is null and void.

Judgment affirmed.

CONTRACTS—OUSTING COURTS OF JURISDICTION.—The doctrine of the principal case, that parties cannot, by any agreements entered into by them, control the course of justice, or effectually oust the courts of the jurisdiction which has been conferred upon them, is well sustained by authority: Monographic note to *Utter v. Travelers' Ins. Co.*, 8 Am. St. Rep. 921-924. See monographic note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 546, 547; extended note to *Western Union Tel. Co. v. Dickinson*, 13 Am. Rep. 298, 299.

JACKS v. ADAMSON.

[56 OHIO STATE, 397.]

JUDGMENTS—NUNC PRO TUNC ENTRIES—EVIDENCE.—The power of a court to make entries nunc pro tunc is restricted to placing upon the record evidence of judicial action which has been actually taken. In determining the question whether such action has been taken, the court may resort to all sources of information that are competent under general rules of evidence, including the oral testimony of witnesses.

Appeal from an order making an entry nunc pro tunc. In November, 1865, John Adams, as administrator of the estate of Quincy Williams, deceased, procured an order from the probate court of Lawrence county for the sale of the lands of the deceased for the purpose of paying his debts. The records of that probate court show that all of the proceedings therein for the sale of said lands were regular except that they fail to show an order confirming such sale. The lands were sold to one Russell, whose title is now vested in Mrs. Jacks. She, in 1893, to defend it against one Mary Adamson, the heiress at law of said Wilson, relied upon the record of such probate proceedings and the deeds following them. She and the administrator joined in a motion for the entry of an order of confirmation nunc pro tunc, on the ground that such order had in fact been made before the execution by the administrator of his deed to Russell, and through mere neglect had not been entered upon the jour-

nal of the court. On the hearing of this motion in the probate court, the proceedings therein and the deeds referred to were offered in evidence, together with the cost bill showing a charge made for confirming the sale. The oral testimony of the administrator, and of C. B. Edgerton, who was probate judge at the time of the sale, was offered and admitted, showing that the order of confirmation was in fact made, and that the then probate judge had written the deeds to Russell, reciting therein the sale to the latter and its confirmation by the court. Defendant objected to the admission of such oral testimony, and appealed from the action of the court in sustaining the motion to enter the order of confirmation nunc pro tunc. The court of common pleas affirmed the order of the probate court, but the circuit court reversed both of such judgments, and plaintiff appealed.

A. P. Johnson, for the plaintiff in error.

J. L. Anderson, for the defendant in error.

⁴⁰¹ SHAUCK, J. It is said that the learned judges of the circuit court were of the opinion that the judgment of reversal rendered in this case was required by the decision of this court in *Ludlow v. Johnston*, 3 Ohio, 553; 17 Am. Dec. 609.

That case was reported at great length, and it has been misunderstood frequently. An analysis of the case shows that it was not a proceeding in the court of common pleas, acting as a court of probate, to enter upon its record the evidence of an order which it had in fact made at a former term. It was an action of ejectment. The plaintiffs claimed as heirs at law of Israel Ludlow, who had died intestate, seised of the lands in controversy. The defendants relied upon the record of a former proceeding instituted by the administrators of Ludlow for the sale of lands to satisfy his debts, and upon a conveyance executed by said administrators pursuant to authority supposed to have been conferred upon them by the court in such former proceeding. The proceeding by the administrators had been instituted under an act which was repealed by an act which took effect June 1, 1805. To this defense the validity of an order of sale made at the August term, 1805, after the repeal of the statute which authorized the court to order the sale, was indispensable. The entry of the August term did not find that an order for the sale of the lands in controversy had in fact been made at the May term, 1805, or at any other time before the repeal of the act under which the proceeding was taken. The

court entered an order first made in August, and attempted to give it effect before the repeal of the statute by adding: "This order to be considered of May term." When this record, including the August ⁴⁰² entry, was offered by the defendant in the ejectment case, it did not show that any order of sale had been made prior to the repeal of the statute which authorized it. The defendant then attempted to supply this defect by parol evidence, showing what the record as amended did not show, viz., that the sale which was made had been ordered in May. It was for this purpose that evidence of that character was held to be incompetent. That case, therefore, contains no warrant for the eighth proposition of the reporter's syllabus, nor for the judgment of the circuit court in this case.

The inherent power of courts of record to correct their records in furtherance of justice is of ancient exercise. It is admitted that the power exists, and that it is restricted to placing upon the record evidence of judicial action which has been actually taken—that it can be exercised only to supply omissions in the exercise of functions that are clerical merely.

But concerning the evidence upon which it may be found that the suggested judicial action was previously taken, the cases are quite discordant. The diverse conclusions that the fact of such former action can be found only from the records; that it may be found from the records aided by the judge's recollection, and such memoranda as there may be and by the files; that parol evidence is in no case admissible; that parol evidence may be taken to settle the terms of a judgment, but not the fact that a judgment was rendered; and that the facts and terms of the judgment may be found upon any evidence by which they are clearly and satisfactorily established, all find support in the decisions of courts of last resort.

⁴⁰³ If the fact that the judgment was pronounced, or an order made, is to be inferred alone from the record as it exists, the inference might as well be drawn by the court in which the record is relied upon as by that in which it was made. It is not easy to see why the recollection of the judge as to the making of an order is more reliable when he continues in office and orders the nunc pro tunc entry than when, as in this case, his official term having expired, he gives oral testimony before his successor upon the same subject. No reason is apparent why a memorandum which an officer may happen to make, but which he is not required to make, should, upon a question of competency, be regarded as entitled to especial consideration. Nor is

it practicable to distinguish between the evidence offered to show the fact, conclusive of nothing, that a judgment was rendered, and that offered to show the terms that are essential to its efficacy.

In proceedings of this character whether the order had been made is a question of fact. It seems more consonant with the purpose for which the power of making entries *nunc pro tunc* is exercised, and with the reasons involved, that in determining that question of fact, the court should resort to all sources of information that are competent under the general rules, including the oral testimony of witnesses who have personal knowledge upon the subject. The proceeding presupposes the absence of a record upon the subject, and the court should receive the best evidence of which the case admits. This view of the subject has been taken in numerous cases, including *Brownlee v. Board of Commrs.*, 101 Ind. 401; *Rugg v. Parker*, 7 Gray, 173; *Frink v. Frink*, 43 N. H. 404 508; 80 Am. Dec. 189; *Weed v. Weed*, 25 Conn. 337; *Bobo v. State*, 40 Ark. 224. In *Hollister v. Judges*, 8 Ohio St. 201, 70 Am. Dec. 100, it was applied by this court to the correction of a bill of exceptions which was also a part of a judicial record.

The reported cases generally recognize the impropriety of exercising the power in question, unless it is clearly shown that the supposed judicial action was formerly taken. In various forms it is declared that to establish that fact there should be such convincing evidence as to exclude all conjecture. That view has been taken by this court whenever the subject has been adverted to, and it is reaffirmed now. The record before us shows, however, that in this regard due caution was observed by the probate court. It does not appear that, as to the effect of the evidence, a different view was taken in the circuit court.

Judgment of the circuit court reversed and that of the common pleas affirmed.

JUDGMENT NUNC PRO TUNC—UPON WHAT EVIDENCE MAY BE BASED.—This is a question upon which there exists some difference of judicial opinion. The courts of Alabama and Missouri adhere firmly to the rule that entry of judgment *nunc pro tunc* can only be made upon showing some entry or memorandum on or among the records or quasi records of the court, and that parol evidence of the rendition of the judgment and its terms cannot be received: *Monographic note to Ninde v. Clark*, 4 Am. St. Rep. 831-833; *Hudson v. Hudson*, 20 Ala. 364; 56 Am. Dec. 200; *Draughan v. Tombeckbee Bank*, 1 Stew. 66; 18 Am. Dec. 38.

ARNOLD v. YANDERS.

[56 OHIO STATE, 417.]

INTERSTATE COMMERCE—CONSTITUTIONAL LAW.—

A statute regulating the sale of convict made goods manufactured in other states by imposing a license tax on those who sell such goods within the state is void as being in conflict with section 8 of article 1 of the constitution of the United States providing that Congress shall have power to regulate commerce among the several states.

INTERSTATE COMMERCE—TAX ON CONVICT MADE GOODS.—A tax or duty imposed by statute upon convict made goods when imported from another state is clearly a regulation of commerce among the states, and an attempt to exercise a power which belongs to Congress alone. Such statute is therefore unconstitutional and void.

P. H. Kaiser, for the plaintiff in error.

Goulder, Wing & Holding, for the defendant in error.

418 BURKET, C. J. The arrest was based upon the act of May 19, 1894 (91 Ohio Laws 346), the first section of which is as follows:

“Section 1. Be it enacted by the general assembly of the state of Ohio, that it shall be unlawful for any person, persons, or corporations to expose for sale within the state of Ohio, without first obtaining from the secretary of state a license to sell, any convict made goods, merchandise, or wares, as hereinafter provided.”

By the subsequent sections of the act, a party desiring to deal in convict made goods is required to obtain a license from the secretary of state, at a cost of five hundred dollars per annum, which must be posted up in his place of business, to give bond with two good sureties in the sum of five thousand dollars, to make an annual report of his purchases and sales, stating prices of purchase and giving names, residences, and street numbers of all purchasers. But the act provides that it shall not affect products of the prisons of this state. The penalty for a violation of the act is a fine not exceeding one thousand dollars, nor less than five dollars or imprisonment not exceeding one year, nor less than ten days, or both fine and imprisonment at the discretion of the court; one-half of the fine to go **419** to the commissioner of labor statistics to aid in such prosecutions.

It is urged by counsel for defendant in error that the act is in conflict with that part of section 8 of article 1 of the constitution of the United States which provides as follows:

“Sec. 8. The Congress shall have power . . . to regulate commerce . . . among the several states.”

Counsel for plaintiff in error claims that convict made goods

do not come within the meaning of "commerce," as that word is used in the above section, and that the state has the right to protect its own citizens, laborers, and markets against an invasion of convict made goods.

This leads to an inquiry as to the meaning of the word "commerce," as used in the constitution of the United States. The proper construction to be placed upon the word as applied to different transactions has often been before the supreme court of the United States, which court alone has power to declare, finally, its legal meaning.

In the case of *Kidd v. Pearson*, 128 U. S. 1, it is said that the buying and selling, and the transportation incidental thereto, constitutes commerce. And in *County of Mobile v. Kimball*, 102 U. S. 691, 702, commerce is defined as follows: "Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities."

It is not competent for a state legislature to declare that convict made goods are not articles of traffic and commerce, and then to act upon such ⁴²⁰ declaration, and discriminate against such goods, or exclude them from the state by unfriendly legislation. Whatever Congress, either by silence or by statute, recognizes as an article of traffic and commerce, must be so received and treated by the several states.

There is no act of Congress declaring that convict made goods are not fit for traffic and commerce, and it therefore follows that such goods are the subject of commerce, and when transported from one state to another for sale or exchange, become articles of interstate commerce, and entitled to be protected as such; and any discrimination against such goods in the state where offered for sale is unconstitutional.

That convict made goods are articles of traffic and commerce, is not only shown by the failure of Congress to legislate on the subject, but is conceded by the act in question; because, after taking out and paying for his license, no restraint is laid upon the dealer, but he is left free to buy and sell as he pleases, only so that he reports his purchases and sales annually, to the end that the public may know who purchase and use such goods, and if need be boycott them for so doing. The act therefore, by its terms, concedes that such goods are articles of traffic and commerce.

It is well settled that in legal effect the money paid for a license to sell goods is a tax upon such goods: *Brown v. Maryland*, 12 Wheat. 419; *Welton v. Missouri*, 91 U. S. 275; *Leloup v. Mobile*, 127 U. S. 640.

As the act in question provides that it shall not affect products of the prisons of this state, the license fee of five hundred dollars is a tax or duty imposed by this act upon such goods when ⁴²¹ imported from another state, and is clearly a regulation of commerce among the states, and an attempt to exercise a power which belongs to Congress alone. The act is, therefore, clearly unconstitutional.:

The mere silence of Congress is not sufficient to authorize a state legislature to legislate upon a subject vested by the constitution in Congress, but such silence is to be regarded as evincing the intention of Congress that the power shall remain where the constitution has placed it.

To give a state legislature power to legislate in such cases requires an act of Congress to that effect: *Leisy v. Hardin*, 135 U. S. 100; *Welton v. Missouri*, 91 U. S. 275.

The police power is reserved to the states, and they have the right to regulate internal trade, so as to protect the health and public welfare of the people, but this power cannot be so extended as to encroach upon interstate commerce; and whether any particular act does so encroach or not, is a question for the courts, and, in the determination of that question, the supreme court of the United States refuses to be bound by the opinion of the state legislatures, or the state courts. If the act is in its effect an encroachment upon interstate commerce, though expressed to be a regulation under the state police power, the federal courts hold it unconstitutional: *Leisy v. Hardin*, 135 U. S. 100; *Minnesota v. Barber*, 136 U. S. 313.

The act in question is not a police regulation, but an attempt to prevent, or at least discourage, the importation of convict made goods from other states, and thereby protect our citizens, laborers, and markets against such goods. But, if we are in a condition to require such protection, the appeal ⁴²² for relief must be made to Congress, which body alone has the power to legally grant such relief: *In re Rahrer*, 140 U. S. 545.

In holding the act in question to be in conflict with the constitution, we obey that instrument and follow a long line of decisions of the supreme court of the United States: *Brennan v. Titusville*, 153 U. S. 289, and cases there cited.

Judgment affirmed.

INTERSTATE COMMERCE—TAXATION OF, BY STATE.—No state has a right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on: *Osborne v. State*, 33 Fla. 162; 39 Am. St. Rep. 99. For a full discussion of the subject see monographic note to *People v. Wemple*, 27 Am. St. Rep. 559-563.

STATE v. GUILBERT.

[56 OHIO STATE, 575.]

CONSTITUTIONAL LAW.—DUE PROCESS OF LAW extends to all adversary rights of persons in property, and requires that, before there shall be a judicial determination affecting such rights, process to obtain jurisdiction of the person claiming them shall be issued and served, except in cases where the statute has provided for a substituted or constructive service.

CONSTITUTIONAL LAW—"TORRENS SYSTEM OF LAND TITLES."—A statute providing for the registration of land titles, and for the determination of adverse interests in land upon notice by publication, without requiring or contemplating that summons or equivalent process shall issue from a court advising those who claim an interest in the land to be registered that their alleged interest is to be the subject of adjudication in the proceedings before a county recorder, being in effect the "Torrens system of land titles," is unconstitutional and void, because it permits the divesting of vested rights in property without due process of law, and because it permits the taking of private property for a private use without the owner's consent and without compensation, and because it attempts to confer judicial power upon a county recorder who is a purely ministerial officer.

Petition for a writ of mandamus alleging that the defendants, who are state officers, are, under a statute entitled "An act to provide for the registration of land titles in the state of Ohio, and to simplify and facilitate the transfer of real estate" (92 Ohio Laws, pp. 210-262), charged with the duty of preparing a uniform system of blank-books in order to carry out the purposes of said statute, and of furnishing such books to the probate judges and other officers in the several counties of the state, and that they refused to perform such duty. Plaintiff prayed for a peremptory writ of mandamus commanding the performance of such duty. Defendants demurred to the petition.

E. H. Fitch and G. Mallon, for the plaintiff in error.

R. A. Harrison and J. K. Richards, for the defendants in error.

602 SHAUCK, J. It is admitted that the alleged duty is charged upon the defendants by the terms of the act cited. Whether the act is constitutional is the only question raised by the demurrer.

A complete analysis of the one hundred and sixty-eight sections of the act would not be practicable. Present purposes will be best subserved by the briefest statement of its provisions, which will bring into view those whose validity is denied upon constitutional grounds. It provides for what is usually called the Torrens system of land titles, with some modification. It requires assignees and trustees for the benefit of creditors to take such steps as will bring the lands in their hands within its operation. It authorizes other trustees and executors and all other persons claiming to be the owners of land to take such steps. It provides that all lands once brought within its operation shall so remain. In its general scope it provides that, as to all lands within its operation, the registration of title shall be substituted for the system of registering deeds heretofore in operation in the state, and that every registered title shall at once become indefeasible in the hands of the purchaser for value from the registered owner. The proceedings by which such registration is to be accomplished, and all claims of interest in the lands adverse to the registered owner cut off, are the subject of the earlier sections of the act.

The application must be made in writing filed with the probate judge or the clerk of the court of ⁶⁰³ common pleas in the county where the land is situated. The substance of the application is prescribed as follows:

“Sec. 7. Every application must contain an accurate description of the land, the amount, nature, and kind of every encumbrance; the full name and postoffice address of the persons owning the land adjoining the land sought to be registered; if occupied, the full name and postoffice address of the occupant; the kind of estate he holds and when it will terminate, and all easements and inferior estates to the fee simple, either in law or equity, of every kind, must be clearly stated, with the full names and postoffice addresses of the persons holding such estates. The application shall contain such further statements as is (are) required by this act, or may be required by the court in which the application is filed, for the purpose of carrying out the provisions of this act.”

Forms of application are prescribed by the act.

The provisions as to notice are as follows:

“Sec. 12. Immediately on the filing of such application, the court shall cause the applicant to give notice by publication in some newspaper of general circulation in said county, for

the period of four consecutive weeks, inserted once a week, to all whom it may concern.

"Sec. 13. The notice required by section 12 shall be in substantially the following form:

"Form 3.

"To whom it may concern: You are hereby notified that — of —, in the county of — and state of Ohio, did, on the — day of —, A. D. 189— file with the — court of said county, his application to register his title in and to the following described ⁶⁰⁴ lands (here briefly describe the same, giving township, lot, etc., in substance as in application), and that — be certified as the registered owner thereof. And that on the — day of —, A. D. 189—, at — o'clock, — m., at the said court, in the — of — in said county, said application will be heard, and order taken in respect thereto, as asked in said application.

"You are hereby further notified that if you have or claim any estate or interest in, or any lien upon said lands, or know of any reasons why such lands should not be registered, or wish to file objections thereto, you are required to then and there appear and assert your claim, and file your objections to the registry of said land, or the said lands will be ordered registered and brought under the provisions of the act of the general assembly of Ohio, passed the — day of — A. D. 189—, and thereafter dealt with under said act as registered land and you will thereafter forever be debarred and stopped from setting up any claim thereto, or therein except under the provisions of said act.

"Sec. 14. Immediately on the first publication of said notice, the publisher shall file with the court as many copies of the notice as the court may require for service, and said court shall cause the applicant, or some other competent person, to serve each person named in said application, resident of the county, with a copy of said notice. And persons named in said application, residents without the county, must be served by sending a copy of said notice to their address by mail. Proof of service shall be made by the sworn affidavit of the person making the same, and filed with the court; such proof must show that such service was made personally or by mail, at least twenty-one ⁶⁰⁵ (21) days before the day so fixed for the hearing of the application."

Referees may be appointed to determine questions arising on

applications. Surveys and abstract may be required, and the "court may establish rules for procuring correct abstracts from responsible parties."

The duties of the court and the requirements of persons notified are prescribed in sections 23 and 33, as follows:

"Sec. 23. Upon the hearing of an application to register land, the court or referee shall carefully examine the same, together with all records, papers and surveys pertaining to the title of said applicant, as required by this act, and if the statements therein are found by the court to be true, and that the applicant is the owner thereof, and has the fee simple title to the land therein described, and that all of the provisions of this act have been complied with, and that the applicant is entitled, under this act, to have the title of said land registered, the court shall order that said lands be registered and brought under the provisions of this act, and thereafter dealt with as registered land."

"Sec. 33. Every person notified either personally, or by application of the notice required by section 12 of this act, of a filing of an application to register lands, who has or claims to have any estate, right, title, or interest in, or lien upon, the land in the application described, or any part thereof, adverse to the applicant, and that is not fully admitted in the application, shall, on or before the day set for the hearing of the application, set forth in writing their respective claims, giving the nature and particulars thereof. Such written ⁶⁰⁶ statement shall be signed, sworn to, and filed in the court, on or before the day last aforesaid."

Sections 34 and 35 prescribe the procedure if an adverse claimant appears, and the right to take an appeal or prosecute error is prescribed as follows:

"Sec. 36. The party or parties aggrieved by the finding, judgment, order, or decree of the court provided in sections 34 and 35, and 68 and 69, may appeal, or prosecute error, direct either from the court of common pleas or probate court, in such manner as is provided by law, to the circuit court, which court shall have final jurisdiction in such cases, and no petition in error therefrom shall be allowed to be filed or prosecuted."

The orders of the court made upon the application are to be entered upon the land registration docket, and it "shall be conclusive evidence in all courts of the state of the facts therein stated, except as otherwise provided in this act." The order with all papers, etc., is then to be transmitted to the recorder

by whom the land is registered upon "the register of land titles."

The general results of registration are defined in the following sections:

"Sec. 72. The registered owner of any estate or interest, in land brought under this act shall, except in case of fraud to which he is a party, or of the person through whom he claims, without valuable consideration paid in good faith, hold the same subject only to such estate, mortgages, liens, charges, and interests as may be noted on the last register of title in the recorder's office, and free from all others, except: 1. Any subsisting lease, or agreement for a lease, for a period not exceeding three years, ⁶⁰⁷ where there is an actual occupation of the land under the lease. The term lease shall include a verbal letting. 2. All public highways shall be deemed to be excluded from the certificate. 3. Any tax or special assessments for which the sale of the land has not been had at the date of the certificate of title. 4. Such rights of action as are followed by this act. 5. Liens, claims, or rights arising or existing under the laws of the United States, which the statutes of Ohio cannot require to appear of record upon the register.

"Sec. 73. Except as herein otherwise provided, no person taking a transfer of registered land, or any estate or interest therein, or of any charge upon the same, from the registered owner, shall be held to inquire into the circumstances under which or the consideration for which such owner, or any previous registered owner, was registered, or be affected with notice, actual or constructive, of any unregistered trust, lien, claim, demand, or interest in the land.

"Sec. 74. In the case of fraud any person defrauded shall have all rights and remedies that he would have had if the land were not under the provisions of this act, provided that nothing contained in this section shall affect the title of a registered owner who has taken bona fide for valuable consideration, or of any person bona fide claiming through or under him.

"Sec. 75. If a deed or instrument is registered which is forged, or executed by a person under legal disability, such registration shall be void, provided that the title of a registered owner ⁶⁰⁸ who has taken bona fide for a valuable consideration, shall not be affected by reason that he claims title through some one, the registration of whose right or interest was void, as provided in this section.

"Sec. 76. No unregistered estate, interest, power, right,

claim, contract, or trust shall prevail against the title of a registered owner taking bona fide for valuable consideration, or of any person bona fide claiming through or under him.

"Sec. 77. Knowledge of the existence of any unregistered estate, interest, power, right, claim, contract, or trust shall not be evidence of want of bona fides so as to affect the title of any registered owner.

"Sec. 78. After the land has been registered no title thereto adverse, or in derogation of the title of the registered owner shall be acquired by any length of possession. Nor shall any interest in registered land be acquired except in accordance with the provisions of this act. No land once brought under and made subject to the provisions of this act shall ever be withdrawn therefrom.

"Sec. 79. The register of title of any land, and the certificate of title, and duly certified copies thereof, shall, except as herein otherwise provided, be received in all courts as evidence of the facts therein stated, and, except where attacked for fraud, as in this act provided, as conclusive evidence that the person named therein as owner is entitled to the land for the estate or interest therein specified.

"Sec. 80. All dealings with land, or any estate or interest therein, after the same has been ⁶⁰⁰ brought under this act, and all liens, encumbrances, and charges upon the same, subsequent to the first registration thereof, shall be deemed to be subject to the terms of this act, and to such amendments and alterations as may hereafter be made; and whenever a memorial has been entered as permitted by this act, the recorder shall carry the same forward upon the register, and all certificates of title, until the same is canceled upon the register, as authorized by this act. The bringing of land under this act shall imply an agreement, which shall run with the land, that the same shall be subject to the terms of that act, and all amendments and alterations thereof.

"Sec. 81. The decree of the court ordering registration shall be in the nature of a decree in rem, and shall be final and conclusive as against the right of every and all persons, known and unknown, to assert any estate, interest, claim, lien, or demand, of any nature or kind whatever, against the land so ordered registered, except as provided in this act.

"Sec. 82. Any person not having actual notice of the proceedings to register land as provided in this act may, at any time within five years from the date of the entering of the de-

cree of registration, but not thereafter, bring an action in the court where such decree was entered, to establish his right, claim, or demand against such land. Provided, however, before such action shall proceed, it must be made to appear to the court that the person bringing such action, or those under whom he claims, had no actual notice thereof in time to appear and file his objections, or assert his claim.

⁶¹⁰ "Sec. 83. The action provided for in the last preceding section shall in no way affect or disturb the rights of any person in said land, acquired subsequent to the registration thereof, bona fide and without knowledge, and for a valuable consideration."

The lands of a deceased owner, whether testate or intestate, shall pass to his personal representatives, "and the same shall be administered in like manner as personal property." Sections 91 and 104, inclusive, contain other provisions with reference to transmission and administration. Sections 105 and 111, inclusive, provide for mortgages, leases, and encumbrances on registered lands, and sections 112 to 123, inclusive, regulate judgment and other statutory liens, partition and judicial sales and prescribe the duties of receivers and master commissioners.

Section 124 is as follows: "Assignees, or trustees for the benefit of creditors, and commissioners of insolvent debtors, holding title to unregistered land from the assignor, shall make application, as provided under this act, to bring such land upon the register of title."

The act in terms confers upon the recorder authority with respect to the discharge of mortgage and other liens and the correction of errors, and provides for appeals from his decision regarding such errors as follows:

"Sec. 125. When any registered mortgage, encumbrance, or charge is satisfied in whole or in part, it shall be the duty of the mortgagee, encumbrancee, assignee, or other person authorized by law to discharge the same, to forthwith file with the recorder a certificate of satisfaction, in whole or in part, as the case may be, executed ⁶¹¹ according to law, and the recorder shall enter such satisfaction upon the register. In the case of failure of the mortgagee, or other person, to certify such satisfaction, then the mortgagor, or other person entitled to such discharge, may ask proof of the same before the recorder; notice thereof, either actual or constructive having been given to the person holding the security, and upon the recorder being satisfied that such mortgage or other charge has been satisfied,

as claimed, he shall enter such satisfaction on the register, and indorse the same upon the certificate of title."

"Sec. 128. When any lien shall cease to be operative in law, by reason of limitation of time, proof of the same may be made, on proper application being filed with the recorder, and the persons shown to be interested notified of such application in the manner provided by this act. If the recorder shall be satisfied that the lien is without force in law, by reason of lapse of time, he shall enter such discharge upon the register and the same shall be prima facie evidence thereof."

"Sec. 131. Whenever it appears that there is an error or omission in any certificate or memorandum or memorial, or that any memorandum or memorial has been made, entered, and indorsed, or certificate entered or issued by mistake, the recorder may, on his own motion, or upon the application of any person interested, summon all persons registered as interested in the lands to which such certificate, memorandum, or memorial has been made relates to appear at an appointed time, and produce their certificates of (or) registered instruments, and if, at the appointed time, the recorder shall find such error or omission or mistake to exist and that no rights of bona fide purchasers ⁶¹² or lienholders for value have intervened whereby his or their estate or interest shall be impaired by the correction of such error, omission, or mistake, he shall, if no appeal is taken as provided in the next section, correct such error or mistake, or supply the omission, and may direct the cancellation of any certificate or registered instrument or any memorandum or memorial entered upon the registration book, or indorsed upon the registered instrument or certificate, by mistake.

"Sec. 132. Any person aggrieved by the finding of the recorder for or against the existence of such error, omission, or mistake may appeal from the decision of the recorder to the court of common pleas or probate court, on giving bond to the acceptance of the recorder as provided by law in other cases for appeal, within ten days of the date of such finding, and the recorder shall make out and deliver to the clerk of the court of common pleas or probate court immediately a transcript of his proceedings in such matter, and shall make a notation of such appeal upon the register of title. When such appeal is determined, the court shall forthwith cause a certified copy of such judgment or decree to be filed with the recorder, and the judgment of the court shall be final and conclusive."

The material provisions of the act concerning the assurance fund are:

"Sec. 144. Upon the first bringing of land under the operation of this act as hereinbefore provided, and upon the issuance of a certificate of title pursuant to section (142) one hundred and forty-two, shall be paid to the recorder one-tenth of one per cent of the value of such land as appraised for taxation, for the purpose of an assurance ⁶¹³ fund under this act. All sums of money so received as provided in this section shall be paid on the first Monday of each and every month to the county treasurer of his county."

Section 145 prescribes how the fund shall be invested.

"Sec. 146. Any person deprived of land, or of any estates or interest therein, in consequence of fraud or misrepresentation in bringing such land under the operation of this act, having had no notice of the proceedings, or by the registration of any other person as owner of such lands, estate, or interest, or in consequence of any error, omission, mistake, or misdescription in any certificate of title, or in any entry or memorandum in the register of titles, or by being omitted in proof of heirship or certificate thereof as provided in section (98) ninety-eight of this act may, at any time within four years from the date of the discovery of such fraud, error, omission, mistake, or misdescription, bring an action in any court of competent jurisdiction, for the recovery of the damages so by him sustained, against the person or persons committing such fraud, or responsible for such error, omission, mistake, or misdescription in any certificate of title, or in any entry or memorandum on the register of title. In any such action, the county treasurer must be made a defendant, and all persons against whom the plaintiff claims the right to pursue for damages must be made defendant to the action. And if this be not done, such persons shall thereby be discharged from liability for damages in the premises.

"Sec. 147. If such action be for the recovery of loss or damage only through an omission, mistake, or misfeasance of the recorder or any ⁶¹⁴ deputy or clerk of the recorder in the performance of their respective duties under the provisions of this act, the recorder alone need be made defendant with the county treasurer; but if such action be brought for loss or damage arising from the fraud or wrongful act of some person or persons other than the recorder, his deputies or clerks, then such action shall be brought against only the county treasurer, and such

person or persons aforesaid. In any such action, the defendant or defendants, other than the county treasurer, shall be primarily liable when recovery is had, and final judgment shall not be entered against the county treasurer until execution against the other defendants shall be returned unsatisfied in whole or in part, and the officer returning the execution shall certify that the amount still due on the execution cannot be collected except by a resort to the assurance fund. The court being satisfied of the truth of such return, made upon proper showing, shall order the amount of the execution and costs, or such part as shall remain unpaid, to be paid by the county treasurer out of the assurance fund. It shall be the duty of the prosecuting attorney of the county, or the county solicitor if there be one, to appear and defend all suits that may affect such assurance fund.

"Sec. 148. Nothing in this act contained shall be so construed as to leave subject to action for recovery of damages, as aforesaid, any bona fide purchaser, mortgagee, or other holder of a lien, charge, or interest, for a valuable consideration, on land brought under this act on the plea that his vendor, mortgagor, or person creating such lien, charge, or interest may have been registered as proprietor through fraud, error, or omission, or ⁶¹⁵ may have derived from or through a person registered as owner through fraud, error, or omission.

"Sec. 149. In case the person primarily liable as provided in section 150, and against whom such action of damages is directed to be brought, as aforesaid, shall be dead or cannot be found in this state, then, in such case, it shall be lawful to bring such action for damages against the county treasurer of the county in which the land may be situated, as defendant, for the purpose of recovering the amount of said damages and costs against the assurance fund. In such case, if final judgment be recovered, the county treasurer, upon the receipt of a certificate of the court before which said action was tried shall pay the amount of such damages and costs as may be awarded, and charge the same to the account of the assurance fund. All actions involving the assurance fund shall be brought in the county where the land is situated.

"Sec. 150. Whenever any money has been paid by any county treasurer out of the county assurance fund, as in this act provided, the county treasurer of such county may bring an action and institute proceedings in any court of competent jurisdiction against the person or persons primarily liable for such

damages and costs, to reimburse such assurance fund; or, should such person or persons be dead, such treasurer may proceed against his or their estates. It shall be his duty to bring such action or institute proceedings in every case where there may be a reasonable probability for reimbursing such assurance fund in whole or in part."

Section 151 limits the action authorized by sections 146 and 147 to ten years.

⁶¹⁶ Whatever may be thought of the burdens of fees and costs which the act lays upon the estates of deceased persons and insolvents, or of its probable effect to disturb titles that are now well settled, it must be deemed a valid enactment, unless, in some of its substantial provisions, it transcends the limitations which the constitution has placed upon the exercise of legislative power, or invades some guaranty which it has erected to the ownership and enjoyment of property.

Counsel for the defendants deny the validity of the act upon the following grounds: Because it provides for cutting off vested interests in property without due course of law in violation of section 16 of the bill of rights; because it provides for the taking of private property for private purposes without the owner's consent in violation of section 19 of the bill of rights; because it provides for the exercise of judicial power by the recorder in violation of section 1 of article 4 of the constitution which vests all such power in the courts of the state; because, being a law of a general nature and not having a uniform operation throughout the state, it violates section 26 of article 2 of the constitution; and because it impairs the obligation of contracts in violation of section 28 of article 2 of the constitution of the state and section 10 of article 1 of the constitution of the United States.

The constitutional guaranty invoked by the first objection is of a remedy *per legem terrae* as it was expressed in *Magna Charta*, or according to the law of the land, or by due process of law, or by due course of law as it is expressed in equivalent phrases in the several constitutions of the American states. It is no longer questioned that the ⁶¹⁷ guaranty operates as a limitation upon both judicial and legislative authority. In *Norman v. Heist*, 5 Watts & S. 171, 40 Am. Dec. 493, Chief Justice Gibson concisely declared its purpose to be "to exclude arbitrary power from every branch of the government": *Cooley's Constitutional Limitations*, 432. The precise objection urged against the act in this regard is, that it provides for the divest-

ing of rights in property by the proceeding to register without the issuance and service of summons according to the law of the land. The act does not require a petition or bill such as is appropriate in suits between adversary parties, nor does it require or contemplate that a summons or equivalent preliminary process shall issue from the court advising those who claim interest in the land to be registered that their alleged interests are to be the subject of adjudication in the proceeding. Both by the terms of the act and by the form which it prescribes, the only notice required is to be given by the applicant. In the notice so required to be given no one claiming an interest adverse to that of the applicant to be named, although the names, places of residence, and alleged interests of all who may claim adversely are known. The terms of the act require that the court shall cause the applicant, or some other competent person, to serve each person named in the application, resident of the county, with a copy of the printed notice. All persons named in the application, resident without the county though within the state, shall be served by sending copies of such notice to their addresses by mail. Only those who are named in the application are required to be served even in this manner. Reference to section 7, providing what the application shall contain, ⁶¹⁸ and to its form as prescribed in section 8, shows that the persons to be thus named and served are the owners of the land adjoining that sought to be registered, the occupant of the land to be registered, if it is occupied, and the holders of easements and estates inferior to the fee simple. One known to claim the title in fee simple adversely to the applicant need not be named in the application, nor receive a copy of the notice, though his place of residence may be within the county and known. As to him the only requirement is that he may have a chance to see a notice signed by the applicant, addressed "To whom it may concern," containing a brief description of the land to be registered, and published in any newspaper of general circulation within the county. That this is sufficient notice to those who are interested in the adjoining property is not denied.

Is it such notice as the law of the land requires to be given to persons claiming interests in property of the pendency of a judicial proceeding, in which such interests are to be the subject of adjudication, and in which, unless they appear, a decree will be entered precluding their further assertion? It is said that it is, because the proceeding to register land under

the act is in rem. Whether it is in rem or in personam is determined by its nature and purpose. To say that the legislature may prescribe such notice as is appropriate to proceedings in rem and thus invest the proceeding with that character is to affirm its power to annul the constitutional requirement. In this aspect of the case, and considering the effect of registration upon interests adverse to those of the applicant, the proceeding to register does not, in any substantial respect, differ from a suit quia ⁶¹⁹timet to settle title. It bears the least possible analogy to a proceeding in rem. The res is not taken into the possession of an officer of the court. No charge or lien is asserted against it.

It is not to be sold with a view to the distribution of its proceeds, and it partakes, therefore, less of the nature of a proceeding in rem than does the foreclosure of a mortgage. The land is not a thing of shifting situs like a ship, against which obligations may accrue to-day in one jurisdiction and to-morrow in another. The status of the land is not changed by registration. The substantial thing determined by registration is, that the person who makes the application has a right of property in the land to the exclusion of all other persons. The judicial force of the proceeding is wholly expended in a conclusive determination of the rights of persons in the land. Except when the land is occupied by one who claims adversely to the application the questions determined in registration are such as both before and since the adoption of the constitution have been determined by courts of equity; and their decrees much more distinctly than the judgments of courts of law operate upon persons.

To authorize a court to determine the adverse claims of parties touching their right in things, judicial process is indispensable. Judicial process, in its largest sense, comprehends all the acts of the court from the beginning of the proceeding to its end. In a narrower sense it is "the means of compelling a defendant to appear in court, after suing out the original writ, in civil and after indictment in criminal cases": Bouvier's Law Dictionary. In every sense it is the act of the court. This act does not contemplate process. The notice which it prescribes ⁶²⁰is the notice of the law of admiralty. The process required by law of the land is the process of the common law.

In Webster v. Reid, 11 How. 437, the court considered the validity of a judgment rendered in proceedings under an act which attempted to authorize the quieting of titles in suits

against defendants to be designated as "owners of the half-breed lands lying in Lee county," and notice to be given by publication. Justice McLean, in the opinion said: "These suits were not proceedings in rem against the land, but in personam against the owners of it. Whether they all resided within the territory or not does not appear, nor is it a matter of any importance. No person is required to answer in a suit on whom process has not been served, or whose property has not been attached. In this case there was no personal notice, nor attachment or other proceeding against the land, until after the judgments. The judgments are, therefore, nullities": *Brown v. Board of Levee Commrs.*, 50 Miss. 471.

That the legislature may provide for a substituted service of judicial process, when it is required by necessity, is not doubted. If, in a suit to adjudicate the rights of persons in property within the state, a defendant resides without the state, such necessity is apparent, for the process of the state has no efficacy beyond its borders. Other cases of necessity are recognized.

The principle is that the state may provide for the adjudication of all adversary rights of persons in property within its borders, and, to the end that such jurisdiction may be complete, the legislature may provide a substituted service of process for cases in which actual service cannot be made.

⁶²¹ In such cases nothing more is required by the law of the land than that the substituted service shall be such as, in the exercise of legislative discretion shall be found most apt to accomplish the purposes of actual service: *Shepherd v. Ware*, 46 Minn. 174; 24 Am. St. Rep. 212. Surely, these views will surprise no one who is familiar with the legislative history of the state.

Section 55 of the Civil Code enacted in 1853 is now in force as section 5035 of the Revised Statutes. It provides: "A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon." The subsequent sections of the chapter relate to the service of the summons so required to be issued. Their provisions for a substituted or constructive service relate wholly to cases in which actual service is impracticable. In these respects the provisions of the code continue the former practice pursued since the organization of the state. We know of no instance prior to the passage of this act in which there was a departure from the views clearly stated by Judge Cooley (*Cooley's Constitutional Limitations*, 6th ed., 452): "In judicial investi-

gations, the law of the land requires an opportunity for a trial; and there can be no trial if only one party is suffered to produce his proofs. The most formal conveyance may be a fraud or a forgery; public officers may connive with rogues to rob the citizen of his property; witnesses may testify or officers certify falsely, and records may be collusively manufactured for dishonest purposes; and that legislation which would preclude the fraud or wrong being shown, and deprive the party wronged of all remedy, has no ⁶²² justification in the principles of natural justice or of constitutional law."

If it is borne in mind that the questions here considered concern the adversary rights of persons in property, it will sufficiently distinguish the cases which involve the police power, or the right of eminent domain or the right of taxation.

Perhaps a more extended consideration than was necessary has been given to this particular question, since the provisions of the act and the briefs suggest the consciousness of those who framed it and those who defend it, that it does not meet the constitutional requirement as to due process of law. In one of the briefs submitted for the plaintiff it is said: "The act contemplates no adjudication as to the title. The applicant cannot be adjudged to have a good title as against B or C, or unknown parties in which a right of ownership appears. If there is any adverse interests, or the possibility of conflicting rights, he is relegated to other courts and other proceedings to try such issues. The court considers only the status of the res. If the applicant is not found to be the undisputed owner of the property in fee simple, his title is not registered."

This view of the act is opposed to its provisions and obvious import. In the prescribed notice "to whom it may concern" is the authorized declaration that those thus notified "will be thereafter forever debarred from setting up any claim," etc. Not recurring to other provisions of the act which provide for the indefeasibility of the registered title, section 74 makes it indefeasible in one who has purchased for a valuable consideration from one who has procured registration by fraud. Section 75 imparts the ⁶²³ same character to the title of such a purchaser from one who has secured registration by forgery of a deed of the real owner; and section 76 provides that "no unregistered estate shall avail against the title of a registered owner taking bona fide," etc. How is it to be known that the applicant is the "undisputed owner" until adversary parties are served with process and afforded an opportunity to say for them-

selves whether they dispute the claim of the plaintiff or applicant? However effective the separation of disputants may be in the prevention of street broils, in the judicial determination of their disputes, the law of the land requires that they be brought together.

The provisions of the act with respect to an "assurance fund" attract attention in this connection. Those for whose indemnity this fund is raised are described in section 146: "Any person deprived of land, or of any estates or interest therein, in consequence of fraud or misrepresentation in bringing such land under the operation of this act, having had no notice of the proceedings, or by the registration of any other person as owner of such lands, estate, or interest, or in consequence of any error, omission, mistake, or misdescription in any certificate of title, or in any entry or memorandum in the register of titles, or by being omitted in proof of heirship or certificate thereof as provided in section (98) ninety-eight of this act may," resort to the fund within the time and in the manner specified. It is not likely that the legislature has thought itself authorized to provide for making whole those who have been defeated in judicial proceedings of an adversary character, involving only private rights, and conducted according to the law of the land. The terms ⁶²⁴ of these sections of the act show that the fund is to be raised to indemnify those whose lands have been wrongfully wrested from them under the earlier provisions of the act, and without due process of law. When the provisions of the constitution are applied to this penitential scheme, it at once becomes apparent that it is both inadequate and forbidden. Section 19 of the bill of rights ordains: "Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency imperatively requiring its immediate seizure, or for the purpose of making or repairing roads which shall be open to the public without charge, a compensation shall be made to the owner in money, and in all other cases, where private property shall be taken for a public use, a compensation therefor shall first be made in money or first secured by a deposit of money."

This act is said to be a rebuke to those who have inherited from feudal times the conceit that property in lands is especially sacred. That property in lands has been more secure than property in chattels has resulted necessarily from the fact that they are not the subject of conflagrations or larceny. Some contribution to the equality of insecurity of property of the two

classes may be found in those provisions of the act which look to the administration and distribution of the lands of deceased persons as though they were chattels. But property in all of its subjects is equally sacred under the protection of this section of the bill of rights. To permit its abrogation would equally expose all descriptions of property to spoliation. The section is an inviolable assurance to all owners ⁶²⁵ of lands and chattels that, unless they are required for a public use, they may retain them in specie, placing upon them any estimate that may be suggested by judgment, sentiment, or caprice; and it is not within the combined authority of the departments of the government of the state to say that the estimate is too high. This section of the bill of rights was so construed by this court in *McCoy v. Grandy*, 3 Ohio St. 463, upon reasoning that has ever since been deemed entirely satisfactory.

In another aspect this scheme is violative of the same section of the bill of rights. If the use were public, the section would require an assured compensation to the owner of the property taken in every event, and, unless in a public exigency or for the construction or repair of free roads, it would require such compensation to be first made. In this act there is no provision for compensation to be first made. The owner's recourse is to a subsequent action to be instituted by himself and subject to a limitation. Nor is there any provision for an assured compensation at any time. The owner's resort is to an assurance fund which, we are told, has been estimated to be sufficient to indemnify those who would be wrongfully deprived of their lands under the provisions of the act. It can scarcely need comment to show that this is not a compliance with the constitutional requirement.

In yet another aspect the scheme is violative of the same section of the bill of rights.

Whether the assurance fund would be adequate or inadequate, it is, in part at least, to be derived from forbidden forces. The real estate in the hands of an assignee for the benefit of creditors ⁶²⁶ belongs to the assignor and his creditors. These lands, by the terms of the act, are subjected to a charge or contribution payable through the recorder to the treasurer of the county. That is, to the extent of such assessments, this property is to be taken by public authority and without the consent of the owners. For what public purpose? Primarily, the purpose is to indemnify private persons whose lands have been wrongfully taken

from them under the provisions of the act. If the act were otherwise constitutional, the ultimate benefit would accrue to those who, as the result of registration which gives conclusive effect to mistake, fraud, or forgery, have acquired lands which belong to others.

That this is in no sense a public purpose seems clear. Considering the purposes for which government is instituted and the high conception of individual right which prevailed at the time of the adoption of the constitution, it would be strange if authority had been conferred upon the state to carry on the business of an insurer of private titles. No such authority is implied in any of the terms of the constitution. It is not implied in any of the enumerated purposes for which government is formed. It is entirely foreign to those purposes. The legislature may, by law, authorize the organization of corporations for the purpose of carrying on the business of insurance, but this grant of power is rather an implied negation of its authority to conduct such business itself.

The functions of the state are governmental only. Its powers are embraced within the three familiar divisions of legislative, judicial, and executive. He who affirms the existence of the power in question must be able to find it embraced in one ⁶²⁷ of these divisions. And since the insuring of titles does not essentially differ from any other insurance, nor indeed from any other business or occupation, he must find authority in whose exercise the state may become the competitor of the citizen in every vocation.

It is further urged that the act is void because it attempts to confer judicial power on the recorder. Counsel agree that power of that character cannot be conferred upon a ministerial officer, but in support of the act it is urged that the powers indicated are ministerial and not judicial.

The principal powers conferred are to take proof after notice to the holder that a mortgage has been discharged and after a hearing to enter a discharge upon the register; to make an entry that a lien has become inoperative in law by reason of limitation of time when application has been made therefor, the person interested notified, and he is satisfied that such is the fact, to correct memorials made or issued by mistake, if the rights of a bona fide purchaser or lienholder for value have not intervened.

It is true that the power to ascertain and decide is not necessarily a judicial power, and it is frequently exercised by minis-

terial officers and legislative bodies. Whether the power to hear and determine is judicial depends upon the nature of the subject of the inquiry, the parties to be affected, and the effect of the determination. While it is not supposed that any definition of judicial power, sufficient for all conceivable cases, has ever been attempted, it is clear that "to adjudicate upon and protect the rights and interests of individual citizens, and to that end to construe and apply the laws, is the peculiar province of the judicial ⁶²⁸ department": Cooley's Constitutional Limitations, 109. Recurring to the duties of the recorder under the act, he is not merely to enter the evidence furnished by the agreement of the parties that a lien has been discharged, or that it has become void by the lapse of time, or that a mistake has intervened touching their rights; but he is to apply the rules of evidence to the ascertainment of disputed facts, to apply the rules of law concerning payment, to interpret and apply the statute of limitations as it may affect the enforcement of liens including such questions of disability as may arise to decide the questions of fact and law that may arise in determining whether mistakes have intervened and who are bona fide purchasers; and then to make an entry which is to have the same effect in concluding the rights of the adversary parties as would a decree in equity. That these are judicial powers is entirely clear. They seem to have been so regarded by the general assembly for there is a provision for appeal from the decisions of the recorder. This is not supposed to include all the judicial powers which the act assumes to confer on the recorder, but it is sufficient for present purposes.

Nor is this objection to the act avoided by the provisions which contemplate a review of or appeal from the action of the recorder. It would, perhaps, be found upon a careful consideration of his powers, that they are not all embraced within the provisions for review or appeal. But the assumption that they are so embraced would not validate the act in this respect. The recorder, as a ministerial officer, is incompetent to receive a grant of judicial power from the legislature. His acts in the attempted exercise of such powers are necessarily ⁶²⁹ nullities. They cannot be effective to impose any obligation or burden upon a citizen, or to deprive him of any right. The act plainly contemplates that the person against whom the recorder decides in the exercise of any of the powers sought to be conferred must either submit to the adverse decision or take upon himself the

burden of an appeal. In view of the constitutional provision on the subject, he cannot be forced to this alternative.

If these are judicial powers, it is admitted that they cannot be vested in the recorder. If they are not judicial, the provisions for an appeal are void, since, as was said by this court in *Ex parte Logan Branch Bank*, 1 Ohio St. 432, "we have no idea of an appeal, except from one court to another."

An examination of *People v. Chase*, 165 Ill. 527, will show that in some of its aspects the act under consideration, though differing from the act passed by the legislature of Illinois to accomplish the same purpose, is within the principles upon which that act was held void.

The views expressed touching the guaranties of the bill of rights are in accord with those of eminent lawyers who have considered methods for simplifying the records of titles and diminishing the labors of searching them. The general system in the contemplation of this act has been thought impracticable because questions of vested rights must remain open for want of due process. There have, accordingly, been recommended legislative enactments to shorten and simplify conveyances, to remove disabilities, to shorten the limitations of actions, to provide for general indexes for townships and wards or other small districts so ⁶³⁰ as to restrict the area of search, and other like remedies operating prospectively, and having due regard to vested rights.

However the general system proposed by this act may have operated where no system of registration previously existed and the conserving influences of constitutions are not enjoyed, it seems, in its prominent features, to be inapplicable where constitutional provisions paramount to legislative enactments, protect vested rights and restrict the state to the exercise of functions that are governmental in their nature.

No discussion of the wisdom of the act would be appropriate here, nor do we deem it necessary to consider other questions affecting its validity. Such questions are presented, but those decided seem sufficient to dispose of the subject.

Demurrer sustained.

CONSTITUTIONS—DUE PROCESS OF LAW—WHAT IS.—"Due process of law" requires an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing, or an opportunity to be heard, prior to judgment is absolutely essential: *State v. Billings*, 55 Minn. 467; 43 Am. St. Rep. 525. The subject has been thoroughly considered in the monographic notes to *Bank of*

State v. Cooper, 24 Am. Dec. 537-545, and Bardwell v. Collins, 20 Am. St. Rep. 554-559. See Rouse v. Donovan, 104 Mich. 234; 53 Am. St. Rep. 457, and note.

CONSTITUTIONAL LAW—TORRENS SYSTEM OF LAND TITLES.—The Torrens system of land titles was enacted in Illinois in 1895 and was held unconstitutional as conferring judicial power upon the county recorder of deeds: *People v. Chase*, 185 Ill. 527.

CASES
IN THE
SUPREME COURT
OF
OREGON.

NEVADA DITCH COMPANY v. BENNETT.

[30 OREGON, 59.]

PRACTICE—CODEFENDANTS, RIGHTS OF AS AMONG ONE ANOTHER, WHEN CANNOT BE DETERMINED.—Where, in a suit brought against several defendants by one plaintiff to determine that he has, and the defendants have not, a right to certain water by appropriation, in which each of the defendants denies the plaintiff's claim and sets up his own, the court is not authorized to determine the respective rights of the defendants as between one another, when the trial proceeded on the theory that there was no contention among the codefendants, and no evidence was offered as between them.

WATERS, DILIGENCE IN EFFECTING APPROPRIATION OF.—When a notice of appropriation was posted in 1881, and work was commenced in the same year, and about two miles of ditch excavated and a dam constructed, and a diversion made, and this section completed in the spring of the following year, and in the fall of the year 1892 the way was cleared for the second section, and during the next spring the excavation and construction were continued until the time of irrigation, but after that time were stopped to permit the use of the water for irrigation, and in the fall of 1883 the construction was resumed and practically completed in the spring of 1884, due diligence was exercised in the construction and completion of the ditches and appliances.

WATERS, APPROPRIATION OF, TO WHAT TIME RELATES.—Where there is a custom that persons desiring to appropriate water shall post a notice at the point of diversion stating the amount of water claimed and the purposes to which it is to be applied, the names of the appropriators, the direction and terminals of the ditch, and that such notice shall be immediately recorded, and the work is prosecuted with due diligence, the appropriation relates back to the first step.

WATERS.—TO THE VALID APPROPRIATION OF WATER THREE ELEMENTS MUST EXIST: 1. Intent to appropriate it to some beneficial use existing at the time or contemplated in the future; 2. A diversion from the natural channel by means of a ditch, canal, or other structure; 3. The application of it within a reasonable time to some useful industry.

WATERS.—THE APPROPRIATION OF WATER IS NOT CONSUMMATED until it has been actually applied to some beneficial purpose or useful industry. The right acquired prior to that time amounts simply to a claim of the appropriator. Therefore, the actual user for a beneficial purpose is the true and only final test touching the question whether the party's claim has ripened into a valid appropriation.

WATERS.—THE AMOUNT OF AN APPROPRIATION of water is in every instance limited to the uses for which it was made, and restricted to the quantity needed for the purpose.

WATERS—APPROPRIATION, TIME ALLOWED TO APPLY TO A BENEFICIAL USE.—A claimant is entitled to a reasonable time after he has diverted and carried water to the place of use in which to make the actual application to the contemplated useful purpose, the prime requirement being that he must be reasonably diligent in making the application, the attendant circumstances to be considered.

WATER—APPROPRIATION BEGUN BY ONE PERSON MAY BE COMPLETED BY ANOTHER.—If one claims water for use upon lands owned by him or of which he has the possessory title, and initiates an appropriation, and, before completing it, sells his lands or possessory title to another, the latter may proceed to complete the appropriation.

WATERS, APPROPRIATION OF FOR USE BY OTHERS.—It is not necessary that the person who appropriates water should use or intend to use it himself or on his own land. He must intend that it shall be applied to a beneficial use, but that use may be accomplished by others to whom he furnishes it for use upon their lands or in their mines or mills.

WATER—APPROPRIATION FOR FUTURE BENEFICIAL USE.—Persons who commence an appropriation for their use and that of other persons who are reasonably expected to settle in that part of the country, and who begin and construct the appliances necessary to the diversion and conveyance of the water to the place of use with due and reasonable diligence, and who subsequently divide their appropriation with persons who use such water, must be regarded as appropriating it for a beneficial use to the extent of their actual appropriation and diversion.

WATERS, APPROPRIATION OF BY THE GOVERNMENT. The appropriation and diversion of waters by the government for use of an Indian reservation is not equivalent to their appropriation and diversion by a private individual, and when the reservation is discontinued, and the lands which constituted it are sold and patented by the government to private individuals, they do not acquire thereby any rights to the water before then so used by the government.

WATERS—TITLE OF PURCHASERS OF PUBLIC LANDS IS SUBJECT TO PRIOR APPROPRIATION OF.—A patent issued by the United States, and which purports to be subject to any vested and accrued water rights which may be recognized and acknowledged by the local laws, customs, and decisions of the court, passes title subject to the rights of any prior appropriators.

Suit commenced in August, 1893, to establish the date and extent of plaintiff's appropriation of the waters of the Malheur river in Oregon, and to enjoin the defendants from any use of the waters of such river which would interfere with plaintiff's rights. The owners of the following ditches were made par-

ties defendant: 1. The Sand Hollow Company ditch; 2. The Gillerman-Froman Ditch; 3. The Eastman Brothers & Ballentine ditch; 4. The Malheur Farmers' Irrigation Company's ditch; 5. The Pacific Live Stock Company's ditches, four in number, and known as the Harper's Ranch ditch, the Warm Spring Valley ditch, the Agency ditch west, and the Agency ditch east. The owners of certain other ditches were made parties defendant, but did not answer the complaint. The appropriation under which the plaintiff claimed was initiated July 12, 1881, by the posting of a notice at the point of intended diversion, claiming eight thousand inches of water for agricultural and milling purposes, stating generally the route and terminals of the ditch. Soon thereafter a copy of this notice was filed and recorded in the county clerk's office of the proper county. Before posting the notice a preliminary line of survey had been made along the proposed route, and the appropriators C. W. Mallett, I. H. Adams, and W. R. Lee had each located a section and a half of land on the line of the proposed ditch. The parties were never, however, able to obtain title to the entire amount of land thus located by them. Mallett acquired title to half a section, Adams to a like amount, and Lee never acquired any title to lands located by him. A few days after the posting of the notice G. W. Blanton and his sons, James and John, visited the valley, and, becoming desirous of settling therein, bargained for a quarter interest in the appropriation, and on July 21, 1881, an agreement was entered into between the parties thus interested in the appropriation providing that Mallett should construct the first section of the ditch, about two miles in length, for two thousand four hundred dollars, and that the other parties should contribute either in money or labor their share of the expenses, and, failing to do so, should forfeit their interest in the ditch. While this agreement was not signed by the Blantons, their interest under it was recognized, and they received in March, 1885, after the completion of the ditch, a one-fourth interest therein. One Foster, in 1881, made a permanent survey for the distance of about ten miles, commencing at the point of diversion claimed in the notice, and the ditch was subsequently constructed practically on the line of the survey. The further acts in the completion of the ditch are sufficiently detailed in the opinion of the court. The Sand Hollow ditch appropriation was based upon a survey made by several parties in 1885, and the beginning of the construction of a ditch in September of the same year, which was completed in the spring of the following year. The Gillerman & Froman appropriation was based upon a notice

posted in December, 1882, and the beginning of work in June, 1883, which work was finally completed in April, 1884. The Eastman Brothers & Ballentine appropriation was based upon the fact that a small ditch was constructed in 1877 from Malheur river to an old slough, whereby water was obtained when the river was high, for the purpose of irrigating wild hay land and some small tracts of grain and vegetables from 1877 to 1881. This ditch was permitted to fall into decay, and in 1882 another ditch was constructed which intersected and cut off the old ditch near where it entered the slough. Afterward, in 1884, Eastman Brothers & Ballentine reopened, repaired, and enlarged the old ditch and from it constructed a new ditch to their premises, which was completed in 1885. The Malheur Farmers' Irrigating Ditch Company's appropriation was based upon the construction of a ditch begun in September, 1883, and completed two years later. The Pacific Live Stock Company's ditch was not constructed, nor any proceedings for appropriation made, until 1888. The Agency ditches were constructed by officials of the United States while in charge of the Indian reservation in the years 1874 and 1876. In 1878, the Indians left the reservation, and the ditches were not applied thereafter to any useful purpose by the government. Afterward, the lands included in the reservation were sold to various parties and patents issued to them therefor by the United States.

Cox, Cotton, Teal & Minor, and Lewis B. Cox, for the plaintiff.

Thomas H. Crawford, Charles W. Parrish, O. F. Buse, and William Smith, for the defendants.

82 WOLVERTON, J. Before proceeding to the discussion of the questions of vital importance, we will dispose of some that may be regarded as preliminary or incidental only. The defendants all filed demurrers to the complaint, which were general in their nature, and were all overruled by the court below. It is insisted here that the court erred in so doing. The objection is taken upon the theory that plaintiff's complaint comprehends an aggregate of individual appropriations, taking their inceptions at different periods, and that the complaint should have stated facts supporting each individual appropriation, and then the acquirement of them by plaintiff; but the complaint states a single appropriation upon which all the rights claimed are dependent, hence the objection is not well taken.

1. It is next contended by the defendants the Gillerman-Fro-

man people that the especial rights of each of the defendants touching the quantity and priority of their several appropriations should be determined here, as well as plaintiff's, and the correlative parts of all the parties to the suit finally fixed and determined. The point is ⁸³ more especially urged as it affects the Gillerman-Froman people. The other defendants earnestly object to such a course and their objection is based upon the condition of the pleadings as well as the course which was pursued in the court below. The answer of each of the defendants controverts the plaintiff's claim, and, in order to show a prior right to that of plaintiff, each has set up its own claim, but no defendant has anywhere, by his or its pleading, assumed to controvert the alleged rights of any of the codefendants, and no issue upon the record was ever made between any of them. However, the Gillerman-Froman people have alleged generally that their claim is prior and superior to all the other defendants, as well as to that of plaintiff, and they ask affirmative relief. But this is not denied by any of their codefendants, nor would it seem that any were called upon to do so. The trial in the court below seems to have proceeded upon the theory that there was no contention among codefendants, and no countervailing testimony was offered as between themselves. In this state of the record and by the course of prior procedure this court is powerless to determine the quantity and priority of any appropriations, except as between plaintiff and the several defendants: *Hargrave v. Cook*, 108 Cal. 72; *Pomeroy on Code Remedies*, sec. 808. It would have been much better if the rights of all the parties to the controversy could have been settled and determined in this suit. Such a thing could have been accomplished, had the pleadings and proofs been formulated and directed to that end and purpose; but, without indicating what would be the proper practice in such cases, let it suffice to say that this case is not in a condition to apply the remedy demanded.

2. The plaintiff, by its complaint, claims a single appropriation of three thousand and thirty-seven miner's inches of the water of the Malheur river, made as of date July 12, 1881, that being ⁸⁴ the date when Mallett, Adams, and Lee posted their notice of appropriation at the original point of diversion through plaintiff's ditch. To sustain the appropriation as of the date named, the doctrine of relation is invoked, it being contended that the promoters of the ditch prosecuted the work of construction with reasonable diligence, and had it fully completed within a reasonable time after the posting of such notice.

There can be no question but that they did pursue the work of construction with all the diligence that could reasonably be required of them. The work was commenced in August or September after the posting and recording of their notice, and, for the purpose of aiding in the excavation of the first section of upward of two miles, a dam was constructed at the head of the proposed ditch, and a diversion made. This section was completed as early as the spring of 1882. Prior to the posting of notice a preliminary survey had been run with a triangle, covering in extent at least the first section completed; but in August prior to the beginning of the work of construction, a permanent survey was made by C. M. Foster, and stakes and monuments set to indicate the route and actual location of the ditch, which was practically followed in the work of construction. This survey is spoken of as being ten miles in length, but the actual length of the ditch from the point of first diversion is something less than nine miles. In the fall of 1882 the way was cleared for the second section, reaching to the eastern terminal of the Foster survey. In the spring its excavation and construction was prosecuted until the irrigating season of that year, when it was discontinued to permit of the use of water through the completed portion of the ditch, by which use from forty to fifty acres of garden and small crops were irrigated during the season. The work of construction was resumed in the fall, and continued until the completion of the second section, in the ⁸⁵ spring of 1884. Water was run through the full length of these two sections in the year 1884, and used for irrigating purposes. There is some dispute as to whether the latter section was completed in the spring of 1884, or a year later; but, if not in every detail, it was practically completed in 1884. This shows an exercise of due and reasonable diligence, considering the magnitude of the undertaking, and the circumstances and difficulties usually attending the inception and prosecution of such work in a new country by pioneers with limited means and facilities: *Kimball v. Gearhart*, 12 Cal. 28.

3. It was sought to prove the existence of a custom, which it is alleged prevailed in that section of the country, whereby parties seeking to make an appropriation of water for agricultural or beneficial purposes were required to post at the point of diversion a notice containing in substance a statement of the amount of water claimed, the purposes to which it was to be applied, the names of the appropriators, the general direction of the proposed ditch, and the terminals thereof, and have the

same immediately recorded in the office of the county clerk or the proper recording officer of the county in which the appropriation was sought to be made. The existence of such a custom is combated by some of the defendants, and by others it is admitted, but in a qualified sense. By the latter it is claimed that the recording of the notice was not required. The referee found that the custom did exist at the time of the inception of each and every of the water appropriations involved in the controversy, to the full extent, as stated above, and in this he is supported by the evidence. Under these conditions, the plaintiff's appropriation would relate back to the date of posting the notice by Mallett, Adams, and Lee, July 12, 1881; certainly to the date of their commencing the construction of the ditch, which was either in August or September following. The rule⁸⁶ seems to be that where notice is required, and one is given, and thereafter the work necessary and requisite to secure a diversion for a beneficial use is begun in good faith, and prosecuted with due and reasonable diligence until completed, and actual diversion made, the appropriation relates back to the first step taken. The authorities are somewhat in conflict as to what constitutes the first step, whether the posting of the notice, or the actual commencement of work: *Cole v. Logan*, 24 Or. 309; *Kinney on Irrigation*, sec. 168; *Woolman v. Garringer*, 1 Mont. 535. If, however, there has been an unreasonable delay in carrying forward the work of construction, and the works and appliances necessary to a diversion for the useful purpose intended are not completed within such time as reasonable diligence would require, the appropriation is considered by Mr. Black as beginning with the date of actual diversion, and by Mr. Kinney when the appropriation is fully completed: *Black's Pomeroy on Water Rights*, sec. 55; *Kinney on Irrigation*, sec. 161. But whether the one or the other of these authorities should be followed does not become material for us to determine.

It is not seriously contended that the plaintiff's appropriation is invalid, but that it should be confined as to quantity and priority to the rights acquired by Mallett and Adams, which would accord to it an appropriation of from two hundred and sixty to five hundred inches, dating from August or September, 1881, and that any appropriation in excess of this quantity should be recognized only as having been made at the date of actual user for beneficial purposes. In other words, it is insisted that plaintiff's present appropriation is a conjoined aggregate of lesser ap-

propriations, having their inception at different dates, and that, when traced to their several sources, that only which is personal to Mallett and Adams will antedate the defendants' appropriation, and ⁸⁷ that, if thus analyzed, the quantity of the appropriation having priority over those of the defendants will be found to be small, and not to exceed the quantity named. This brings up a question which we have found difficult of solution, and the conclusion at which we have arrived has not been reached without some misgivings. Let us first get a clear idea of the elements which enter into and go to establish a valid appropriation of the waters of a public stream to a beneficial purpose, as we shall be aided by the process, and be the better enabled by the application of analogous cases to the salient features to determine with greater satisfaction the quantity and legal status of the plaintiff's appropriation. The rule is concisely laid down by Mr. Justice Moore, in *Low v. Rizer*, 25 Or. 557, that "to constitute a valid appropriation of water three elements must always exist: 1. An intent to apply it to some beneficial use, existing at the time or contemplated in the future; 2. A diversion from the natural channel by means of a ditch, canal, or other structure; and 3. An application of it within a reasonable time to some useful industry." In elaboration of these elements, Mr. Pomeroy says of the first: "The fundamental doctrine is well settled that the appropriation must be made with a bona fide present design or intention of applying the water to some immediate useful or beneficial purpose, or in present bona fide contemplation of a future application of it to such a purpose, by the parties thus appropriating or claiming": *Black's Pomeroy on Water Rights*, sec. 48. Mr. Justice Lord, in *Simmons v. Winters*, 21 Or. 42, 28 Am. St. Rep. 727, says: "There must be some actual beneficial purpose, existing at the time or contemplated in the future, as the object for which the water is utilized." This language was approved by Chief Justice Bean in a later case: *See Hindman v. Rizer*, 21 Or. 120.

⁸⁸ It has been suggested that the intent and the application is a matter personal to the appropriator, and that whatever he proposes to do with the water must be done by himself, and in connection with his own property. From the nature of things, the intent to apply to some present or future contemplated use must rest with the appropriator. It is a mental status which may manifest itself by subsequent declarations and acts, such as posting notice, diverting the water by the building of a dam, the construction of a ditch or other means, and by apply-

ing it to the contemplated use. Ordinarily, a person may declare his intentions through another, and may act through an agent, and yet the declarations and acts are as much his as if they were the result of his personal and physical application, and unless there is some reason why an appropriator may not invoke the ordinary agencies for the purposes of perfecting his appropriation, he ought not to be denied the right of their employment for such purposes. So far as it may become necessary to construct the necessary appliances to secure the actual diversion of water, and to transport it to the place of use, and even as it concerns the physical application to the use, there can be no doubt of the right to his employment of such agencies. But the purposes of the appropriation must abide with the appropriator, it must be a design of his concoction or adoption, and the use he proposes must be a beneficial one; thus far it is perfectly manifest that the act is personal to himself. So that, taking these propositions as granted, the inquiry is narrowed to the object to which the use must be applied. Must the appropriator be the proprietor of or have an interest in the object in connection with which the water must be utilized, in order to perfect the appropriation, or will it serve the purpose if the water is supplied to some other person, who makes the appropriation in connection with an object in which the appropriator has no interest? ⁸⁹ To state the proposition concisely, Can A appropriate water for the purpose of running B's mill, or irrigating his lands or working his mines, and will such use made of it by B, granting it to be beneficial, inure to the appropriator's benefit, in the process of perfecting his appropriation? For the present, let us consider the other two elements which go to make up a valid appropriation. As the water of a public stream, while flowing in its natural channel, is the property of the public, an individual, if he would obtain a usufructuary interest therein, must lay hold of so much of it as is required for his use; that is, make a diversion whereby he is thereafter enabled to assert absolute control over it. This needs no elucidation. The third element requires an actual user for some beneficial purpose.

4. The term "appropriation" is often loosely used by the authorities, and in general it is used with reference to a claim to the use of the water of a public stream from the time of the inception of the right, at all the intermediate stages, and down to the time when the last act is accomplished by which the right is finally and completely secured. An appropriation proper is not made until there has been an actual application of

the water claimed to some beneficial purpose or some useful industry; all rights acquired prior to this time, at whatsoever step in the process, amount simply to a claim of an appropriation, but they are none the less rights and privileges which may be asserted and maintained against all persons not entitled to priority in rights and privileges of like nature. The supreme court of California defines the word "appropriation," in the connection in which we are now considering it, as "the intent to take, accompanied by some open, physical demonstration of the intent and for some valuable use": *McDonald v. Bear River Min. Co.*, 13 Cal. 233. It is said in *Thomas v. Guiraud*, 6 Colo. 533: "The true test of appropriation ⁹⁰ of water is the successful application thereof to the beneficial use designed." In *Larimer County Reservoir Co. v. People*, 8 Colo. 614, Helm, J., in speaking for the court, says: "We are of the opinion that when the individual, by some open, physical demonstration indicates an intent to take, for a valuable or beneficial use, and through such demonstration ultimately succeeds in applying the water to the use designed, there is such an appropriation as is contemplated by our constitution and statutes." This language was approved, and the doctrine thereby stated adopted in a late case in the same state: See *Fort Morgan Land Co. v. South Platte Ditch Co.*, 18 Colo. 1; 36 Am. St. Rep. 259. In *Farmer's High Line Canal etc. Co. v. Southworth*, 13 Colo. 115, a complaint by which it was sought to establish an appropriation was held insufficient upon demurrer in that it did not allege the application of the water to the plaintiff's lands. So in *Perego v. McKissick*, 79 Cal. 572, Thornton, J., says: "If the plaintiff has never used the water for any useful or beneficial purpose, he was never an appropriator," and in *Low v. Rizor*, 25 Or. 557, Mr. Justice Moore says: "There having been a failure to make the application of the water to the irrigation of the land within a reasonable time, one of the elements of a valid appropriation is lacking, and hence the defendant's claim to a prior appropriation must fail." Mr. Kinney, in his work on Irrigation, section 167, says: "The appropriation becomes perfect only when the ditches or canals are completed, the water diverted from its natural stream or channel, and actually used for beneficial purposes." So that actual user for a beneficial purpose is the true and only final test touching the question whether a party's claim has ripened into a valid appropriation. There can be no constructive appropriation, nor can any step required to be taken throughout the whole project and

course of ⁹¹ water appropriations be constructively accomplished. It is the actual physical performance of every essential requisite, from the time the purpose is definitely conceived down to the ultimate user of the water in connection with the advancement of some useful and beneficial industry, that matures and finally accomplishes the "appropriation."

5. But this understanding of what it takes to constitute an appropriation does not preclude claimants from acquiring valuable rights and privileges prior to the time when such claims ripen into a full or completed appropriation. There are two periods of gestation, if we may be allowed the expression. One concerns the time required, measured by due and reasonable diligence, for the building and construction of such works and appliances as may be necessary and convenient for diverting the water and carrying it to the place of use (of this we have spoken heretofore), and the other the time needful to utilize the water by the actual application of it to the contemplated beneficial purpose. The appropriation is in every instance limited in quantity and quality by the uses for which the appropriation is made: *Atchison v. Petersen*, 20 Wall. 507. In *Simmons v. Winters*, 21 Or. 35, 28 Am. St. Rep. 727, Mr. Justice Lord says: "The amount of water appropriated must be restricted to the quantity needed for the purpose." The reason of the rule is, that by nature the water supply is limited in the arid regions, and habitation is dependent upon its use to make the earth yield up its precious metals and the soil to bring forth its fruits in season, hence the restriction of its use to quantities needed for beneficial purposes, as with such husbanding of the supply there is yet not sufficient to meet the increasing demands.

6. The claimant is entitled to a reasonable time after he has diverted and carried the water to the place of use in which to make the actual application to the contemplated ⁹² useful purpose; the prime requirement being that he must use reasonable diligence in making the application, the attendant and surrounding circumstances being considered. We quote again from Mr. Justice Lord, in *Simmons v. Winters*, 21 Or. 42, 28 Am. St. Rep. 727: "If the amount of water appropriated is within the given beneficial purpose for which it was taken, no more than is necessary to irrigate the lands contemplated to be reduced to cultivation as soon as can reasonably be done, although more than can be beneficially used for the present, it is nevertheless a valid appropriation": See, also, *Hindman v. Rizer*, 21 Or. 112. In *Conant v. Jones*, 32 Pac. R. 250; the court say: "A per-

son who complies with the law as to locating and conducting the water to the point of intended use has such time as he may need or require, using ordinary diligence in getting his land into cultivation, to make application of such water to the intended use; such time, at least, as is reasonable under all the circumstances of the case": See, also, *Moss v. Rose*, 27 Or. 598; 50 Am. St. Rep. 743. In this case the defendant had cleared off sagebrush, and reduced to cultivation one hundred acres out of one hundred and sixty, during a period of seven years, and was still engaged in clearing up the balance for the purpose of agriculture, and it was held, under the circumstances surrounding the case, that he was exercising reasonable diligence. And in *Cole v. Logan*, 24 Or. 304, Mr. Justice Moore says: "As he [defendant] adds to the area of his cultivated land, he may increase the amount of his diversion until he has acquired the quantity necessary to properly irrigate the whole tract, and any subsequent appropriator diverts the water subject to such prior claim. To entitle the defendant, however, to the benefit of such an appropriation, he should, within a reasonable time, apply the water to such beneficial use. As fast as he can reasonably put his homestead ⁹³ into cultivation, he is entitled to divert and use the water for that purpose." These authorities are sufficient to show that the proposition is settled in this state.

7. Now to return to the contemplated use or the object for which the claim of appropriation is made: After a completed appropriation, the appropriator may sell and convey his lands in connection with which the appropriation was made, and the water rights acquired thereby will pass appurtenant to the land. And this is so even where possessory rights to the public lands, the title to which has not yet been acquired from the government, is transferred by delivery of possession without deed or other writing: See *Hindman v. Rizer*, 21 Or. 112; *Low v. Schaffer*, 24 Or. 239. The ruling under the facts of the former of these cases would seem to imply that if the party who initiated the appropriation had not yet completed it when the transfer of the possessory title to which the water right was appurtenant took place, that his successor would then complete the appropriation. The point, however, was not specially made, but we think it must be conceded that such would be the case. Suppose A is the owner in fee of a tract of land, or of a possessory title thereto, under the government, and initiates a water appropriation for contemplated use for the irrigation of such tract by proper notice, and actual diversion and conveyance to and upon the land,

but, before he has a reasonable time in which to apply all the water needed to the use designed, he conveys the land with his water rights thus acquired to B, surely B could complete the appropriation by reducing the remainder of the land to cultivation, and applying the water to the irrigation thereof—that is, to A's contemplated use. In this instance, B, having acquired A's initiative right, makes the application in his stead, but to the object in connection with which A designed the use. Take another case. Suppose ⁹⁴ A makes a diversion for a contemplated use upon White Acre, which he owns, and afterward, and before he has completed his appropriation by actual user of all the water of his appropriation needed for the cultivation of White Acre, he purchases Black Acre, of like dimensions, and requiring a like quantity of water for its cultivation, and thereupon he abandons White Acre, and uses the water upon Black Acre; can he thus complete his appropriation? It would seem reasonable that he could, although upon this proposition we have found no adjudicated cases. If such is the case, here is a change of the object in connection with which the use was primarily designed. However, in either case, the object was primarily the property of the appropriator.

8. After an appropriation is completed, it is settled that there may be a change of the place of use: See *Wimer v. Simmons*, 27 Or. 1; 50 Am. St. Rep. 685. Even a sale or transfer of the whole or a part of the appropriation may then be made, either in connection with or separate and apart from the land, and the purchaser may use it for an entirely different and distinct purpose: *Drake v. Earhart*, 2 Idaho, 716; *Strickler v. Colorado Springs*, 16 Colo. 68; 25 Am. St. Rep. 245.

9. Mr. Pomeroy, in his work on Water Rights, section 47, as touching the methods by which an appropriation is effected, asserts the following proposition: "The very object of his [the appropriator's] appropriation may be to conduct the water from the stream, through a ditch or canal across the intervening public lands, to the tract which he possesses as a mining claim, a farm, or a mill, or even to sell and dispose of the water thus conducted through the canal to other parties, who use it for like purposes on their own 'claims' or tracts of land." And Mr. Kinney states the proposition in very much the same ⁹⁵ language: See *Kinney on Irrigation*, sec. 156. No authorities are cited in support of the text. The language here used by the learned authors, that the very object of the appropriation may be to sell and dispose of the water to other parties, who may use

it for like purposes on their own claims or tracts, is only reconcilable with the idea that the contemplated use may be for other persons not concerned in the initiation of the appropriation, as they are discussing the methods of appropriation, not of the property rights after a completed appropriation, nor of a sale or disposal of the use while the appropriation is in process of acquirement. And we have seen that there can be no appropriation without actual application to the contemplated use. Mr. Kinney, in a succeeding section (section 171), in a summary of his chapter upon "Methods by which Appropriations of Water may be Made," says: "At the very inception of a valid appropriation of water from a natural stream or lake, there must be a bona fide intention upon the part of the one attempting to appropriate the water to apply the same, when his appropriation is completed, to some of the beneficial or useful purposes." Then, after stating the office of the notice and the necessity of diversion, he says: "All the water, when so diverted, must be applied to some one of the beneficial or useful purposes." Mr. Pomeroy is also in accord with this view, although he does not state it so clearly. In this statement of the rule we find no element which requires the appropriator to make the contemplated use in connection with lands or property of his own, and the rule thus stated is complied with when the appropriator's contemplated use is to work the mines, run the mill, or irrigate the land of another. In *Simmons v. Winters*, 21 Or. 35, 28 Am. St. Rep. 727, Mr. Justice Lord says: "While a settler cannot appropriate more water from the public domain than is necessary to irrigate his ⁹⁶ land, nor any to irrigate lands which he does not intend to cultivate, nor own or hold by possessory title," and from this language it is argued that the rule goes farther than as stated by Mr. Kinney, and requires the appropriator to possess or own the lands in connection with which the contemplated use must be wrought out by a physical application thereto of the water claimed, but the language was used with reference to the facts of that particular case. So, also, language of somewhat similar import was used by Hawley, C. J., in *Barnes v. Sabron*, 10 Nev. 243, cited in *Simmons v. Winters*, 21 Or. 25; 28 Am. St. Rep. 727. In each of these cases the settler was making an appropriation for use upon his own lands. The question of a contemplated use elsewhere was not made, so that these cases are not authority here.

The general purpose of an appropriation is to utilize the water in the arid regions, where the supply is limited, for the de-

velopment and advancement of beneficial industries. In many localities where the water is difficult of diversion, and the expense considerable in conducting it to the place of use, if individual landholders, or even an aggregation of them, were required to make the appropriation for use upon their own possession, these general purposes would be entirely defeated simply for the reason that such holders could not bear the burden of making the appropriation. In such cases, other persons possessing capital are often willing to make the diversion for the benefit of those who have use for the water, but, unless they may contemplate a use which may be applied by the landowner to his possessions, they could not even initiate the appropriation until they had possessed themselves of lands in proportion to the amount of water it is desired to appropriate; so that if the user must be the appropriator, and the appropriator the landholder, the arid regions in many places would remain arid, whereas ^{or} otherwise they could be made to teem with fertility. No sufficient reason has been suggested why the contemplated use may not be for and upon the possessions of a person other than the appropriator; the authorities we have seem to support the rule that it can be, and we believe it is correct upon principle. We take it, therefore, that the bona fide intention which is required of the appropriator to apply the water to some useful purpose may comprehend a use to be made by or through another person, and upon lands and possessions other than those of the appropriator. Thus the appropriator is enabled to complete and finally establish his appropriation through the agency of the user.

In Colorado, within the meaning of her constitution, it is held that the appropriation of water consists of two acts: 1. A diversion; and 2. The application thereof to a beneficial use; and the latter is declared to be the essential act; hence it is there established that canal companies which are engaged in diverting the water and carrying it to the consumer are to be "regarded as an intermediate agency existing for the purpose of aiding consumers in the exercise of their constitutional rights, as well as a private enterprise prosecuted for the benefit of its owners": *Farmers' etc. Co. v. Southworth*, 13 Colo. 130; *Wyatt v. Larimer Irr. Co.*, 18 Colo. 308; 36 Am. St. Rep. 280. In effect, the carrier, that is, the canal company, stands in the relation of an agent to the user, who must be regarded as the principal. But where a third element is essential to a valid appropriation, consisting of an intent which, by the nature of things, is peculiarly

the act of the appropriator, and which must precede all others in the process of appropriation, it would seem that he who designed the scheme and made the diversion was the principal, rather than the user, who applies the result of the ⁹⁸ former's labor to his beneficial purpose. But, in whatever capacity the parties to the appropriation may be considered, the result is the same, the water of a public stream is eventually applied to a beneficial use, and the general purposes of such appropriations accomplished. As to who, in general, would own the appropriation when completed, it is not necessary for us to say at this time. We are of the opinion, however, that it is the subject of contract between the person who initiates the appropriation and the user. Nor is such a rule consistent or congenial with the creation and fostering of monopolies in the use of the waters of public streams. The appropriator cannot withhold the water from a beneficial use. He must be diligent in making the diversion, or else he loses his inceptive right, and reasonably expeditious in making the application to a beneficial use, otherwise his appropriation will be measured by the quantity actually used; and he must not cease to use the waters appropriated, upon pain of suffering an abandonment. And going with all this is the primordial condition that when not using he must suffer others to use.

10. Tested by this understanding of the law, let us examine the plaintiff's appropriation. Mallett, Adams, and Lee contemplated a use, not only to be applied by themselves, but by such others as might come in under their ditch. They had in mind some persons with whom they had arranged to join them in the new settlement, should they find a suitable locality; and they expected others to come, as they did subsequently, some of whom they brought in themselves. Indeed, the very object of the scheme was to induce immigration and settlement, which they expected to accomplish by diverting the water, and conveying it to such localities as would be convenient for use, with a purpose of developing the appropriation with the aid of such other settlers as would apply the use. ⁹⁹ They had a reasonable expectation that there would be a demand for water as soon as they could convey it to a convenient place for the intended use, and in this respect the scheme could not be said to be merely speculative, impracticable, or visionary. Their original scheme comprehended the building of the ditch as far as the Dunbar place or tap. This is shown by the fact that their survey comprehended only that portion of the ditch. They refused to build

the Morfitt extension, but allowed him to construct it, and conveyed to him an interest in the main or original ditch. But it was no part of the original design to carry the water down for the use of Morfitt or other persons convenient to such extension, and the same may be said of the Danielson extension. It was incumbent upon Mallett, Adams, and Lee to begin and construct the works and appliances necessary to a diversion and conveyance of the water to the place of use with all due and reasonable diligence. This they did, and accomplished their purpose in this respect in 1884. The fact that Lee dropped out could make no difference. Mallett and Adams carried forward the enterprise as it was conceived and had been entered upon by all the parties. It was also incumbent upon them to have at the time, or approximately with the time of completing such works and appliances, users ready and willing with sufficient lands and possessions to absorb the appropriation by application to a beneficial use within a reasonable time thereafter. They complied in part with this condition by arranging to divide their appropriation with Blanton, Brown, and others before they had completed the diversion; and at or near the time of such completion they contracted with others for transfers of additional subdivided interests, all of whom began the use of water through the ditch at about or near the time of the completion ¹⁰⁰ of the works and appliances for the diversion and conveyance of the water to the place of use.

In *Irwin v. Strait*, 18 Nev. 436, one Withington had purchased a tract of land, diverted water, and caused it to flow thereupon in April, 1867, but did not begin the proper use of it for irrigating purposes until the spring of 1868. In commenting upon this state of facts, Belknap, speaking for the court, says: "We do not think that, in exercising reasonable diligence to appropriate the water, Withington was bound to use it for irrigation during the year 1867. It may have been impracticable by reason of the season, or the difficulties incident to an unsettled country, to have applied the water to irrigation the same spring in which he made his purchase." So it would seem in the case before us that if parties, through the intervention of the appropriators, began the use of water as early as the irrigating season of 1885, there would have been the manifestation of sufficient diligence to prevent the appropriation from lapsing. Whatever diversions were made through the Morfitt and Danielson extensions cannot be considered as within the Mallett, Adams, and Lee appropriations, as their contemplated use did not compre-

hend an application through either of these extensions; and, as far as any appropriations made by parties through these extensions are concerned, they must be considered as individual appropriations, independent of that made by Mallett, Adams, and Lee, and their inception must date from the time of actual user, or at most from the time of the commencement of use in each individual case. There was an enlargement of the ditch in 1888, and a change of the point of diversion, and at or subsequent to that time parties began the use of water; but the evidence is too meager by which to fix the date and quantity of such appropriations, and hence they can have no place in this investigation. The Nevada Ditch ¹⁰¹ Company, the plaintiff herein, has acquired various subdivided interests of parties who acquired through Mallett, Adams, and Lee, and to this extent it must be considered as the owner of their appropriation. The stockholders may or may not be entitled to the use of water, as it regards the company, in proportion to the number of shares of stock they hold therein, but the stock is in no way the measure of the appropriation. The change of the point of diversion has worked no one an injury, and hence none can complain: *Cole v. Logan*, 24 Or. 304.

Now as to the quantity of plaintiff's appropriation: There are sixteen hundred and forty-three acres under cultivation, which can be traced with reasonable certainty to users who began the use of water in 1883, 1884, and 1885, and one hundred and sixty acres additional, which may be traced to a commencement in 1886. In 1894 there was irrigated under the two first sections of the ditch about nineteen hundred and seventy acres. Parties have been diligent in reducing their lands to cultivation, and yet at the time of the commencement of this suit had not reclaimed all their holdings as intended or desired. In the opinion of the referee, the capacity of the ditch was two thousand and eighty-two inches, miner's measurement, 1886, and at that time carried water to its full limit, all which was actually utilized for beneficial purposes. While the capacity of the ditch is not the measure of the appropriation, it nevertheless becomes a potent factor in the ascertainment of the primary intention and establishment of the appropriation, where the evidence touching the use and its inception is indefinite. It requires about one inch of water to the acre for successful irrigation, and when the land is new even more; but upon an average an inch an acre will suffice for the irrigation of the lands under the first two sections of the Nevada ditch, including loss by seepage and evaporation.

Thus considered, plaintiff's appropriation would range from sixteen hundred and forty-three to nineteen hundred and seventy inches, measured by ¹⁰² actual user. Upon the whole, we think plaintiff should be allowed an appropriation of two thousand inches of water, miner's measurement, which has for its commencement by relation to August or September, 1881, if not to June 12th of that year, the date of posting the notice.

11. As regards the agency ditches, the Pacific Live Stock Company claims an appropriation prior to the plaintiff. It is contended that the government, having set aside the Malheur Indian Reserve, and its officers and agents having constructed the two agency ditches, diverted the water thereby and used it for agricultural and mechanical purposes, making an appropriation of the water for beneficial uses with like effect as if it was a private individual; and that having granted the lands upon which the ditches are located and the water was utilized, with their appurtenances, the grant carried with it the appropriation, all which the Pacific Live Stock Company has acquired through mesne conveyances from the government. Actual diversion and use for beneficial purposes will constitute an appropriation; but is such the effect when the government has made the diversion from a public stream, and applied the use to government property, although for beneficial purposes? Prior to September 12, 1872, the lands comprised in the Malheur Indian Reservation were a part of the public domain, but by executive orders of date September 12, 1872, May 15, 1875, and January 28, 1876, they were withdrawn from settlement, and set apart for the use and occupancy of the Snake and Piute Indians. By executive orders of date September 13, 1882, and May 21, 1883, the whole reserve was again restored to the public domain, except three hundred and twenty acres upon which the old Camp Harney military post buildings were situated. On May 23, 1883, the agency buildings, and sections 3 and 10, township 19 south, range 37 east, upon which they were situated, were ordered sold, in accordance with ¹⁰³ the provisions of sections 2122 and 2123 of the United States Revised Statutes. The remaining portions of the lands so restored to the public domain were thrown open to settlement. E. L. Bradley having pre-empted the lands in section 4 upon which the heads of both ditches are located, the government issued to him the usual patent therefor, containing the following conditions and reservations, viz: "To have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belong-

ing subject to any vested and accrued water rights, for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts, etc." This patent was issued November 26, 1889. T. M. Overfelt purchased the agency buildings, with sections 3 and 10, and on May 9, 1885, a patent was issued to him for these buildings and premises, with like conditions and reservations in every respect as the Bradley patent, except the words "improvements, tenements," are inserted and precede the words "rights, privileges, immunities, and appurtenances."

It has been the policy of the general government from an early date, when the exigencies of the public service required it, for the President, through the instrumentality of executive orders, to reserve such portions and parcels of the public domain from sale and settlement as seemed expedient, and thereby set them apart for public use, and it may be conceded that the President had competent authority for so doing: *Grisar v. McDowell*, 6 Wall. 381. It may be predicated of the waters of non-navigable streams upon the public domain, that are not appropriated by the methods cognizant to law, that they are as much the property of the government as the lands ¹⁰⁴ through which they flow: *Kinney on Irrigation*, sec. 134. *Hillyer, J., in Union etc. Min. Co. v. Ferris*, 2 Saw. 176, says: "A stream of water is a part and parcel of the land through which it flows, inseparably annexed to the soil. . . . The government, as proprietor of the land through which a stream of water naturally flows, has the same property and right in the stream as any other owner of land has, be it usufructuary or otherwise": See, also, *Vansickle v. Haines*, 7 Nev. 249. In the *Mining Debris* case, 9 Saw. 492, 18 Fed. Rep. 753, *Sawyer, C. J.*, says: "As owners of the public lands, the United States, like any other owner, could sell them in large or small quantities, and convey a fee simple title to their grantees, or could lease them, or reserve them from sale, or grant a limited estate, subject to easements granted to others. . . . They could do all this with their own lands, held in the character of proprietor, merely as the public lands are held." In short, the government can deal with its lands as other land proprietors can deal with theirs. In the Pacific Coast states, Congress has recognized the privilege of private citizens to acquire usufructuary interests in the waters of public streams, independent of riparian ownership. This is

but one way, however, of disposing of the public domain. A new and peculiar right is carved out of it, and settled upon private persons, either in their individual or corporate capacity. Now, if such an estate may be carved out of the public domain for an individual, it may be reserved by the general government, but the waters of non-navigable streams are part of such public domain, and hence the property of the government, which may lay hold of and use them, without taking any of the steps made necessary to obtain an usufructuary interest therein by private individuals. But if it would prevent individuals from acquiring interests by prior appropriation, it would seem that there should be a ¹⁰⁵ reservation made of such waters either by act of Congress or some executive order. Such has not been the case here. The most that can be predicated of the acts of the government and its officers and agents, in the diversion and use of waters in connection with the agency lands, buildings, and machinery, is that it was a reservation for a public use, not an appropriation for a beneficial use in that sense, although actually used by the government for beneficial purposes, which was also a public use. It was a use the government could employ so long as it saw fit, but it is not clear how a public use could become appurtenant to the soil so as to pass with it to a private individual.

12. The public use which the government employs, and the usufructuary interest acquired by the individual by appropriation, are two distinct and different things; the latter may and does pass appurtenant to the soil, but the moment the government parts with its domain to a private individual the public use is abandoned, unless a like use is by special and competent stipulations passed to him by his grant. It is not claimed that such was the case here. But when the reserve was thrown open to sale and settlement, the reserved lands were thereby restored to the public domain, and the public use abandoned, and such would surely be the effect as it relates to any reservation of the waters of such domain for a like use. This, of course, proceeds upon the assumption that the use made of the waters by the officers and agents of the government had the effect of a formal withdrawal thereof by competent authority under the government, but we do not decide that such was in reality the effect of such use. Such we think would be the effect of a restoration to the public domain, and the ordinary patent would not carry with the lands the public use made of the waters upon such lands as an appurtenant thereto.

¹⁰⁶ 13. But if we are mistaken in this view of the question, there is another matter connected with the transaction which is fatal to the Pacific Live Stock Company's claim. It derives its title through patent from the government, which is a grant "subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts." This is an implied recognition of such rights of prior appropriators as had at the date of the patent been established, and a direct transfer expressly subject to such rights. And the patentee, and, a priori, his successor in interest can take no larger estate than the government has been pleased to grant: Kinney on Irrigation, sec. 148. So that the company is especially estopped by its muniments of title from claiming as a specific grant from the government, whether as an appurtenant or otherwise, the usufruct of the waters of the Malheur river and its tributaries, as against any and all persons who acquired rights as prior appropriators of the waters of such streams before the issuance of the patent to Bradley and Overfelt. The addition of the words "improvements and tenements" in the Overfelt patent cannot enlarge the grant, except in so far as is quite apparent from the incidents and the patent itself that the government meant to pass the title to the agency buildings as well as to the land. In this view of the matter, the Pacific Live Stock Company must depend for its water rights upon such appropriation as was initiated by Overfelt & Co., after possession of sections 3 and 10 was surrendered to them by the government. It appears that they took possession in April, 1885, prior to the issuance of the patent, and that they at once repaired both these ditches, and began the use of water through them for useful purposes. If such was the case, the inception ¹⁰⁷ of the Pacific Live Stock Company's appropriation antedates the patent to Overfelt, and was a right acquired independent of such patent, and such a right as one holding merely the possessory title to government lands might acquire. But even the inception of the right, whatever it may be, cannot take an earlier date than April, 1885, which is long subsequent to the acquirement by plaintiff of its appropriation, and hence is subordinate thereto.

As concerns the Gillerman-Froman ditch, it has been suggested that the appropriation made by means of it had its inception with the Rinehart survey in 1877 or 1878, but Rinehart

did not follow up the survey with the construction of the ditch and diversion of water, nor is there any privity of interest shown between him and the Gillerman-Froman people, so it is plain there is no merit in the suggestion. In the absence of such privity the Gillerman-Froman appropriation is clearly subsequent in time to that of the plaintiff.

For the Malheur Farmers' Irrigating Ditch Company it is claimed that its appropriation had its inception with the Osburn surveys in 1880, and the posting and recording of a notice of appropriation claiming five thousand inches of water a mile and a half above the head of its ditch. But Osburn and Limeberger did not exercise reasonable diligence in making their diversion, and there is no relation between their attempted appropriation and the one which the company now possesses. Hence its appropriation is also subordinate to plaintiff's.

Eastman Brothers & Ballentine acquired no rights to their appropriation earlier than 1884, nor did the Sand Hollow Ditch people prior to July, 1885. The Warm Spring Valley ditch was constructed without notice in 1888, and it is not claimed that any appropriation was made through the Harper's Ranch ditch earlier than April, 1883. So ¹⁰⁸ that all these appropriations are subservient to that of the plaintiff.

These considerations lead to a modification of the decree of the court below, and a decree will be entered here establishing the plaintiff's appropriation of two thousand inches of water, miner's measurement, and enjoining all the defendants who are parties to the appeal from diverting any of the waters of the Malheur river until the plaintiff receives the amount of its appropriation. The case will be remanded to the court below, with directions to carry the decree into effect.

Modified.

What Constitutes an Appropriation of Water.*

The Preliminary Notice.—The chief value of the principal case is in its consideration of the question, what is essential to constitute a valid appropriation of water, in which question are included both the acts necessary to constitute such an appropriation and the diligence which must be exercised in their performance. Either by statute, or by a custom so well established and generally recognized as to have all the force of a statute, it is usual for persons intending to appropriate the waters of a running stream, or some part thereof, to give warning of their intention by posting at or near the intended point of diversion a notice signed by the person or persons

* REFERENCE TO MONOGRAPHIC NOTES.

Water, respective rights of appropriators and riparian owners: Note to Heath v. Williams, 43 Am. Dec. 269-272.

desiring to make the appropriation and stating such fact, the amount of water intended to be appropriated, the place and means of diversion, the use or uses for which the water is desired, and generally the place where it is to be used, and a designation of the general route of the ditch or canal by which it is to be carried. These notices, however, are not indispensable to the valid appropriation of water. They are merely intended as the first act toward such appropriation, to which the appropriation, when completed with reasonable diligence, shall relate, and shall thus become paramount to the rights of such persons as shall subsequently undertake to make an appropriation of the waters of the same stream, whether such appropriation be preceded by a formal notice or not. The actual appropriation of water, though not preceded by the posting or recording of any notice, is valid both as against persons claiming an interest in the water as riparian proprietors: (*Burrows v. Burrows*, 82 Cal. 564), and as against subsequent appropriators thereof: *Wells v. Mantes*, 99 Cal. 583; *Watterson v. Saldunbehere*, 101 Cal. 107; *Hargrave v. Cook*, 108 Cal. 72; *Wells v. Kreyenhagen*, 117 Cal. 329; *Union etc. Co. v. Dangberg*, 81 Fed. Rep. 73. The notice of itself cannot constitute an appropriation of water nor confer any right on the persons filing it other than that of proceeding with reasonable diligence to complete the proposed appropriation. If they do not thus proceed, they have no rights whatsoever in the waters of the stream concerning the appropriation of which they have given their notice: *Cardoza v. Calkins*, 117 Cal. 106.

Statutes of the United States Concerning.—The Revised Statutes of the United States contain certain enactments respecting the appropriation of waters and which are applicable to the public lands. These statutes have generally, if not universally, been construed as merely recognizing pre-existing laws or customs under and by virtue of which it had been the habit for many years, in the western portion of the United States, of persons desiring the use of the water for mining, agricultural, or milling purposes, to divert it from the running streams and apply it to the desired purpose. Therefore, it has always been held that an appropriation of water running through lands constituting a part of the public domain will not only be recognized by the United States, but may be enforced against patentees of such lands whose rights do not antedate the appropriation of such water: *Osgood v. El Dorado etc. Co.*, 56 Cal. 571; *Hammond v. Rose*, 11 Colo. 524; 7 Am. St. Rep. 258; *Drake v. Earhart*, 2 Idaho, 716; *Jones v. Adams*, 19 Nev. 78; 3 Am. St. Rep. 788; *Lehl etc. Co. v. Moyle*, 4 Utah, 327; *Isaacs v. Barber*, 10 Wash. 124; 45 Am. St. Rep. 772; *Union etc. Co. v. Dangberg*, 81 Fed. Rep. 73; *Broder v. Water Co.*, 101 U. S. 274.

Relation of Appropriator's Title.—As between appropriators of water and purchasers of land from the United States, as well as between rival claimants of water by appropriation, it may often be necessary to ascertain the precise point of time when the right attempted to be asserted began; for it is universally conceded that

the right of an appropriator of water, though an actual appropriation and use thereof are necessary to its consummation, must, when the consummation is effected, be deemed to have begun with the first work or act necessary to such appropriation, reasonable diligence in perfecting it being thereafter exercised. In those states in which a notice is required to be posted and recorded, the right of the appropriator, when perfected with reasonable diligence relates back to the filing of such notice. On the other hand, if notice is not provided for by statute, or, if provided for, is not given, the title of the appropriator by relation must be regarded as commencing at the time when he began his dam, ditch, flume, or other appliance by means of which his appropriation is effected, provided he prosecutes his enterprise to success and with reasonable diligence: *Woolman v. Garringer*, 1 Mont. 535; *Ophir etc. Co. v. Carpenter*, 4 Nev. 534; 97 Am. Dec. 550; *Irwin v. Stralt*, 18 Nev. 436; *Cole v. Logan*, 24 Or. 309; *Nevada etc. Co. v. Bennett*, 30 Or. 59; ante, p. 777; note to *Heath v. Williams*, 43 Am. Dec. 281; *Kinney on Irrigation*, sec. 168; *Union etc. Co. v. Dangberg*, 81 Fed. Rep. 73.

There may be cases, however, in which, though the work of appropriation is not prosecuted with reasonable diligence, it is ultimately completed and an actual appropriation made. Under such circumstances, the title of the appropriator cannot relate back to the first step taken by him, because to permit him to do so would be to regard with the same favor an appropriator who had been diligent and one who had not. Still, if the appropriation is actually completed, the appropriator acquires rights by virtue thereof paramount to the rights of all others accruing subsequently to the perfected appropriation. Whether the title can relate back to any period anterior to this must be regarded as in doubt. Possibly, if, after being guilty of a want of diligence in prosecuting the proposed appropriation and constructing the appliances necessary thereto, the intending appropriator should begin work and thereafter prosecute it diligently and notoriously, his title, when his work was completed, might relate back to the commencement of this uninterrupted period of diligence, or, at least, to some time therein when it must be apparent to all observers that the work was being prosecuted diligently and with reasonable expectation of success. We have not, however, met any adjudication respecting a case of this character; and, so far as there is any general expression upon this subject, it is to the effect that where there has been a want of reasonable diligence, but the intending appropriator nevertheless finishes his work and makes an actual appropriation, his title does not relate to any period anterior to that event, and is therefore subordinate to the claims of other appropriators, who, though their first step was taken after his, were not guilty of any want of diligence in the prosecution of their enterprise: *Ophir etc. Co. v. Carpenter*, 4 Nev. 534; 97 Am. Dec. 550; *Kinney on Irrigation*, secs. 168, 184.

In one instance, in which the question was not that of want of diligence in completing the diversion of the works and appliances

necessary thereto, but of too great delay in applying the water after its diversion to some useful purpose, but such delay was succeeded by the application of the water to such a purpose before the right of any other appropriator intervened, it was held that the right of the first appropriator had not been lost. The court said: "If, by neglect to apply the water within a proper time, the right to apply was forfeited, the water reverted, and anyone could proceed to appropriate it; but such right could only attach while the right of the former claimant was in abeyance by reason of his negligence, and the second party must have availed himself of the right before the re-entry and prosecution of the enterprise of the first party. Unless, during the interim, when, by failure to prosecute the enterprise, the water right may be regarded as having reverted, some other party intervenes and makes a valid and legal appropriation of the water, the first party may resume, and if such resumption occurs before intervening rights attach, the right to appropriate is lost": *Beaver Brook Co. v. St. Vrain Co.*, 6 Colo. App. 135.

"To constitute a valid appropriation of water three elements must always exist: 1. An intent to apply it to some beneficial use, existing at the time or contemplated in the future; 2. A diversion from the natural channel by means of a ditch, canal, or other structure; and 3. An application of it, within a reasonable time, to some useful industry": *Low v. Rizer*, 25 Or. 551, 557; *Nevada Ditch Co. v. Bennett*, 30 Or. 59; ante, p. 777. "Appropriation is the intent to take, accompanied by some open, physical demonstration of the intent, and for some valuable use": *McDonald v. Bear River etc. Co.*, 13 Cal. 220, 232. "The true test of an appropriation of water is the successful application thereof to the beneficial use designed, and the method of diverting or carrying the same, or making such application, is immaterial": *Thomas v. Guiraud*, 6 Colo. 530; *Larimer Co. v. People*, 8 Colo. 616; *Fort Morgan etc. Co. v. Ditch Co.*, 18 Colo. 4; 36 Am. St. Rep. 259; *Taughenbaugh v. Clark*, 6 Colo. App. 244.

The purpose for which water is appropriated is not material, provided it is for some useful industry or for the supplying of a well-recognized want. It may be to aid in mining operations: Marius v. Bricknell, 10 Cal. 217; *Ortman v. Dixon*, 13 Cal. 34; or to furnish power for a mill or for the propelling of other machinery: *McKinney v. Smith*, 21 Cal. 374; *Ortman v. Dixon*, 13 Cal. 34; *Speake v. Hamilton*, 21 Or. 3; *Isaacs v. Barber*, 10 Wash. 124; 45 Am. St. Rep. 772; as to operate an electric plant: *Lanboon v. Bell*, 18 Colo. 346; or to irrigate lands devoted to agriculture or horticulture; *Tucker v. Jones*, 8 Mont. 225; *Barnes v. Sabron*, 10 Nev. 217; *Ison v. Nelson etc. Co.*, 47 Fed. Rep. 199; or to supply water to quench the thirst of men and other animals, or to extinguish fires, or to subserve any other useful end connected with the government and well-being of municipalities and other communities.

The Intent of the Diversion.—The first of the elements essential to a valid appropriation of water is an intent to apply it to some beneficial use, existing at the time or contemplated in the future.

The intent must exist at the time of the diversion of the water, and must be an intent that it shall be applied to a beneficial use. The most unquestionable illustration of the diversion of water without accomplishing any appropriation of it exists when a ditch or other appliance has been constructed and used for the purpose of draining off superfluous waters, the intention being rather to rid oneself of the water than to make any use whatever of it. Under such circumstances there is no appropriation of the water, however long continued its diversion may be, until an intent is formed of applying it to some beneficial purpose: *Maeris v. Bicknell*, 7 Cal. 261; 68 Am. Dec. 257; *McKinney v. Smith*, 21 Cal. 373; *Thomas v. Guiraud*, 6 Colo. 530; *Dick v. Caldwell*, 14 Nev. 167.

In the case cited from 68 Am. Dec. 257, it was shown that, in 1851, the predecessors of the plaintiff cut a ditch from a ravine, and one year later the predecessors of the defendant cut two ditches from the same ravine, but above that cut at the earlier date. It was insisted that the ditch first cut was intended for, and used only as, a drain to carry off water from certain mining claims, and that before the water so carried off had been applied to any beneficial purpose, the other ditches had been constructed and water diverted thereby and used for mining. The trial court instructed the jury that it was not material what was the original intention of the party constructing the first ditch, provided its use was not abandoned prior to the time the rights of other parties attached. Upon this instruction there was a judgment in favor of the plaintiffs, and an appeal therefrom to the supreme court, where it was reversed because of error in this instruction. In determining this question the appellate court said: "In the case of *Kelly v. Natoma Water Co.*, 6 Cal. 105, this court held that 'possession or actual appropriation must be the test of priority in all claims to the use of water, whenever such claims are not dependent upon the ownership of the land through which the water flows.' From this decision, it follows that there must be an actual appropriation, and it would seem clear that such appropriation must be for some useful purpose allowed by law. In fact, merely turning the water from a claim, with the intention to dispense with its use, is no actual appropriation at all. It also follows, from the same decision, that until such actual appropriation there can exist no complete right to the use of the water, for the party may never carry out his intention. But it was also held in that case that if a party commenced first to construct a work in good faith, then, although his power of enjoyment would not commence until its completion, yet the right, as against others, would have relation to the time of commencement. From these principles, it would seem legitimately to follow that if the ditch of plaintiffs was cut for the purposes of drainage simply, and not with the bona fide intention of appropriating the water thus diverted to some useful object, and the ditch or ditches of defendant were commenced first in good faith with the intent thus to appropriate the water, and before any actual appropriation by the plaintiffs or their grantors for mining purposes, then

the defendants gained a priority over the grantors of plaintiffs, and over all persons holding under them. Unless the grantors of plaintiffs had constructed their ditch with the intention of using the water for mining or other useful purposes, or after its construction they had actually so applied it, the defendants could not know that they ever would so apply it or intended to so apply it. If, at the time plaintiffs' ditch was made, such intention had existed and been avowed, and afterward carried out in good faith within a reasonable time, considering all the circumstances, then the defendants could not, by any act of theirs, rightfully appropriate any water in the ravine, necessary to fill the ditch of plaintiffs according to its actual capacity at the date of the commencement of defendants' ditch or ditches. From these principles it follows that the mere prior construction of a ditch, and diverting the waters of a stream, will not give the party any priority over the others. There must be an actual appropriation, or intention to appropriate, followed by due diligence."

In the illustration we have given there can be no presumption of any intention to exercise a right of ownership or to claim a property in the water diverted or in the use thereof, but the result must be the same, though the diverter intends to claim some ownership or property interest in the water. If he does not intend its devotion to some beneficial use, if his object was to impound it (*Beaver Brood etc. Co. v. St. Vrain etc. Co.*, 6 Colo. App. 130), or to otherwise keep other persons from using it, the carrying out of that object could not of itself constitute an appropriation: *Senior v. Anderson*, 115 Cal. 496; *Combs v. Agricultural Ditch Co.*, 17 Colo. 146; 31 Am. St. Rep. 275; *Farmers' etc. Co. v. Agricultural Ditch Co.*, 3 Colo. App. 255. Thus where a dam was constructed across the outlet of certain lakes for the purpose of retaining the waters thereof, to be drawn off at pleasure and used in a ditch belonging to the persons who constructed the dam, but without any necessity of using the additional amount of waters thus accumulated and restrained, the court said: "The evidence in relation to this claim is perfectly plain and uncontradictory, and, we think, shows conclusively that the claim was invalid and without the semblance of law to support it. The water was not claimed for any useful or beneficial purpose or in contemplation of a future appropriation for any such purpose by the parties claiming it. It was a bare claim, for no other object that we can discover than that of speculation. The court would have been justified in instructing the jury to disregard it entirely": *Weaver v. Eureka Lake Co.*, 15 Cal. 271. There are other cases employing language similar to that just quoted (*Combs v. Agricultural Ditch Co.*, 17 Colo. 146; 31 Am. St. Rep. 275), and, like it, liable to mislead the reader by generating a doubt whether water may be appropriated for the purpose of realizing a profit by its sale. When the decisions state in general terms that an appropriation of water may not be made for the purpose of speculation, we do not understand them to mean that the appropriator must intend to use the water personally, or have lands to the irrigation of which it is intended to be applied, or mines

or mills in whose operation he contemplates that it may be profitably employed. What we suppose them to mean is, that water cannot be appropriated by one who neither intends to use it himself nor to permit its employment in agriculture or commerce, and not that he may not appropriate it in view of the increased need that is likely to develop from its use through changes likely to result from a probable increase in population or from the better development of the resources and industries of the community. He must, however, contemplate and intend with reasonable diligence to prosecute his enterprise, so that water may be brought within the reach of persons likely to need it, and may be offered to them for their use at such prices as may be fixed by the appropriator or by some board or tribunal having jurisdiction of that subject. Thus it was said in a case considering the right to the appropriation of water under the constitution of Colorado: "Under our constitution, the water of every natural stream in this state is deemed to be the property of the public. Private ownership of water in the natural streams is not recognized. The right to divert water therefrom and apply the same to beneficial uses is, however, expressly guaranteed. By such diversion and use a priority of right to the use of the water may be acquired. This priority has been declared a property right, and, as such, subject to sale and transfer": *Fort Morgan etc. Co. v. South Platte etc. Co.*, 18 Colo. 1; 36 Am. St. Rep. 259. In one instance it was contended that though a landowner had by appropriation acquired the right to the use of water for agricultural purposes, that he could not transfer such water right to a city to be used for municipal purposes. It was answered thus: "The authorities seem to concur in the conclusion that the priority to the use of the water is a property right. To limit its transfer, as contended by appellee, would, in many instances, destroy much of its value. It may happen that the soil for which the original appropriation was made has been washed away and lost to the owner, as the result of a freshet or otherwise. To say, under such circumstances, that he could not sell the water right to be used upon other land would be to deprive him of all benefits from such right. We grant that the water itself is the property of the public; its use, however, is subject to appropriation, and in this case it is conceded that the owner has the paramount right to such use. In our opinion, this right may be transferred by sale, so long as the rights of others, as in this case, are not injuriously affected thereby. If the priority to the use of water for agricultural purposes is a right of property, then the right to sell it is as essential and sacred as the right to possess and use. Blackstone says: 'The third absolute right inherent in every Englishman is that of property, which consists in the free use, enjoyment, and disposal of all his acquisitions without any control or diminution, save only by the laws of the land: 1 Blackstone's Commentaries, 138.' What difference can it make to others whether the owner of the priority in this case uses it upon his own land, or sells it to others to be used upon other lands?" *Strickler v. Colorado Springs*, 16 Colo. 61; 25 Am. St. Rep. 245.

The Mode of Diversion.—The second element of a valid appropriation of water, namely, that it must be diverted by means of a ditch, canal, or other appliance, needs no especial consideration here, for the reason that it is the fact of diversion, and not its mode, which is material, and whether there has been any actual diversion is a fact for the determination of the jury where there is any conflict in the evidence, or, though there be no conflict, if different persons may reasonably reach different conclusions therefrom. Ordinarily, a diversion is accomplished by a ditch or canal, but any other mode which, under the circumstances, proves effective may be resorted to, as where, by damming up a stream or lake, its waters are made to so rise that some part of them flow into a natural channel (*Simmons v. Winters*, 21 Or. 35; 28 Am. St. Rep. 727), by which they are diverted to another locality and there applied to some useful purpose, or without being taken to any considerable distance are made to overflow lands adjacent to such dam, and thereby to make them more productive. Water, after being diverted from a stream, may be returned to a natural watercourse, and after being carried for some distance therein, the same water or other water of equal amount may be taken therefrom by the appropriator. In other words, he may, in carrying the water to the place where it is to be used, avail himself of a running stream or any other depression, whether natural or artificial, which will accomplish the end in view: *Butte etc. Co. v. Vaughan*, 11 Cal. 143; 70 Am. Rec. 769. "If a dam or contrivance of any kind will suffice to turn water from the stream and moisten lands sought to be cultivated, it is sufficient though no ditch is needed or constructed. Or if the land be productive by the natural overflow of the water thereon without the aid of any appliance whatever, the cultivation of such land by means of the water so naturally moistening it is a sufficient appropriation of such water, or so much thereof as is reasonably necessary for such use. The truest test of an appropriation of water is the successful application thereof to the beneficial use designed; and the method of diverting or carrying the same or making such application is immaterial": *Thomas v. Guirard*, 6 Colo. 530.

The Actual Use of the Water.—The third, and perhaps the most essential, element to the legal appropriation of water is its application within a reasonable time to some useful purpose or industry. It is, perhaps, not strictly true that this application is essential to the appropriation, for if a diversion is actually made with intent to use it for such a purpose, the appropriation is then complete in the sense that the rights of the appropriator cannot be defeated by acts done or appropriations attempted to be made by others after such diversion and while he is proceeding with reasonable diligence to apply the water appropriated by him to the purpose contemplated, or to any other useful purpose, though not the one in view when the diversion was made. At all events, there is no doubt that when water is, within a reasonable time after its diversion, applied to a useful purpose, such application being intended when the diversion was made, the rights of the appropriator relate back to the first step

In the process of appropriation and are paramount to the rights of all other persons having a later inception: Colorado etc. Co. v. Trust Co., 3 Colo. App. 545. What the courts and law writers have meant by declaring that the application of water within a reasonable time to some useful industry is essential to its valid appropriation is, that no one, though he actually diverts water under a claim that he intends to apply it to a useful purpose, shall be permitted unreasonably to withhold its use from others and thereby prevent its application to the trust with which water is usually deemed to be impressed, at least in those states in which large quantities of arid lands are situated that may be made productive by irrigation. We have shown that the intent to apply the water to a useful purpose is indispensable to its appropriation, and, therefore, that one whose object in diverting water from a stream or lake was drainage did not thereby acquire any rights therein as an appropriator. Therefore, in every instance in which water has been diverted, and it is apparent that the object of the diversion was not that of using the water, either directly or through others, there has been no appropriation of it; and though it is not clear that the object was that of drainage merely, still other facts either attending or succeeding the diversion may show that it was not made with intent of applying the water within a reasonable time to any useful purpose of industry, and, if so, the claim that it was appropriated by such diversion must be denied: Weaver v. Eureka etc. Co., 15 Cal. 271; Peregoy v. McKissick, 79 Cal. 572; Vernon etc. Co. v. Los Angeles, 106 Cal. 237; Cash v. Thornton, 3 Colo. App. 475; Farmers' etc. Co. v. Southworth, 13 Colo. 111; Farmers' etc. Co. v. Agricultural Ditch Co., 22 Colo. 513; 55 Am. St. Rep. 149; Wheeler v. Northern etc. Co., 10 Colo. 582; 3 Am. St. Rep. 603; Fort Morgan etc. Co. v. South Platte Ditch Co., 18 Colo. 1; 36 Am. St. Rep. 259; Combs v. Agricultural Ditch Co., 17 Colo. 146; 31 Am. St. Rep. 275; Simmons v. Winters, 21 Or. 35; 28 Am. St. Rep. 727; Hindman v. Rizer, 21 Or. 210; Wimer v. Simmons, 27 Or. 1; 50 Am. St. Rep. 685.

The Amount Deemed Appropriated.—The rule that to complete an appropriation of water it must be applied to a beneficial use necessarily includes the idea that the amount sought to be applied shall not be unreasonable when considered in connection with the use made or contemplated. Hence, where an appropriator makes his appropriation for the purpose of irrigating his land, or furnishing motive power for his mill, or for any other purpose which he may designate, he acquires no right to any property beyond that necessary for the accomplishment of the designated purpose. Water in excess of that, though actually diverted and carried away by him, is not, in the legal sense, appropriated, and still remains subject to appropriation and use by other persons. In other words, an appropriator will not be permitted to waste or misapply water for the purpose of depriving others of their right to its use: Simmons v. Winters, 21 Or. 35; 28 Am. St. Rep. 727; Becker v. Marble Creek Irrigation Co., 15 Utah, 225. "No one is entitled to have a priority adjudged for more water than he has actually appropriated, nor for more than he actu-

ally needs. His priority of right must be limited by each of these considerations": *Nichols v. McIntosh*, 19 Colo. 22. "The legal theory upon which a case of this kind should be tried is very simple, however difficult it may be to apply the law to the evidence. It is plain that the quantity of land and the character of the soil which the appropriators of water from the ditch have under cultivation, as well as their actual prior appropriations of water to the irrigation of such lands, and not the number of shares of stock they may own, are the important matters to be considered in determining such a controversy. In the trial of such an issue, it is also important to observe that no matter how early a person's priority of appropriation may be, he is not entitled to receive more water than is necessary for his actual use. An excessive diversion of water cannot be regarded as a diversion to beneficial use within the meaning of the constitution. Water, in this country, is too scarce, and consequently too precious, to admit of waste. The constitutional rule of distribution, 'first come, first served,' does not imply that the prior appropriator may be extravagantly prodigal in dealing with this peculiar bounty of nature": *Combs v. Agricultural Ditch Co.*, 17 Colo. 146; 31 Am. St. Rep. 275, 281. "Possibly, the appellant's counsel is of the belief that the plaintiff, having made the first appropriation, is entitled to have the water come down to him to the extent of his appropriation, whether he has use for it or not. If so, he is mistaken. Water is too precious in this arid climate to permit of its being unnecessarily wasted. The findings do not show how much water there is in the stream altogether, or whether there is more than enough to irrigate plaintiff's one hundred and twenty-five acres. If there is not, then when he has irrigated that amount, he is entitled to the use of it all. The same is the case when he has irrigated less than one hundred and twenty-five acres, if he needs it all for what he does irrigate. But whatever he may be irrigating, he is entitled only to the amount he needs, economically and reasonably used, and, when he has that, he cannot prevent others from using the surplus": *Roeder v. Stein* (Nev.), 42 Pac. Rep. 867; *Riverside etc. Co. v. Sargent*, 112 Cal. 234. "Water is diverted to propel machinery in flourmills and sawmills, and to irrigate land for cultivation, as well as to enable miners to work their mining claims; and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced. We say within reasonable limits, for this right to water, like the right by prior occupancy to mining ground or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use, and vest an absolute monopoly in a single individual": *Basey v. Gallagher*, 20 Wall. 676, 683. Hence, whatever be the amount of water which has been diverted or otherwise attempted to be appropriated, it must be restricted to the amount necessary to be used for the purpose for which the appropriation was made: *Carron v. Wood*, 10 Mont. 500; *Simpson v. Williams*, 18 Nev. 432.

Wasteful Use not Permitted.—The cases already cited, to which others might be added (Union etc. Co. v. Dangberg, 81 Fed. Rep. 73; Kinney on Irrigation, sec. 38), indicate that an appropriator of water will not be sustained in the wasteful use of it, and that, notwithstanding his diversion of a larger quantity than is necessary, he will be restricted to a reasonably economical use of it. It will obviously be exceedingly difficult for courts to prescribe any unvarying test by which to determine whether the use made of water by the appropriator is so wasteful that it will not be permitted if operating to the prejudice of other appropriators. In one instance, it has been held that the appropriator would not be sustained in using any method of conveying water more wasteful than an ordinary ditch: Roeder v. Stein (Nev.), 42 Pac. Rep. 867. In another case, it was held proper to enjoin an appropriator from diverting the whole amount of water appropriated for the purpose of irrigation at times when it could not be beneficially used for that purpose, and when, as a necessary consequence, it must run to waste; but the trial court having in this case, in effect, required the appropriator to conduct the water by means of pipes to the place where it was to be used, and not having taken into consideration the amount of water which must necessarily be lost in conducting it through an open ditch or flume, its decree was reversed, because it ought to have taken into consideration the loss of water necessarily resulting in conducting it for any considerable distance, and the appellate court was also of the opinion that, as ditches and flumes "are the useful and ordinary means of diverting water in this state, parties who have made their appropriations by such means cannot be compelled to substitute iron pipes, though they may be compelled to keep their flumes and ditches in good repair, so as to prevent any unnecessary waste": Barrows v. Fox, 98 Cal. 63.

Diligence Required in Diverting.—Either as a result of statutory law or of well-known custom having the force of law, one who conceives the purpose of diverting and applying water to some beneficial use is allowed a reasonable time within which to make the diversion, and, after making the diversion, in which to apply the water diverted to the use contemplated or some other. Whether he is proceeding with reasonable diligence in either event is largely a question of fact for the decision of a jury or of the court discharging in this respect the functions of a jury: Osgood v. Water etc. Co., 56 Cal. 571, 579. Whether the question is one of reasonable diligence in constructing the works necessary to the diversion, or in applying the water to a beneficial use after it is diverted, it is to be determined after considering the condition of the country and the circumstances under which the appropriator was called upon to act. "Where the right to the use of running water is based upon an appropriation, and not upon the ownership in the soil, it is a generally recognized rule here that priority of appropriation gives the prior right. When any work is necessary to be done, the law gives the claimant a reasonable time within which to do it, and although the appropriation is not deemed complete until the actual diversion and use of the wa-

ter, still, if such work be prosecuted with reasonable diligence, the right relates to the time when the first step was taken to secure it. If, however, the work was not prosecuted with diligence, the right does not so relate, but generally dates from the time when the work is completed or the appropriation is fully perfected": *Ophir etc. Co. v. Carpenter*, 4 Nev. 534; 97 Am. Dec. 550. In this case, it appeared that a person, desiring to convey water from a river to a village, constructed, in 1858, a ditch more than four miles in length and of varying depth and width, and in the year following used it for the purpose of conveying water to such village, and for other purposes. Some three years later he enlarged the ditch so as to increase its capacity tenfold. In the mean time, other persons had entered upon an enterprise looking to the diversion of water from the same stream, and the first appropriator claimed that he had a prior right to all the water carried by his enlarged ditch on the ground that he had at all times intended such enlargement and had proceeded with reasonable diligence to carry out his plans. It was shown, however, that the work prosecuted by him during the three years succeeding 1858 consisted chiefly in clearing out the existing ditch by removing from it such earth and rock as had fallen therein, though in this work as many as twenty men were at times employed. It was held that the persons who, during the period of inactivity of the first appropriator entered upon the work of a second appropriation and prosecuted it diligently and vigorously, acquired rights against which the subsequent enlargement of the ditch of the first appropriator could not prevail.

In stating that the circumstances under which an appropriator is called upon to act may be taken into consideration, we do not wish to be understood that he may be regarded as proceeding with reasonable diligence because the delays with which he is chargeable were due to his personal inability to accomplish his intentions. His time is not shortened by his worldly prosperity, nor extended by his poverty. Hence he cannot excuse a want of reasonable diligence by proving that his purposes were rendered impossible of more speedy accomplishment through his ill-health or his inability to procure the moneys necessary to the prosecution of his enterprise: *Mitchell v. Canal Co.*, 75 Cal. 482; *Keeney v. Carillo*, 2 N. Mex. 493; *Cole v. Logan*, 24 Or. 304. Perhaps this rule was disregarded in *Arnold v. Passavant*, 19 Mont. 580. The circumstances which the jury may properly consider in determining the question of diligence in constructing the appliances necessary for the diversion of water include "the climate of the country, as to whether work may be prosecuted continuously all the year round or only for a few months of the year; the physical condition of the country through which the canal is to pass, as to whether the same is level or rough, and whether the soil is hard or easy to work; also the extent and magnitude of the work itself": *Kimball v. Gearhart*, 12 Cal. 27; *Kimney on Irrigation*, sec. 166. The only attempt to prescribe any general test by which to determine the diligence required of an appropriator, so far as we are aware, was made in *Ophir etc. Co. v. Carpenter*, 4 Nev. 534, 97 Am. Dec. 550, wherein the court said: "Diligence is defined to be the 'steady

application to business of any kind; constant effort to accomplish an undertaking.' The law does not require any unusual or extraordinary efforts, but only that which is usual, ordinary, and reasonable. The diligence required in cases of this kind is that constancy or steadiness of purpose or labor which is usual with men engaged in like enterprises, and who desire a speedy accomplishment of their designs—such assiduity in the prosecution of the enterprise as will manifest to the world a bona fide intention to complete it within a reasonable time. It is the doing of an act, or series of acts, with all practical expedition, with no delay, except such as may be incident to the work itself. The law, then, requires the grantors of the defendants to prosecute the work necessary to an execution of the design with all practical expedition."

Diligence in Applying to a Useful Purpose.—Where the claim is made that an appropriator of water has not applied it to any beneficial purpose with reasonable diligence, it is manifest that the question, what is due diligence, is more difficult to answer than when the claim is of alleged unreasonable delay in constructing the works necessary to accomplish the diversion of the water. The appropriation may be made with reference to the future, and whether the water is intended to be used by the appropriator himself or to be supplied to others for their use, it is not essential that he should have had immediate use for the water at the time of its diversion, nor that it should then be required by the community which he proposes to supply, if he reasonably contemplates that in the changes which are likely to take place, either on his own lands or in the community, the water which he seeks to appropriate will be required. During the time that he remains unable to use it he cannot complain of its use by others, and hence cannot enjoin such use: *Nevada County v. Kidd*, 37 Cal. 311. The principal case affords an excellent illustration of the rule that an appropriator need not have use for water at the time of its diversion. It there appeared that various persons settled in an undeveloped part of the country, where the lands were without value, owing to their aridity, and saw that it was possible to supply them with water and make them productive and valuable. They proceeded to take the steps essential to an appropriation of such water, to the extent of posting the required notice of an intended appropriation and constructing the ditches necessary to divert the water and to carry it to the neighborhood in which its use was contemplated. After the diversion was made, the lands were not yet in a condition to apply the water to their use, except to a limited extent; and it was properly held that the immediate application of the water to the use was not required, and that the appropriators and others who became interested with or under them had the right, on subsequently proceeding with due diligence, to fit their lands for cultivation, through the aid of irrigation, to apply the required water thereto, and thereby the appropriation as to them became complete and related back to the first work done in the progress of the enterprise. There can be no doubt of the correctness of the views expressed, nor of the propriety of their application

to the case before the court: *Taughenbaugh v. Clark*, 6 Colo. App. 235; *Conant v. Jones*, 32 Pac. R. 250; *Wimer v. Simmons*, 27 Or. 1; 50 Am. St. Rep. 685; *McDonald v. Lannen*, 19 Mont. 78; *Arnold v. Passavant*, 19 Mont. 575. In a case decided by the supreme court of Montana, it appeared probable that the trial court in the judgment which it had entered had proceeded upon the theory that at the time of an attempted appropriation of water, the claimants thereof had a stated acreage of land under cultivation, and that the trial court in determining the rights of the parties had limited these persons to the quantity of water sufficient to irrigate their lands at that time. The supreme court said that if such were the theory of the trial court, it was, without doubt, erroneous, because "thereby a prior appropriator of water would be cut down to the quantity necessary to irrigate the land he actually had under cultivation when the subsequent appropriation was made, although the first appropriator's land was all available for the production of crops by aid of irrigation, but, at the time of making the appropriation of water necessary for its irrigation, he had not subdued all of it to the plow. The priority under such rule would depend largely upon the time appropriators brought their lands under cultivation, and not upon the priority of appropriation and diversion of the water necessary to irrigate the land owned by the appropriator, as the law provides": *Kleinschmidt v. Greiser*, 14 Mont. 484; 43 Am. St. Rep. 652.

Waters not Used.—On the other hand, though the person diverting water intends to apply it to some useful purpose, he cannot sustain his claim to the use of the water so diverted unless it was necessary for the use contemplated, nor, if necessary, where he has not proceeded with reasonable diligence to apply it to such use. So much of the water as he has not so applied, he must be regarded as forfeiting or as having never made any valid appropriation of: *Senior v. Anderson*, 115 Cal. 496; *New Mercer Ditch Co. v. Armstrong*, 21 Colo. 357; *Columbia etc. Co. v. Holter*, 1 Mont. 296; *Alder etc. Co. v. Hayes*, 6 Mont. 38; *Simmons v. Winters*, 21 Or. 35; 28 Am. St. Rep. 727; *Hindman v. Rizer*, 21 Or. 112; *Smyth v. Neal* (Or.), 49 Pac. Rep. 850. If a trial court finds that after the appropriation of water a specified amount thereof only was used and only upon certain days of each week for a long period of time, it is not material that it did not find the quantity originally appropriated, for after the use of the water had been thus restricted, other persons were at liberty to take it at other times: *Santa Paula Water Co. v. Peralta*, 113 Cal. 38. One who has appropriated water to the extent necessary to irrigate lands owned by him is not entitled, upon acquiring other lands, to a supply of water necessary to irrigate them also, to the prejudice of intervening appropriators: *Union etc. Co. v. Dangberg*, 81 Fed. Rep. 73. Though an appropriator of water then owns lands for the irrigation of which it is necessary, and intends to apply it for that purpose, if, after placing part of it in a condition for irrigation, he ceases to further improve it and permits some of the cultivated parts to grow up in willows, he becomes, as against subsequent appropriators, entitled to so much water only as is sufficient to irrigate the part which he has cultivated: *Hindman v. Rizer*, 21

Or. 112; Cole v. Logan, 24 Or. 304. The use of the water for the small portion subjected to irrigation is equivalent to an abandonment of the right to use it for the residue. Low v. Rizor, 25 Or. 557. If water is diverted by several persons with intent to apply it to a beneficial use and under such circumstances that they must be regarded as tenants in common, one of them cannot be deemed to have abandoned his right because for several years he makes no use of his share of the water thus appropriated, if, in the mean time, he diligently prosecutes his improvement of his lands, adding each year to the area under cultivation and obtaining the water necessary thereto from other sources of supply: Moss v. Rose, 27 Or. 595; 50 Am. St. Rep. 743.

Increase of Use.—A landowner who has appropriated water for use upon his land is restricted to such use, and cannot, after the amount has become fixed by the use, increase it to the detriment of subsequent intervening appropriators either by purchasing and placing under cultivation an additional amount of land, or by selling the surplus to be used by others: Senior v. Anderson, 115 Cal. 496; Union etc. Co. v. Dangberg, 81 Fed. Rep. 73; Becker v. Marble Creek Irrigation Co., 15 Utah, 225. If, however, no subsequent appropriation has been initiated, such landowner had an undoubted right to use an additional amount of water whenever necessary for any cause, and such use may constitute a valid appropriation thereof from its date, and, according to some of the decisions, from the taking of the first step in the original enterprise: Beaver Brook etc. Co. v. St. Vrain etc. Co., 6 Colo. App. 130.

Change in Place or Mode of Diversion or in the Use.—If an appropriation of water has been completed, the appropriator's right to its use cannot be defeated or impaired by a change of the place or mode of its diversion (Kleinschmidt v. Greiser, 14 Mont. 484; 43 Am. St. Rep. 652), or its application to a use not contemplated when the original appropriation was made. If this were not true, a change of circumstances by which the use of the water for the purposes first contemplated would no longer be profitable would result in a practical destruction of the appropriator's interest therein, and in a loss by him of all of the water and of the appliances by which it had been diverted, however valuable, as where the chief, and perhaps the only, purpose at first contemplated was the use of the water for mining, and the mines in which it was used have proved unprofitable or become exhausted. In such an event, we apprehend that there is no doubt that the owner of the water, or of the right to use it, may employ it for any other lawful and useful purpose, as for the irrigation of agricultural land; nor do we apprehend that, in the event of his changing the use, is there any necessity for him to show that the use originally contemplated had become impracticable or unprofitable. The appropriation having become perfect by the diversion of the water and its application to a useful purpose, the appropriator and his successors in interest acquired, as we understand the decisions, the right to use the water thus actually appropriated, either for the purpose originally contemplated or for any other law-

ful purpose: *Lowden v. Frey*, 67 Cal. 474; *Davis v. Gale*, 32 Cal. 26; 91 Am. Dec. 554; *Kidd v. Laird*, 15 Cal. 162; 76 Am. Dec. 472; *Gallagher v. Montecito etc. Co.*, 101 Cal. 242; *Ramelli v. Irish*, 96 Cal. 214; *Woolman v. Garringer*, 1 Mont. 535; *Creek v. Bozeman etc. Co.*, 15 Mont. 121; *Meagher v. Hardenbrook*, 11 Mont. 385; *Middle Creek Ditch Co. v. Henry*, 15 Mont. 558; *Kinney on Irrigation*, secs. 154, 233, 234.

Here it is important to remember the difference between a change in the use for which water has been appropriated and an attempt to appropriate for a specified purpose water in excess of that which is required therefor and a seeking to control the surplus by selling it for use in an entirely different purpose, as where an appropriator of water for use on his farm, finding the amount diverted to be in excess of his reasonable demands, undertakes to sell such surplus to others. This he cannot do as against intervening appropriators, because, as to this surplus, he had never made any valid appropriation before the inception of their rights: *Creek v. Bozeman etc. Co.*, 15 Mont. 121.

Size or Capacity of Ditch.—It follows, necessarily, from the rule that an appropriation of water is not consummated by its diversion, but only by its application to a beneficial use, that the size or capacity of the ditch by which the diversion is made is not necessarily the measure of the rights of the person seeking to make an appropriation thereby. Such capacity may be in excess of the requirements of the appropriator, and the water diverted by it may be so much more than necessary for the prudent cultivation of the land to which it is to be applied, in which event the surplus has not been, in any legal sense, appropriated, and remains subject to further appropriation to the same extent as if it had not been carried from the lake or stream out of which it has been caused to flow: *Greer v. Heiser*, 16 Colo. 306; *Farmers' etc. Co. v. Agricultural Ditch Co.*, 22 Colo. 513; 55 Am. St. Rep. 149; *Barnes v. Sabron*, 10 Nev. 217. Nor, on the other hand, is an appropriator necessarily limited to the capacity of his ditch. It may, when constructed, disappoint all reasonable expectations, as where, from the irregularities in the grade or obstructions falling therein, or for other causes, it was not capable of conveying as much water "as its size would indicate," and therefore does not accomplish the object in view. The intending appropriator may proceed with reasonable diligence to correct these defects, and, having done so, his rights are the same as if his ditch or other means of diversion had proved adequate in the first instance: *White v. Todd's Valley etc. Co.*, 8 Cal. 443; 68 Am. Dec. 338; *Conant v. Jones*, 32 Pac. R. 250; *Barnes v. Sabron*, 10 Nev. 217. An appropriator, unless the amount of water actually diverted by him is shown to be excessive, must be deemed entitled to that amount, although he is not ready to use it at the time of its diversion, or even, in some instances, for years afterward, and he has the right to provide for his future as well as his present wants. He may make the diversion necessary for the irrigation of his lands, though he is not at once able to bring them under cultivation, in which event, upon proceed-

ing with reasonable diligence, he may be regarded as consummating his appropriation to the extent necessary for the successful cultivation of his entire land: *White v. Todd's Valley etc. Co.*, 8 Cal. 443; 68 Am. Dec. 338; *Nevada Ditch Co. v. Bennett*, 30 Or. 69; ante, p. 777; while, on the other hand, his supineness may be so great as to forfeit his right, except to the water actually and necessarily used by him, though adequate to the profitable use of a small portion only of his land: *Low v. Rizer*, 25 Or. 552.

There are recent decisions of the supreme court of Montana which we find difficulty in reconciling with the views hereinbefore expressed in this note; to wit, that the actual use of water is necessary to its appropriation; that the amount used, rather than the amount diverted, is the test of the appropriation, and that want of diligence in applying it to a beneficial use cannot be excused on account of pecuniary inability of the claimant to more rapidly proceed with the prosecution of his enterprise. Thus, in *McDonald v. Lannen*, 19 Mont. 78, it appeared that the owner of land lying on both sides of a creek constructed a ditch on the north side thereof, by means of which he could irrigate only forty acres of the land on that side, though the capacity of his ditch was greater than was necessary for that purpose. Subsequently, after other appropriations had attached, he constructed another ditch to reach the land on the opposite side of the stream. The court held that, even as against the subsequent appropriators, the original appropriator was not limited to the amount necessary to irrigate the forty acres, and was entitled to priority to an amount equal to the capacity of his original ditch. The court said: "The test of the extent of an appropriation with reference to the subsequent right to the waters of a stream is dependent upon the capacity of the first ditch before such subsequent appropriation is made. When an owner or possessor of land makes an appropriation of water in excess of the needs of the particular portion of the land upon which he conveys the water, and other portions of his land also require irrigation, his water right is not limited by the requirements of the particular fraction. He may still, despite the fact that another's water right has attached, construct other ditches through his remaining land, provided the total amount of water conveyed by all the ditches on his place does not exceed the original capacity of the first ditch. As between his appropriation and the subsequent water right, the capacity of the ditch by means of which he first made his appropriation is the test of the extent of it." Both the report and the opinion of the court are silent respecting the time intervening after the construction of the original ditch and the use of the waters on the forty acres of land and the construction of other ditches and the use of the water on an entirely different parcel lying upon the opposite side of the creek. From the fact that the court made no reference to this subject, nor to the question of what had been the diligence of the original appropriator in proceeding to place his lands upon the opposite side of the creek under cultivation and irrigation, we are inclined to the conclusion that the court intended to regard the capacity of the ditch, rather than the use made of the water therein, as the final test of the appropriation. In a case decided at a later date in the same year by the same court, it appeared that a

claimant of water had one hundred and eighty acres of land which could be covered with water from his ditches in 1869, but that for many years he cultivated but forty-five acres of such land, during which time in the year 1878 other persons constructed a ditch and made an appropriation of water, and thereupon contended that the original appropriator had been guilty of such want of diligence in placing the remainder of his land under cultivation as showed an abandonment of the surplus waters, or no valid appropriation thereof. The court said that the plaintiff had testified, and was not contradicted, that he cultivated his land and "used water to irrigate it, as he and his partner got money in their pockets. For all that appears, he was a farmer, struggling for a livelihood, and clinging to his water right for the benefit of the lands for which it was originally acquired. There has been no diversion of water from this creek by plaintiff or his predecessors for speculative purposes." The court therefore concluded that the plaintiff's rights were paramount to those of any subsequent appropriator, and appears to have established as a part of the law at least of that state, that in determining whether a claimant has proceeded to apply water to a useful purpose with reasonable diligence, his pecuniary inability is a proper subject for consideration: *Arnold v. Passavant*, 19 Mont. 575, 580.

Appropriation for Sale.—In the decisions heretofore cited affirming that the application of the water diverted to a beneficial use is an essential element of its complete appropriation, the appropriator had in view, in making the diversion of water, its use for mining or irrigation in or upon his own mines or lands, and it was uniformly held that he could not be regarded as making any valid appropriation except to the extent of the use made of the water, and, in some instances, that he was not entitled to claim the surplus, after supplying his own wants, for sale to others. The appropriation of water for sale to others is authorized by the statutes of the states in which it is valuable for that purpose, and, in many instances, the chief, and even the sole, object of an appropriator is not that of any use by him in and upon his own lands or mines, but the sale of the water to others who have mines to be worked or lands to be irrigated. In cases of appropriation for the purpose of supplying water to others, we do not understand how it can be said that the use of the water is an essential element of its appropriation. If the intended appropriator constructs the works and appliances necessary for the diversion of the water and the carrying of it to points where its use is desirable and profitable, and has actually carried it there, or is ready and willing to do so, and offers it to all persons who are willing to pay for its use, we apprehend that his appropriation is complete, though the persons to whom it is thus offered refuse to receive or use it. They certainly cannot thus defeat the rights of the diverter. If their refusal is so unanimous and so long continued as to indicate that there is no reasonable probability of the using of the water in that neighborhood within a reasonable time, perhaps it may become the duty of the appropriator to seek some other customers or to appropriate his water to some other use, but, in the mean time, his title cannot be subject to successful assault on the ground that he has not used the water himself nor been able to find others who

would use it. This question has scarcely been noticed elsewhere than in the principal case. As against the contention there made, that the claimants could not acquire rights to water that they were not in a present condition to use, the court answered: "There are two periods of gestation, if we may be allowed the expression. One concerns the time, measured by due and reasonable diligence, for the building and construction of such works and appliances as may be necessary and convenient for diverting the water and carrying it to the place of use; and the other, the time needful to utilize the water by the actual application of it to the contemplated beneficial purpose." The court also referred, apparently with approval, to statements made in *Kinney on Irrigation* and *Pomeroy on Water Rights* to the effect that the object of an appropriator "may be to conduct the water from a stream, through a ditch or canal, across the intervening public lands, to the tract which he possessed as a mining claim, a farm or a mill, or even to sell or dispose of the water thus conducted through the canal to other parties to use it for like purposes on their own claims or tracts of land." And the court argued that in many localities, "where the water is difficult of diversion and the expense considerable in conducting it to the place of use, if individual landholders, or even an aggregation of them, were required to make the appropriation for use upon their own possession, this general purpose would be entirely defeated simply for the reason that such holders could not bear the burden of making the appropriation. In such cases, other persons possessing capital are often willing to make the diversion for the benefit of those who have use for the water, but, unless they may contemplate a use which may be applied by the landowner to his possessions, they could not even initiate the appropriation until they had possessed themselves of lands in proportion to the amount of water it is desired to appropriate; so that if the user must be the appropriator, and the appropriator the landowner, the arid regions in many places would remain arid, whereas otherwise they would be made to teem with fertility. No sufficient reason has been suggested why the contemplated use may not be for and upon the possessions of a person other than of the appropriator; the authorities seem to support the rule that it can be, and we think it is correct upon principle. We take it, therefore, that the bona fide intention which is required of the appropriator to apply the water to some useful purpose may comprehend a use made by or through another person, and upon lands and possessions other than those of the appropriator. Thus the appropriator is enabled to complete and finally establish his appropriation through the agency of the user": *Nevada Ditch Co. v. Bennett*, 30 Or. 96; ante, p. 777. See, also, *Strickler v. Colorado Springs*, 16 Colo. 61; 25 Am. St. Rep. 245.

WATERS AND WATERCOURSES—APPROPRIATION ON PUBLIC LANDS—RIGHTS OF SUBSEQUENT PURCHASERS.—Where the right to the waters of a stream on public land has become vested by prior appropriation, it is now provided by statute that a subsequent grantee of the land from the government takes subject to that right: *Monographic note to Heath v. Williams*, 43 Am. Dec. 280; *extended note to Tolle v. Correth*, 98 Am. Dec. 545.

BRIDAL VEIL LUMBERING COMPANY v. JOHNSON.

[30 OREGON, 205.]

EMINENT DOMAIN—WHAT IS A PUBLIC USE IS A JUDICIAL QUESTION.—Whether a proposed use is in fact public so as to justify the taking of property without the consent of the owner is a question for the courts to determine, and, in doing so, they are not confined to the description of the objects and purposes of the corporation as set forth in its articles of incorporation, but may resort to extrinsic evidence showing the actual business to be conducted by it.

EMINENT DOMAIN—RAILWAYS, WHEN A PUBLIC USE. If a railway is constructed for the benefit and use of the general public in carrying freight and passengers, it must be regarded as a public use, though there is no town or settlement at either of its termini nor along its line, and its route is through a rough, mountainous, and sparsely settled country, and it has never charged persons for riding as passengers, and has no passenger or freight cars or depots, and its use has been in transporting logs from the lands of the corporation to its sawmills.

Proceeding on behalf of the Bridal Veil Lumbering Company to condemn a right of way for a railroad. It was resisted on the ground that the corporation plaintiff was organized for the operation of a sawmill and the manufacture of lumber, and that the proposed railroad was intended for its own private use and not for the ordinary purposes of a railroad. The trial court found that the plaintiff was incorporated in 1889, and that its purpose was that of constructing and operating a railroad to transport freight and passengers from Bridal Veil, Oregon, by the way of the mills of the plaintiff corporation to section 1 in township 2 south, range 7 east, in the state of Oregon; that its organization was not solely for the purpose of operating the sawmill; that a part of the railroad had already been constructed and so operated that the general public had had the use and benefit of it in the transportation of freight and passengers whenever either such freight or passengers were offered; and that the railway, so far as completed, provided means of transportation useful and beneficial to the people living in the section of the country in which it is built, and giving them improved facilities for the transportation of freight; and the court concluded, as a matter of law, that the plaintiff was entitled to exercise the power of eminent domain. The defendant asked for additional findings, some of which the court made, and from them it further appeared that the northern terminus of the road was the plaintiff's sawmill at a point two miles from and about thirteen hundred feet above the town of Bridal Veil; that no line of the road had been surveyed, located, or constructed from

Bridal Veil to the sawmill; that the road so far as surveyed and constructed extended five and a half miles to lands owned by the plaintiff; that the southern terminus of the road, as described in the articles of incorporation, was near the base of Mt. Hood upon lands owned by the United States, and that there was not at, or near thereto, any town, city, settlement, or other railroad; that the country along the line of the route was rough, mountainous, covered by timber, and sparsely settled, and except at the town of Bridal Veil there was no place on the line or its vicinity containing any town, city, or thickly settled neighborhood; that the plaintiff had no passenger depots or cars, except a number of trucks on one of which there was a platform, covered in time of rain; that the plaintiff always permitted any person to ride on its trucks who wished to do so, never making any charge therefor. The court, however, refused to find that the principal purpose for which the road had been constructed was that of transporting logs from the lands of the plaintiff to its mill. Judgment for the plaintiff, the defendant appealed.

Watson, Beekman & Watson, for the appellant.

Bronaugh, McArthur, Fenton & Bronaugh, for the respondent.

208 BEAN, J. 1. There being no bill of exceptions in the record, the only question for our determination is whether the findings of fact support the judgment. The right of eminent domain is a right of sovereignty, and can be exercised only by legislative authority, and for a public use or benefit. When, therefore, a particular corporation claims the right to take private property without the consent of the owner, it must show not only a legislative warrant, but, if its right is challenged on that ground, it must be able to establish the fact that the enterprise in which **209** it is engaged is one by which a public use or benefit is to be subserved or promoted, so that such taking can be said to be for a public and not a private use. The necessity or expediency of taking private property for public use, the instrumentalities through which it may be done, and the mode of procedure, are legislative and not judicial questions. But, whether the proposed use thereof is in fact public, so as to justify its taking without the consent of the owner, has always been a question for the courts to determine, and, in doing so, they are not confined to the description of the objects and purposes of the corporation as set forth in its articles of incorpora-

tion, but may resort to evidence aliunde showing the actual business proposed to be conducted by it: *Lewis on Eminent Domain*, sec. 158; *Matter of Niagara Falls etc. Ry. Co.*, 108 N. Y. 375; *Chicago etc. R. R. Co. v. Wiltse*, 116 Ill. 449.

2. Now, in this case, from the findings of fact, it clearly appears that plaintiff is a corporation organized for the construction of a railroad for the transportation of freight and passengers, and therefore sections 3239 and 3240 of Hill's Code invest it with authority to exercise the power of eminent domain, if the use it intends to make of the property sought to be taken is in fact public. Bearing upon this question, the findings are that it has already constructed five and a half miles of road, and is now and has been operating the same for the use and benefit of the general public in carrying freight and passengers, and there is nothing in the record anywhere to indicate that the road has ever been used or is intended to be used for any other or different purpose, or that it was built or intended for a logging road, or has ever been used for that purpose; or, in fact that it is in any way connected with or a part of the mill enterprise; or, indeed, except by inference, that it belongs to the mill company. We are, therefore, ²¹⁰ unable to say that the court was in error in holding that the railroad of plaintiff is public so as to justify the exercise in its behalf of the power of eminent domain. The fact that it has not been fully completed between the termini indicated in its articles of incorporation, or that there is at present no town, city, or settlement, or other railroad at its proposed southeastern terminus, or that its proposed route is through a rough, mountainous, and sparsely settled country, or that the plaintiff has not yet fully equipped the road, or supplied itself with complete and perfect terminal facilities, or that it has not charged the passengers upon its railroad any fare, does not affect its right to exercise the power of eminent domain. The question of public use is not determined, as a matter of law, by any of these things, but by the fact that the proposed road is intended as a highway for the use of the public in the transportation of freight and passengers. And it can make no difference that its use may be limited by circumstances to a small part of the community. Its character is determined by the right of the public to use it, and not by the extent to which that right is exercised: *De Camp v. Hibernia R. R. Co.*, 47 N. J. L. 43; *Phillips v. Watson*, 63 Iowa, 28; *Ross v. Davis*, 97 Ind. 79.

If everyone having occasion to use the road as a passenger or for transportation of freight may do so, and of right may require the plaintiff to serve him in that respect, it is a public way, although the number actually exercising the right is very small. The findings of the court show that the enterprise in which plaintiff is engaged, and for which it requires the land in question, is of this character, and therefore we have no alternative but to affirm the judgment. In doing so, however, we do not desire to be understood as holding that a railroad constructed by a mill company for the evident purpose of transporting logs to ²¹¹ its mill can become a public highway, so as to justify the exercise of the power of eminent domain in its behalf, because of any declaration in its articles of incorporation to that effect, or on account of any right of the public to use it for the transportation of freight and passengers. No such question is presented by this record. The findings of the court by which we are bound negative such an inference and this decision is based upon the facts as found by the court below.

The judgment must therefore be affirmed.

EMINENT DOMAIN—PUBLIC USE—WHAT IS A JUDICIAL QUESTION.—Decisions may be found asserting that what is a public use is a legislative question, and other decisions declaring with equal emphasis that this is a judicial question. But where there is a constitutional provision denying the right to take lands for any other than a public use, it would seem that the question whether any particular use is a public use or not is, ultimately at least, a judicial question: Monographic note to *Lynch v. Forbes*, 42 Am. St. Rep. 406.

EMINENT DOMAIN—PUBLIC USE—RAILROAD.—If in point of law, a use is public, the fact that not very many persons will enjoy the use is not material in applying the doctrine of eminent domain: *Butte etc. Ry. Co. v. Montana etc. Ry. Co.*, 16 Mont. 504; 50 Am. St. Rep. 508. It is well settled that railroads for public travel are public improvements, in behalf of which the power of eminent domain may be legitimately exercised: Monographic note to *Beekman v. Saratoga etc. R. R. Co.*, 22 Am. Dec. 695, on what uses justify exercise of power of eminent domain.

NICKUM v. BURCKHARDT.

[30 OREGON, 464.]

ESTOPPEL, NECESSITY FOR PLEADING.—One who has an opportunity to plead an estoppel, but does not, thereby waives it. Therefore, a corporation wishing to prevent defendants from controverting its corporate existence on the ground that they have dealt with it as a corporation, and are therefore estopped to deny that it is such, must plead such estoppel.

CORPORATION, SUBSCRIBER TO CAPITAL STOCK OF.—It is not essential to constitute one a subscriber to the capital stock of a corporation that he should have subscribed to the stock-books after articles of incorporation have been perfected and filed. If there is a preliminary subscription, and the corporation is thereafter formed as contemplated, within a reasonable time, the subscribers become shareholders without any further act. Persons who signed such preliminary subscription and also consented to the holding of the first meeting and participated therein must, therefore, be deemed subscribers.

CORPORATIONS, CHANGE IN PURPOSE OF SUBSCRIPTION.—Though the purposes designated in the articles of incorporation do not correspond with those set forth in the preliminary subscription, the subscribers remain bound, if they have participated in the organization of the corporation after knowing of such change.

CORPORATIONS.—THE FAILURE TO NOTIFY SUBSCRIBERS OF THE FIRST MEETING of a corporation cannot be urged by other subscribers who were notified and were present at such meeting. Such meeting is valid if a sufficient number of subscribers were present, though others entitled to be present and to participate therein were absent because not notified.

RES JUDICATA.—TO CONSTITUTE A DECISION in one cause an estoppel in another, the case adjudicated must have been between the same parties in the same right or capacity.

RES JUDICATA — CORPORATIONS, JUDGMENTS AGAINST, WHEN BINDING UPON STOCKHOLDERS.—A corporation represents and binds its stockholders in all matters within the limits of its corporate powers so long as it acts in good faith and without fraud upon their rights; and, in the bringing and defending of suits affecting the rights and obligations of the corporation, it binds the stockholders as fully as in the making of contracts. This is true only in those cases in which the corporation is charged as representing the individual stockholders.

RES JUDICATA—JUDGMENT AGAINST CORPORATION IN FAVOR OF A STOCKHOLDER, WHEN NOT CONCLUSIVE IN CONTROVERSIES WITH OTHER STOCKHOLDERS.—A corporation, in prosecuting an action against a stockholder to recover a subscription, does not represent him and the other stockholders, and a judgment against it in favor of such stockholder is not conclusive against it in a subsequent action between it and other stockholders involving the same issues.

Charles J. Schnabel, Ralph W. Wilbur, and John L. Balleray, for the appellant.

Joseph B. Thompson, for the respondent.

400 WOLVERTON, J. This is an action to recover for assessments levied upon unpaid capital stock of a private corpora-

tion. About June 18, 1893, some thirteen persons, among whom were Guy Posson, who signed for two shares, J. E. Juston, for four; F. C. Barnes, for ten; and H. Pease, for three, subscribed the following agreement, each placing opposite his name the number of shares presumably intended to be taken: "We, the undersigned, each in consideration of the promise of the other, agree to subscribe for and take the number of shares of the capital stock set opposite our respective names of a company to be incorporated for the purpose of operating a fertilizer, feeding and fattening stock and poultry; and, if obtainable, collecting and disposing of swill, and other purposes of like nature; said company to be incorporated in accordance with the laws of the state of Oregon, with a capital stock of fifteen thousand dollars divided into one hundred and fifty shares of the value of one hundred dollars each." There were seventy-eight shares subscribed for upon this paper, representing seven thousand eight hundred dollars. On the seventh day of October, 1893, three of the subscribers executed, duly acknowledged, and caused to be filed and recorded in the proper offices, articles of incorporation, incorporating the Oregon Fertilizing Company, specifying the object and business thereof to be "to transport wood, produce, and garbage, and to cremate ⁴⁶⁷ such garbage, or to use the same for feed or fertilizing purposes." A little later, all the subscribers to said instrument, except the four above named, signed with others the following writing, which is contained in a minute-book kept for the purpose of recording the proceedings of the corporation, to wit: "We, the undersigned, hereby subscribe for the number of shares of capital stock of the Oregon Fertilizing Company, set opposite our respective names, and agree to pay for the same at such time or times as may be ordered by the board of directors hereafter to be elected." Only sixty-nine shares of the capital stock were subscribed for upon this latter instrument. Subsequently, all the subscribers to this instrument, together with Posson and Juston, signed an agreement to hold the first meeting of the stockholders on October 14, 1893, waiving the thirty days' notice required by law, and, in pursuance thereof, the meeting was held, all said signers being present, either in person or by proxy, but no others, and participated in the election of directors and other business. The incorporators having certified to the result of the election, the directors elected took the oath of office, and at once organized by electing the officers of the board. To abate the action, the defendants plead that the plaintiff company is not an incorporation.

It was urged at the hearing that the defendants ought to be estopped from alleging that the Oregon Fertilizing Company is not a corporation duly incorporated and organized in all respects as contemplated by law, inasmuch as they are subscribers or purchasers of stock subsequent to the alleged completed organization of the company; that, having dealt with the company in its corporate capacity, and having entered into contractual relations with it, they have recognized its existence as a body corporate, and that now, when sued upon their obligation to it as such a body, they should not be permitted to deny ⁴⁰⁸ its legal existence. The doctrine here contended for is undoubtedly well grounded in the law, but it cannot be invoked in this case because not pleaded. The opportunity was afforded for setting up the supposed estoppel in the reply, but it was not done, and it is now too late to assert it. It is said that "if a party who has an opportunity to plead an estoppel upon which he relies fails to do so, but goes to issue on the fact, he thereby waives the estoppel, puts the matter at large, and the jury may disregard the estoppel, and are at liberty to find the truth": Note to *Tyler v. Hall*, 27 Am. St. Rep. 337-346. To the same effect are *Bruce v. Phoenix Ins. Co.*, 24 Or. 486, and *Bays v. Trulson*, 25 Or. 109.

This question disposed of, we come to another, more complex in its nature, and that is whether there has been an organization of the plaintiff corporation under and in pursuance of the general statutes providing therefor. The regularity of the execution and filing of the articles of incorporation is conceded. The persons subscribing the articles are known as the incorporators, and their powers and duties are purely statutory. They may open books and receive subscriptions to the capital stock; "they shall give notice to the subscribers to meet" at such time and place as they may designate for the purpose of electing directors; they shall act as inspectors at the first meeting for that purpose, certify who are elected, and appoint the time and place of their first meeting. This enumeration comprises the substance of their powers: See *Hill's Code*, sec. 3222. These are all acts necessary to and in furtherance of the completion of the organization. The organization is completed only when directors have been elected, and they have elected a president and secretary, which it is contemplated they shall do at their first meeting. From the time of the first meeting of the directors, ⁴⁰⁹ that is to say, from the time of the organization of the board, "the powers vested in the corporation are exercised by them or

by their officers or agents under their direction" (Hill's Code, sec. 3225), thus relieving the incorporators of further duty or power in the premises, or, rather, their functions then cease because their duties have been fulfilled and their powers executed. From the date of its completed organization the incorporation may begin the prosecution of its enterprise or business. It may then sue and be sued, contract and be contracted with, and exercise any of the other statutory powers incident to its organization and the enterprise, business, pursuit, or occupation adopted. The corporation may elect its board of directors when one-half of the capital stock has been subscribed: Hill's Code, sec. 3222; *Fairview R. R. Co. v. Spillman*, 23 Or. 587. And one question here is whether one-half of the capital stock had been subscribed when the board was elected. It seems to be supposed that, in order to constitute a person a subscriber to the capital stock of a corporation, he must have subscribed to the stock-books of the concern after its articles of incorporation have been perfected and filed, and *Coyote etc. Min. Co. v. Ruble*, 8 Or. 284, is cited as authority. *Boise, J.*, at page 294, says, in effect, that to put a person in the position of a subscriber to the capital stock it must be shown by the stock-book signed by him, or evidence equivalent to such signing. This would seem to support the proposition, but at another place (page 298) he says: "It is necessary for the corporation to prove the subscription by producing the subscription signed by Ruble, either by himself or by another for him with his authority, or by some acts of his which are equivalent to a subscription." So that the case does not decide either that the primary subscription must be made upon the stock-book, or that it shall have been made subsequent to the execution of ⁴⁷⁰ the articles of incorporation. In a late case (*Balfour v. Baker City Gas Co.*, 27 Or. 307), *Bean, C. J.*, speaking for this court, says: "From an extended examination of the authorities, we take the law to be that when the proposed corporation is formed as contemplated in the preliminary subscription, and within a reasonable time thereafter, the subscription, unless revoked in the manner authorized by law, becomes irrevocable, the subscriber becomes a shareholder, and liable as such without any further act on his part." And this seems to be so, although the statute may provide for the opening of stock-books by designated persons after the articles are filed: 1 *Thompson on Corporations*, secs. 1152-1166; *Buffalo etc. R. R. Co. v. Gifford*, 87 N. Y. 294. Nor is the distinction taken in some of the cases between a present subscription and

an agreement to subscribe to the stock of a corporation thereafter to be created thought to be sound: 1 Cook on Stocks and Stockholders, sec. 75; Knox v. Childersburg Land Co., 86 Ala. 180-184; Athol Music Hall Co. v. Carey, 116 Mass. 471. Now, it appears that by preliminary subscriptions seventy-eight shares of the capital stock were signed for, three more than was necessary for the completion of the organization by the election of directors. Four of the individuals signing this paper, representing nineteen shares, did not sign the later agreement, to which sixty-nine shares only were subscribed. All those subscribing the latter paper, together with Guy Posson and J. E. Juston, who signed the preliminary subscription, signed the consent agreement for holding the first meeting, and participated therein, and Juston was elected a director. So it will be seen that if the two shares of Posson and the four of Juston are added to the sixty-nine shares signed to the second paper, one-half of the capital stock was represented at such meeting. But the question arises, Were they subscribers to the ⁴⁷¹ capital stock? We think that, having signed the preliminary subscription and the consent agreement for the first meeting, and having participated therein, they became bound in that capacity, and must be so considered. They certainly are estopped by their acts from denying that they are subscribers, and, this being so, the law requiring a subscription of one-half of the capital stock before organization was substantially complied with.

Incidental to this question, it is argued that the purposes designated in the articles of incorporation do not correspond with those set forth in the preliminary subscription, and therefore that Posson and Juston cannot be held to be subscribers. We presume that ordinarily a material departure in this respect will avoid the original agreement, but in this case the persons named have construed the purposes to be one and the same by participation in the organization under the articles of incorporation, or, rather, to speak more concisely, they have assented to the departure, if such it may be termed: Knox v. Childersburg Land Co., 86 Ala. 180.

Again, it is urged that if the primary subscription is sufficient to bind the subscribers to the capital stock of the concern, then, Barnes and Pease not being present, and having no notice of the first meeting, and not having waived the same by writing or otherwise, the election of directors was irregular and void. We are not to be understood as passing upon the sufficiency of this paper within itself, but that, considering the sub-

scription thereto of Posson and Juston, in connection with their subsequent acts, they were properly recognized as stockholders, and hence that one-half of the capital stock was represented at the organization of the company. The fact that Barnes and Pease had not been notified of the meeting could not furnish grounds for objection by those subscribers present and participating therein; they have not ⁴⁷² suffered by the omission, and are not in a position to object as to others: *Schenectady etc. Ry. Co. v. Thatcher*, 11 N. Y. 102. See, also, *Handley v. Stutz*, 139 U. S. 422; *Morawetz on Private Corporations*, sec. 399. Thus we have an organization perfected by persons bound as subscribers, and representing fully one-half of the capital stock as fixed by the articles of incorporation, and all bound by its proceedings. We think the organization valid, although Barnes and Pease were not notified. As to how they would be affected by want of notice it is not for us to determine at this time; it is sufficient to say that those subscribers participating cannot object on that account.

The defendants, if subscribers to the capital stock, became such after the organization, and the want of notice to Barnes and Pease could not affect them; so that they are in no better position to object to the regularity of the organization on that account than those participating in the first meeting. The result is, that, in so far as they are concerned, the company was duly incorporated, and this result is reached not because they are estopped by having dealt with it but because it was legally organized prior to their subscription to the capital stock.

For the purpose of estopping the plaintiff from asserting its due and legal organization, it is alleged in the answer in abatement that plaintiff had theretofore instituted an action in a justice's court against Guy Posson for assessments made by the company upon his alleged subscription to the capital stock; that a trial was had upon the sole issue whether Posson was a subscriber at the date of the attempted organization; and that it was determined by the judgment that he was not. It is claimed that, as the same question is necessarily involved in determining in this action whether the plaintiff was duly organized, the plaintiff is estopped to assert its truth, the judgment ⁴⁷³ having gone against him in the justice's court. The plea is argumentative, and avers in effect that, as the judgment in the justice's court estops the plaintiff to now assert that Posson is a subscriber, therefore it cannot be affirmed that the corporation is duly organized. That this is an action upon a different cause

from the one against Posson cannot be gainsaid; the inquiry, therefore, to which the estoppel is pertinent must be confined to the point or question actually determined in the Posson case: *Cromwell v. County of Sac*, 94 U. S. 353. Thus far, the plea is apparently within the rule. But a very important essential to the estoppel is wanting in that this cause and the one adjudicated in the justice's court are not between the same parties in the same right or capacity, or their privies claiming under them. This objection is fatal to the plea: 1 Freeman on Judgments, sec. 252.

The judgment of the court below must therefore be reversed, and the cause remanded for such further proceedings as may be deemed proper not inconsistent with this opinion.

ON MOTION FOR REHEARING.

WOLVERTON, J. Since the opinion was rendered in this cause, we have been favored with an elaborate brief upon respondents' motion for a rehearing, urging with commendable earnestness that the court is in error in holding that the plaintiff is not estopped to prosecute this action by reason of the judgment rendered and given in Posson's favor in the justice's court. In our anxiety to be right, we have at much pains re-examined the question, but find no reason for receding from our former position. One line ⁴⁷⁴ of authorities relied upon in support of the motion establishes the doctrine clearly stated by Chief Justice Fuller in *Hawkins v. Glenn*, 131 U. S. 332, that: "A decree against a corporation in respect to corporate matters, such as the making of an assessment in the discharge of a duty resting on the corporation, necessarily binds its members, in the absence of fraud, and that this is involved in the contract created in becoming a stockholder." The estoppel which was invoked with success in that case was a decree of a chancery court in a creditor's suit against a corporation, whereby an assessment was levied against the stockholders. It was urged that as the stockholders were not made parties to the suit, nor served with summons, they were not to be bound by the decree; but it was decided that they were represented by the corporation, and that the assessment by decree took the place of a regular assessment by the board of directors, and, therefore, that it was unnecessary to make them parties to the suit, or serve them, but that they were bound by the decree, because they were integral parts of the corporation, and, in view of the law, they

were privy to the proceedings touching the body of which they were members. Such is the effect also of *Glenn v. Liggett*, 135 U. S. 533; *Lehman v. Glenn*, 87 Ala. 618; *Howard v. Glenn*, 85 Ga. 238; 21 Am. St. Rep. 156; *Glenn v. Williams*, 60 Md. 93. All these cases, including *Hawkins v. Glenn*, 131 U. S. 332, are concerning different phases of the same transaction, but the courts are in accord upon the proposition stated. *Stutz v. Handley*, 41 Fed. Rep. 531, is a case by a creditor of a corporation, instituted in behalf of himself and all others similarly situated, against a stockholder, to subject the amount remaining unpaid upon shares of the capital stock held by him to the payment of the company's debts. The creditor had previously obtained judgment against the ⁴⁷⁵ company for the price of certain machinery, against which it had interposed a counterclaim for damages by breach of warranty, which was disallowed, and the stockholder attempted to again counterclaim for the same breach, but it was held that he was precluded by the judgment in the action against the company upon the ground and for the reason that he was represented by the company in that action, and had already had his day in court on that question. *Baines v. Babcock* 95 Cal. 581, 29 Am. St. Rep. 158, was a suit similar to *Stutz v. Handley*, 41 Fed. Rep. 531. A judgment had been recovered against the company upon its contract, and in the creditor's suit a stockholder attempted to show that the contract was one which the corporation was without power to make, and therefore ultra vires and void, but the court held that he was precluded by the judgment in the action against the corporation. In deciding the question. De Haven, J., said: "A corporation represents and binds its stockholders in all matters within the limits of its corporate power, so long as it acts in good faith and without fraud upon their rights; and in the bringing and defending of suits affecting the rights and obligations of the corporation, it binds the stockholders as fully as in the making of contracts."

Willoughby v. Chicago etc. Ry. Co., 50 N. J. Eq. 656, was a case instituted by plaintiff in behalf of themselves and all others similarly situated who should come in and be made parties to the suit, in deciding which the court said: "From the very form and nature of these suits, each stockholder must be considered as represented; for if he is in sympathy with the complainant he may become a party complainant by application to the court, if he is in sympathy with the threatened action of the company, he is represented by and in the corporation, which is a necessary party to the suit." This was held to fall within

a class of cases where a duty is incumbent upon ⁴⁷⁶ the corporation, but, failing to take action in the premises, a stockholder is permitted to prosecute as the nominal party, but representing the corporation as the real party, in the place and stead of the accustomed officials. In all these cases it will be seen that the stockholders are bound by the judgment or decree against the corporation in matters pertaining to the duties of the corporation touching its rights and obligations with which it is charged as the representative of the individual stockholders, who may be regarded in that respect as integral parts of the body corporate, and this is as far as the estoppel extends. But in an action by the corporation against a stockholder to recover for stock assessments, while it may be said that the corporation is acting in discharge of a duty imposed upon it by the stockholders through the articles of incorporation and by-laws, the defendant is, from the very nature of things, an adversary party in the fullest sense of the word. The corporation cannot be said to represent the stockholder while prosecuting an action against him to enforce the payment of a stock subscription which he is resisting. But a stockholder who has no action pending against him for the enforcement of his unpaid stock bears the same relation to the corporation, is bound or obligated to it by a contract of like nature and effect, and his rights and duties toward the company and all other stockholders are identical with the one resisting, so that if, in such a case, it does not represent the stockholder against whom the action is being prosecuted, can it be consistently or logically said to represent such as have not actions pending against them, in so far as to conclude them in their individual capacities and touching their obligations to the corporation? Mr. Van Fleet says: "In order to conclude any right, title, or interest of a person by adjudication, it is essential that he be a party to the proceeding, or be represented by one. In the latter case ⁴⁷⁷ he is said to be a privy": 2 Van Fleet on Former Adjudication, sec. 459. And it is because the stockholder is represented by the corporation that he is precluded by a judgment or decree rendered against it; but if the proceeding is one in which the stockholder and the corporation are adversary parties, the reason of the rule ceases, for in such case the corporation does not and cannot represent the stockholder. Suppose the judgment in the justice's court had gone against Posson, and it had been there determined that he was a subscriber to the capital stock of the concern, would it be contended for a moment that the defendant in this action would be precluded by

that judgment when he at the same time was contesting the legality of the organization of the company upon the very ground that Posson was not a stockholder in an action of the same nature? In what way could it be said that the defendant here was in privity with Posson, and, if not in that event, why should he be when the judgment is rendered against the corporation? Stockholders are not in privity with the corporation as it pertains to actions prosecuted by it against them for the recovery of unpaid stock subscriptions, for the very cogent reason that they and the company are always adversary parties in such actions, and a priori they are not in privity with each other, as such privity must depend upon the corporate function to represent the stockholders, which does not nor cannot exist.

The motion will be denied.

Rehearing denied.

ESTOPPEL—WAIVER OF, BY FAILURE TO PLEAD.—If a party who has an opportunity to plead an estoppel upon which he relies fails to do so, but goes to issue on the fact, he thereby waives the estoppel: Monographic note to *Tyler v. Hall*, 27 Am. St. Rep. 346, on the mode and necessity of pleading an estoppel. See *Cockrill v. Hutchinson*, 135 Mo. 67; 58 Am. St. Rep. 565, and note.

CORPORATIONS—SUBSCRIPTION TO CAPITAL STOCK—WHEN ENFORCEABLE.—A subscription of moneys to be paid to a corporation not yet existing is enforceable by it after it comes into existence: *Richelieu Hotel Co. v. International etc. Encampment Co.*, 140 Ill. 248; 33 Am. St. Rep. 234, and note. Issuance of a stock certificate is not necessary to make the subscriber a stockholder: *Cartwright v. Dickinson*, 88 Tenn. 476; 17 Am. St. Rep. 910, and note; *Butler's Univ. v. Schoonover*, 114 Ind. 381; 5 Am. St. Rep. 627. A subscriber to the stock of a corporation cannot defeat an action to recover the amount of his subscription, on the ground that the corporation formed is not the one to which he subscribed, when he has, after the issuing of stock, voted thereon, and otherwise recognized the existence of the corporation: *Greenbrier Ind. Exposition v. Squires*, 30 W. Va. 307; 52 Am. St. Rep. 885, and note. See monographic note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 806-872.

JUDGMENT—RES JUDICATA.—A former judgment is not admissible as conclusive evidence of a material fact therein adjudicated, unless the parties are identical in the two cases, and also sue or defend in the same right or capacity: *Fuller v. Metropolitan Life Ins. Co.*, 68 Conn. 55; 57 Am. St. Rep. 84, and note.

JUDGMENT AGAINST CORPORATION—WHEN BINDING UPON STOCKHOLDER.—If the stockholders are represented in an action by the corporation, judgment against the corporation binds the stockholders: Monographic note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 814. See *Nichols v. Stevens*, 123 Mo. 96; 45 Am. St. Rep. 514, and note; *Holland v. Duluth Iron etc. Co.*, 65 Minn. 324; ante, p. 480, and note.

GROSSMAN v. OAKLAND.

[30 OREGON, 478.]

MUNICIPAL CORPORATIONS, POWER OF TO DECLARE WHAT ARE NUISANCES.—A municipal corporation has no power to declare a particular use of property a nuisance, unless such use comes within the common law or the statutory idea of a nuisance, though its charter purports to confer upon it power to prevent and restrain nuisances and to declare what shall constitute a nuisance.

A MUNICIPAL ORDINANCE PROHIBITING THE BUILDING OF ANY FENCE along the side of any railroad within that part of the municipality which was laid out in lots and blocks, and that any fence so built is a nuisance, is void.

CRIMINAL LAW.—THE PLEA OF GUILTY ADMITS ONLY the acts charged, and does not preclude the defendants from claiming that they do not constitute a crime.

Bronaugh, McArthur, Fenton & Bronaugh, for the appellant.

J. W. Hamilton, for the respondent.

482 BEAN, C. J. On June 12, 1894, the petitioner was arrested on a warrant of the municipal court of the city of Oakland, issued upon a complaint charging him with having "committed a public nuisance within the platted portion of said city, by driving stakes as a part of the fence which he was then and there building along the side of the O. & C. Railroad, otherwise known as the Southern Pacific Railroad, contrary to ordinance No. 58 of the city," and on a plea of guilty was fined twenty-five dollars. He thereupon sued out a writ of review to have the judgment of the recorder's ⁴⁸³ court annulled and set aside, on the ground that the ordinance was void. The writ being dismissed by the circuit court, he brings this appeal. The ordinance in question was passed by the Oakland council June 11, 1894, for the declared purpose, as shown by the minutes of the meeting, of "prohibiting the Southern Pacific Railroad Company from building a fence along their railroad within the corporate limits of the city," and provides: "That it shall be unlawful for any person, association, or corporation, owning, operating, or controlling any railroad within the corporate limits of the city of Oakland, Oregon, or any person or persons in the employment of any such person, association, or corporation, or any other person whatever, to build, construct, or maintain any fence or other obstruction whatever along the side of any such railroad within the portion of the corporate limits of said city of Oakland that is laid out in lots and blocks, and every such fence and obstruction is hereby declared a nuisance within and against the ordinance of said city of Oakland."

1. In our opinion, this ordinance cannot be sustained as a legitimate exercise of municipal power. The charter of the city confers upon it the power to prevent and restrain nuisances, and to "declare what shall constitute a nuisance"; but this does not authorize it to declare a particular use of property a nuisance, unless such use comes within the common law or statutory idea of a nuisance: 2 Wood on Nuisances, 3d ed., 977; Yates v. Milwaukee, 10 Wall. 497; Des Plaines v. Poyer, 123 Ill. 348; 5 Am. St. Rep. 524; Quintini v. City Board etc., 64 Miss. 483; 60 Am. Rep. 62; Chicago etc. R. R. Co. v. Joliet, 79 Ill. 44; Hutton v. Camden, 39 N. J. L. 122; 23 Am. Rep. 203. By this provision of the charter the city is clothed with authority ⁴⁸⁴ to declare by general ordinance under what circumstances and conditions certain specified acts or things injurious to the health or dangerous to the public are to constitute and be deemed nuisances, leaving the question of fact open for judicial determination as to whether the particular act or thing complained of comes within the prohibited class; but it cannot by ordinance arbitrarily declare any particular thing a nuisance which has not heretofore been so declared by law, or judicially determined to be such: Denver v. Mullen, 7 Colo. 345. An ordinance of the city cannot transform into a nuisance an act or thing not treated as such by statutory or common law, nor can it prohibit the free use of property by the owner, so long as such use does not interfere with the rights of others. Every proprietor has a constitutional right to erect upon his property such buildings or other structures as he may deem necessary for its enjoyment, having due regard for the rights of others, and this is a vested right guaranteed by the constitution, and cannot be arbitrarily interfered with. It is true one cannot lawfully use his property in such a manner as to injure another, but a particular use which may or may not result in creating a nuisance according to circumstances cannot be declared such in advance. The question when it may or may not become a nuisance within some provision of law must be settled as one of fact and not of law. Now, the fencing of a railway track in the platted portion of a city can ordinarily work no more harm or injury to others than the fencing of private property, and it would not for a moment be contended that an ordinance prohibiting a private citizen from fencing his property regardless of the character of the fence would be valid. The fencing or inclosing of property is a lawful and harmless use, in itself, and does not become a nuisance because the municipal authorities

⁴⁸⁵ have so declared, unless it is so in fact by reason of the character of the structure or the place of its erection; and in such case the ordinance should be directed against the unlawful and not the lawful act, leaving it to be judicially determined whether the particular structure is in fact a nuisance, either by reason of its character or the place of its erection. But the ordinance in question is not directed to the prohibition of such fences or structures as may by reason of their character or location be a nuisance, but it absolutely prohibits a railroad company from in any manner fencing or inclosing its track in the platted portions of the city, although the fence may be upon its own property, acquired by purchase or condemnation, and although it may be necessary to do so as a protection to its servants or the traveling public, and, in our opinion, is manifestly void: Tiedeman on Limitations of Police Power, sec. 122 a.

2. It is contended, however, that by his plea of guilty the petitioner has waived the right to insist in this proceeding that the ordinance is void; but the plea of guilty is only an admission that the defendant committed the acts charged in the complaint, and, unless such acts constitute an offense or are in violation of some valid ordinance of the city, his admission was not material and he waived nothing thereby: Fletcher v. State, 12 Ark. 169. It follows that the judgment of the court below must be reversed.

MUNICIPAL CORPORATIONS—POWER TO DECLARE NUISANCES.—Under a general grant of power over nuisances, town authorities have no power to adopt an ordinance declaring a thing a nuisance which, in fact, is clearly not one, but in doubtful cases, depending upon a variety of circumstances requiring judgment and discretion, their action is conclusive: Harmison v. Lewiston, 153 Ill. 313; 46 Am. St. Rep. 893, and note; Walker v. Jameson, 140 Ind. 591; 49 Am. St. Rep. 222, and note.

CRIMINAL LAW—EFFECT OF PLEA OF GUILTY.—Voluntary plea of guilty tendered by the accused upon his preliminary examination is such a confession of guilt as may be submitted to the jury upon the trial, in connection with his confessions made to others, and the circumstances surrounding the case, as tending to establish the corpus delicti: People v. Gould, 70 Mich. 240; 14 Am. St. Rep. 493. See, also, Wilmoth v. Hensel, 151 Pa. St. 200; 31 Am. St. Rep. 738.

GETTY v. AMES.

[80 OREGON, 573.]

MECHANIC'S LIEN, WHO NOT ENTITLED TO.—One employed by the month to do such work as his employer may require, and who, in pursuance of such employment, does work some of which is of a character for which a lien might be asserted and the balance of a different character, is not entitled to any lien. Where lienable and nonlienable items are included in one contract for a specified sum, or are made the basis of a lumping charge, so that it cannot be seen from the contract or account what properly is charged to each, the benefit of the mechanics' lien law is lost.

MECHANIC'S LIEN.—A NOTICE OR CLAIM OF A MECHANIC'S LIEN MUST STATE, either directly or by necessary inference, the name of the person to whom the claimants furnished material or for whom they performed the labor, otherwise no lien can be enforced.

G. W. Short, William R. Willis, Andrew M. Crawford, and Satson, Beekman & Watson, for the appellant.

J. W. Hamilton and John A. Gray, for the respondent.

574 BEAN, J. This is a suit by R. W. Getty to foreclose two alleged mechanics' liens claimed by him upon a building and fence belonging to the defendants Ames and Thibault. The defendants Christensen & Johnson, by their answer, deny the validity of said liens, and set up and seek to foreclose a mechanics' lien of their own upon the same property for labor performed and material furnished. The defendants **575 O'Connell** and Flanagan are mortgage lien claimants, and by their answers controvert the validity of the Christensen & Johnson lien, and also those claimed by the plaintiff, and set up their mortgages, and ask to have them foreclosed in this suit. After issue joined, a trial was had, resulting in a decree declaring the liens of plaintiff and defendants Christensen & Johnson void, and foreclosing the mortgages of O'Connell and Flanagan; and from such decree this appeal is taken.

1. Although an oral argument was made for plaintiff, and a brief filed in his behalf, it is not clear that he has perfected an appeal to this court; but, waiving that point, it is obvious that as to him the decree below must be affirmed. From the evidence it appears that about the 1st of May, 1893, he was hired by the defendants Ames and Thibault for the term of one year at a monthly salary of one hundred and twenty-five dollars, to perform such labor and render such services for them as they might from time to time direct, and to furnish a team and carriage.

In pursuance of this contract, he immediately entered upon his work, and continued in their service until about the 15th of October, 1893, during which time, at irregular intervals, when not otherwise employed, he worked on a dwelling-house and fence his employers were then building, but no separate account was kept of or charge made for the time actually employed in such labor, and the plaintiff's estimate of the value thereof is the merest guess. He was employed by the month to render such services as his employers might require or demand, which it now seems included lienable and nonlienable work indiscriminately. This, however, does not entitle him to a lien for such labor or services as might otherwise come within the provisions of the lien law, for the court cannot undertake from extrinsic evidence to apportion the amount of his monthly salary between the lienable and nonlienable work performed by ⁵⁷⁶ him. This question was considered in *Allen v. Elwert*, 29 Or. 444, and the rule there announced is that "where lienable and nonlienable items are included in one contract for a specific sum, or are made the basis of a lumping charge so that it cannot be perceived from the contract or account what proportion is chargeable to each, the benefit of the mechanics' lien law is lost. In such cases, the court cannot, by extrinsic evidence, apportion the amount of the entire charge or contract price between the lienable and nonlienable items. But where the claimant's demand, made in good faith, consists of several different items, separately charged, some of which are by law a lien upon the property, and others do not come within the scope of the statute, he may enforce his lien so far as given by law, and it is not vitiated because he has included therein nonlienable items." Within this rule, it is clear that plaintiff is not entitled to enforce the liens claimed by him.

2. The only other question to be determined in the case is the sufficiency of the claim of lien filed by the defendants Christensen & Johnson. That portion thereof material to this case is as follows: "Know all men by these presents, that W. O. Christensen and C. A. Johnson, partners as Christensen & Johnson, have by virtue of a special contract heretofore made with Kate F. Ames and Frank Thibault in the construction of a certain building, used as a dwelling and barn, constructed and being upon the following described land, to wit." Here follows the description of the land. "That Kate F. Ames is the legal owner of said blocks 6 and 7, in Schetter's Addition to Marshfield, Coos county, Oregon, and that Frank Thibault has some interest in said property, and joined with said Kate Ames in the contract

for constructing said building. That the contract and reasonable price of such building so constructed was the sum of sixteen hundred ⁵⁷⁷ and eighty-three and 66-100 dollars, lawful money of the United States. That the sum of sixteen hundred and eighty-three and 66-100 dollars is now due, said demand and account being hereinafter specifically set forth and stated." Then follows a declaration of the intention to hold the lien upon the building and such convenient space around the same as may be required for its use and occupation, and the statement of account. Within the rule announced by this court in *Rankin v. Malarkey*, 23 Or. 593, *Dillon v. Hart*, 25 Or. 49, and *Leick v. Beers*, 28 Or. 483, this claim or notice of lien is clearly insufficient, because it does not state, either directly or by necessary inference, the name of the person to whom the claimants furnished material, or for whom they performed the labor for which they seek to enforce the lien, or, indeed, that they furnished any material or performed any labor whatever on the building of the defendants. Upon these questions the notice is entirely silent, and is, therefore, insufficient under the mechanics' lien law of this state. It follows that the decree of the court below must be affirmed, and it is so ordered.

MECHANIC'S LIEN—CLAIM FOR—SUFFICIENCY OF.—A mechanic's lien notice is sufficient if it describes the premises, and states the amount due, to whom, from whom, and for what it is due: *Coburn v. Stephens*, 137 Ind. 683; 45 Am. St. Rep. 218, and note. See *Wharton v. Real Estate etc. Co.*, 180 Pa. St. 168; 57 Am. St. Rep. 629, and note.

MECHANIC'S LIEN—CLAIM FOR—LUMPING CHARGE.—A claim for a mechanic's lien containing a lumping charge, in which are mingled items for which a lien is given, with items for which no lien is given, is insufficient to support the lien: *Williams v. Toledo Coal Co.*, 25 Or. 426; 42 Am. St. Rep. 799. See *Wharton v. Real Estate etc. Co.*, 180 Pa. St. 168; 57 Am. St. Rep. 629, and note; *Mitchell etc. Co. v. Allison*, 138 Mo. 50; ante, p. 544, and note.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

SMITH *v.* SMITH.

[98 TENNESSEE, 101.]

MARRIED WOMAN, ACTION FOR ALIENATING HUSBAND'S AFFECTIONS.—A married woman had, at the common law, a cause of action against one who wrongfully enticed away or alienated the affections of her husband, but, because of her disability, her right of action remained in abeyance, and could not be prosecuted by her in her own name. If he died or there was an absolute divorce, her right of action remained her property, and she could then prosecute a suit therefore as a feme sole.

A MARRIED WOMAN IS NOT GIVEN THE POWER TO PROSECUTE IN HER OWN NAME AN ACTION FOR ENTICING AWAY HER HUSBAND OR ALIENATING his affections by a statute providing that, where a husband has deserted his family, his wife may prosecute or defend in his name any action which he might have prosecuted or defended, and she may sue or be sued in her own name for any cause of action accruing subsequently to such desertion.

Cooper & Cooper, for Sallie Smith.

Vertrees & Vertrees and J. M. Quarles, for Hugh F. Smith.

102 McALISTER, J. The plaintiff, a married woman, commenced this suit in the circuit court of Davidson county, against Hugh F. Smith, her brother in law, and Mary Smith, his wife, to recover damages for alienating the affections of plaintiff's husband, John M. Smith, by means of putting in circulation certain false, malicious, and defamatory statements concerning the character of plaintiff. The declaration further charges that, by reason of said malicious conduct on the part of the defendants, her husband, the said John M. Smith, in August, 1895, abandoned plaintiff, and has since refused to live with her. The husband, John M. Smith, was also made a party defendant. The defendants interposed a demurrer to the declaration, assigning, among other causes, that the false and malicious charges which caused the alienation of the affections of plaintiff's husband were

spoken prior to the abandonment, and that the cause of action is therefore one that cannot be prosecuted by the wife alone. The circuit court sustained the demurrer, and dismissed the suit.

At common law, on account of the well-settled doctrine of marital unity, the right of a married woman to prosecute an action in her own name, for the redress of personal injuries, was denied. The cause of action for a personal injury to a married woman, whether committed before or after marriage, ¹⁰³ at common law, belonged to her, but, on account of the disability of coverture, she had no remedy unless the husband joined in bringing the suit for conformity. The right of action was hers, but, owing to the legal fiction of the unity of husband and wife, she could not assert it. The husband and wife were treated as one person, and marriage operated as a suspension, in most respects, of the legal existence of the latter. But marriage only suspended her personal rights, it did not destroy them or transfer them all absolutely to the husband. While it was an absolute gift to him of her goods and chattels, it was only a qualified gift to him of her choses in action, depending upon the condition that he reduce them to possession during coverture, or, otherwise, upon his death, they belonged to her: *Bright's Husband and Wife*, 34-36; *Clancey on Women*, 109; *Reeves' Domestic Relations*, 4th ed., 1; 2 *Kent's Commentaries*, 11th ed., 116.

Says Mr. Bishop: "It is common doctrine, upon which the decisions in all the states of the Union and of England are in harmony, that, on the death of the husband, the wife's choses in action, not reduced by him to possession, survive to her. She takes them, not as his heir, personal representative, or administratrix, but they revert to her in her own right. And we have seen," says the author, "that this doctrine applies as well to the wife's postnuptial choses in action as to her antenuptial ones": *Bishop on Married Women*, sec. 171. It is well settled that ¹⁰⁴ torts committed upon a married woman are comprehended within the definition of the term choses in action: *People v. Tioga etc.*, 19 Wend. 73, 74; *Berger v. Jacobs*, 21 Mich. 215; *Chicago etc. R. R. Co. v. Dunn*, 52 Ill. 260; 4 Am. Rep. 606.

Says Mr. Reeves, in his work on *Domestic Relations*, 87: "Although the husband is entitled to all the property which the wife acquires during coverture, yet, if damages be claimed for an injury to her person or reputation during coverture, those damages belong to her, and she must be joined with her husband in the suit. When damages for such an injury are collected, they belong to the husband, but, in case of his death before they are

reduced to possession, they survive to the wife in the same manner as if the injury had been received before marriage."

Says Mr. Bishop: "If she [the wife] is slandered, or an assault and battery is committed upon her, or any trespass or actionable wrong, she may, on becoming discoverd, sue the wrongdoer the same as though she had been sole when she received the the injury; though, if the suit is brought in the lifetime of her husband, he must be made a party plaintiff with her, in consequence of the general rule of law which places the wife under the protection of her husband. When the result of the wrong becomes money, in the form of damages paid by the wrongdoer, the wife, though she can receive, ¹⁰⁵ cannot hold it, and the title glides to the husband, making the money his": Bishop on Married Women, sec. 705.

So that it is plain, at common law, a married woman had a cause of action against a party who wrongfully enticed away or alienated the affections of her husband, but, by reason of the disability of coverture, that right remained in abeyance, and could not be prosecuted by the feme covert in her own name. If the husband died, or there was an absolute divorce, the right of action remained the property of the wife, and might be prosecuted by her as a feme sole: *Legg v. Legg*, 8 Mass. 99; *Postlewaite v. Postlewaite*, 1 Ind. App. 473.

These propositions, however, are controverted by counsel for plaintiff, and authorities are cited to support the contention that a married woman has a right to prosecute such an action without joinder of her husband.

The case of *Foot v. Card*, 58 Conn. 4, 18 Am. St. Rep. 258, does broadly hold that a married woman, independently of any statute, may sue for the alienation and loss of her husband's conjugal affection and society, in her own name, and without joining her husband as coplaintiff, and the decision seems to have been rested upon the ground that the damages belong solely to the wife. But it must be conceded that this case is out of line with the great current of authority, and is not supported by sound legal reasoning. According to the great weight of ¹⁰⁶ authority, the wife can maintain such an action only in jurisdictions where there is an enabling statute. Says Mr. Cooley, in discussing this subject, in his work on Torts, page 227: "We see no reason why such an action cannot be supported where, by statute, the wife is allowed to sue 'for personal wrongs suffered by her.'" In *Bennett v. Bennett*, 116 N. Y. 584, the wife was permitted to prosecute the action in her own name under the Code of Civil Procedure, which provided that "a married woman

appears, prosecutes, or defends, in an action or special proceeding, alone, or joined with other parties, as if she were single."

Westlake v. Westlake, 34 Ohio St. 621, 32 Am. Rep. 397, was an action of slander by the wife in which it was held that the suit might be maintained under a statute of Ohio conferring on the wife "all rights in action" which have "grown out of a violation of any of her personal rights." In *Seaver v. Adams*, 66 N. H. 142, 49 Am. St. Rep. 597, it was held that under the statute of New Hampshire, enacting that a married woman may sue in all matters in law or equity, for any wrong done her, this action may be maintained. The court remarked that the only reason why the wife formerly could not maintain an action for the alienation of her husband's affections was the "barbarous common-law fiction that her legal existence became suspended during the marriage and became merged into his, which long since ceased to obtain in this jurisdiction." ¹⁰⁷ There remains now no other semblance of a reason, in principle, why such an action may not be maintained here." There is another class of cases which hold that one who entices away a husband is not liable in damages to the wife for the loss of his society and support, either at common law or under a statute giving her a right of action for injury to person or character. Such are the cases of *Duffies v. Duffies*, 76 Wis. 374; 20 Am. St. Rep. 79; *Mehrhoff v. Mehrhoff*, 76 Fed. Rep. 13; *Doe v. Roe*, 82 Me. 503; 17 Am. St. Rep. 499.

There can be no doubt, however, that the great preponderance of authority holds that, at common law, the wife had such a right of action, but was without remedy to assert it, and that it may be prosecuted in all jurisdictions where, by statute, the wife is clothed with the powers of a feme sole. It is insisted by counsel for plaintiff that there is such enabling statute in the state of Tennessee, and we are cited to section 4505 of Shannon's Code, which provides, viz: "Where a husband has deserted his family, the wife may prosecute or defend in his name any action which he might have prosecuted or defended; she may also sue and be sued in her own name for any cause of action accruing subsequently to such desertion." At common law, a deserted wife has no power to prosecute in her own name such causes of action. It was only in case of absolute divorce or the death of the husband that she could prosecute a right of action accruing to her during the coverture. This statute enables a deserted wife ¹⁰⁸ to prosecute an action, but, under two limitations. to wit: 1. She must prosecute it in his name, if it is an action which he might have prosecuted. This paragraph of the

statute bears no relevancy to the present action, since it is not prosecuted in the husband's name; 2. Under this statute, her right to sue in her own name is restricted to such causes of action as accrue subsequently to such desertion. The declaration in this case shows that the slanderous words, which, it is alleged, caused the estrangement of the husband and the loss of his consortium were spoken prior to the desertion.

The case of *Hester v. Hester*, 88 Tenn. 270, was a suit by a deserted wife to recover damages from the defendant "for falsely and maliciously attempting to ruin her character and for separating her and her husband." It appeared in that case that some of the causes of action accrued prior to the desertion and others subsequently thereto. The court held that under the statute the wife was limited to the causes of action accruing subsequently to the desertion, although acts occurring prior thereto might be looked to on the question of damages, if shown to have been a part of the plan alleged in the declaration.

It appearing, therefore, that no cause of action is alleged in the declaration to have occurred subsequently to the desertion, the demurrer was properly sustained, and the judgment is affirmed.

HUSBAND AND WIFE—WIFE'S ACTION FOR ALIENATION OF HUSBAND'S AFFECTIONS.—The authorities are divided upon the question whether or not a wife at common law had a right of action for the alienation of her husband's affections: Monographic note to *Clow v. Chapman*, 46 Am. St. Rep. 473. But it is now generally held that she has such right if, under the statutes of the state under which she prosecutes her action, she is given power to sue for personal wrongs without joining her husband: Monographic note to *Clow v. Chapman*, 46 Am. St. Rep. 474. See *Price v. Price*, 91 Iowa, 693; 51 Am. St. Rep. 360; *Seaver v. Adams*, 66 N. H. 142; 49 Am. St. Rep. 597.

CARTER v. McCLURE.

[98 TENNESSEE, 109]

PARTNERSHIP, WHAT IS.—Persons who contribute small sums of money for the purpose of establishing a co-operative store, the main portion of the capital being contributed by a third person, and who expect to share in the profits in proportion to the capital contributed by them, but whose chief object is to obtain the privilege of purchasing at such store for less prices than persons who do not so contribute, must be deemed partners, though they do not intend to assume liability as such.

A PARTNERSHIP IS a voluntary contract between two or more persons who place their money, effects, labor, and skill, or some or all of them, into lawful commerce or business, with the understanding that there shall be a community of profits between them.

JOINT STOCK COMPANIES, unless incorporated, are partnerships.

PARTNERSHIP, CHANGE IN MEMBERSHIP, WHEN DOES NOT DISSOLVE.—If several persons are interested as partners, and a new partner is taken into the business without the objection of any and with the apparent consent of all, or one of the partners dies, the survivors, or those remaining in the business, remain bound as partners, where the partnership agreement provided that the business should be continued for five years, unless two-thirds of the stockholders agreed to discontinue in a shorter time, and there was no such agreement nor any indication of a desire to discontinue until after the insolvency of the firm was ascertained.

A PARTNERSHIP MAY BE FORMED WITH TRANSFERABLE SHARES, in which event a transfer of any of such shares to third persons or the death of a shareholder does not dissolve the partnership.

Banks & Embrey and Estill & Lynch, for Carter, Dunbar & Co.

J. H. Holman and Martin & Littleton, for McClure, Lucas & Co.

¹¹⁰ BEARD, J. The bill in this cause was filed by complainants, as creditors of McClure, Lucas & Co., seeking to hold the defendants liable for the debts of that concern, upon the theory that it was a commercial firm, of which defendants were members at the time of the creation of these debts. The facts so far as they are important in the decision of this case, and as they have been found by the court of chancery appeals are, that these defendants, with others who are not sued, all members of an Alliance lodge in the town of Huntland, in this state, entered into an agreement among themselves to raise a sum of money, which, it was assumed, would be sufficient to establish a co-operative store in that place. This agreement was reduced to writing, and the names of the parties in interest were by them affixed to it, and over against his signature was placed the amount which each subscriber obligated himself to contribute to this joint enterprise. This agreement is in words and figures following, to wit:

“Huntland, Tenn., Dec. 31st, 1888.

“We, the undersigned, agree to pay to the directors, to be elected, the sum annexed to our respective names, by the first of January, 1889, for the purpose of establishing a co-operative store at ¹¹¹ Huntland, Tennessee. We further agree that the said money remain in the business for at least five years from beginning, unless two-thirds of the stockholders agree to discontinue the business in a shorter time. We further agree that three of the stockholders be elected annually as directors, to have full control of the stock hereunto subscribed. It is further agreed that the directors act in conjunction with R. W. McClure, who is a stockholder to the amount of \$2,050, and

who is to be the principal salesman, and in the transaction of all business between the said McClure and directors, the directors are to be regarded collectively or as a unit, and the said McClure as a unit."

After the execution of this paper, the three directors provided for in it were duly chosen, and into their hands the subscribers paid the several sums they had agreed to contribute. These sums, aggregating five hundred and ninety dollars were turned over by the directors to Mr. McClure, who, adding the amount of two thousand and fifty dollars which he had agreed to place in the venture, purchased a stock of goods, and opened up a co-operative store in the name of R. W. McClure & Co., this being the business name agreed upon by McClure and the three directors. No incorporation ever took place, nor was such ever intended by these parties. The main purpose of the defendants in entering into this business was to avoid what they deemed to be the extortion theretofore practiced upon them in the sale of goods by the merchants of the country. ¹¹² While not embodied in their writing, yet one of the terms of the contract, and the one which chiefly, if not altogether, induced all the subscribers (save no doubt McClure) to become interested in this enterprise, was that they were to purchase such goods as they might require from the stock in this store at a profit not exceeding ten per cent above cost; and these directors were chosen as their representatives especially to look after McClure, who was the largest shareholder, as well as manager, and see that he kept faith with the subscribers in this matter. While the defendants, styling themselves in their written agreement as "stockholders," took no active personal control of the concern, yet they manifested a lively interest in its success; in addition to giving it the benefit of their own patronage, they were zealous in commending it to their neighbors. At the end of the first year, one Mosely desired to purchase an interest in the business. He, however, was not a member of the "Alliance," and organized as this enterprise was in line with or under the inspiration of that movement, it was necessary that he become such before he could be allowed to make such purchase. In order to qualify him to this end, the rules of the "lodge," to which these defendants belonged, were suspended, and at one meeting he was admitted to the privilege of full fellowship with them. He contributed two thousand dollars to the capital of the concern, and its name was changed to McClure, Mosely & Co. At the end of another term of twelve ¹¹³ months, Mosely sold out his interest to one Lucas, and thereafter the enterprise

was conducted in the name of McClure, Lucas & Co., until insolvency overwhelmed it with disaster. The claims of complainants accrued during the existence of and against this latter concern. In addition to these changes in the organization of and style of the business, two deaths occurred among the original subscribers—one of them before and the other after the creation of these debts. This latter death, however, can in no way affect this controversy, and will, therefore, not be further noticed.

Upon this state of facts, it is insisted for the defendants: 1. That this undertaking was in no sense a partnership, and that they did not sustain the relation of partners to either R. W. McClure & Co., Mosely, McClure & Co., or McClure, Lucas & Co; 2. If, however, they are mistaken in this broad proposition, then that they were only partners in the firm of R. W. McClure & Co. and that all partnership relation and liability, on their part, were terminated or dissolved by the various changes already adverted to, and long prior to the creation of complainants' debts. The chancellor and the court of chancery appeals held both these contentions against the defendants and the case is now before us on an appeal from the decree of this last-named court.

1. Were these parties engaged in a partnership enterprise? All of the defendants earnestly disclaim ¹¹⁴ any purpose of entering upon such an undertaking. While, as has been stated, the prime motive of these parties was to organize a mercantile establishment, where their various needs would be supplied at reasonable figures, yet they confess that, outside of this, they expected to share in any profits earned by it, in proportion to the respective amounts contributed by them. These amounts were small, yet they were to serve as a basis for such distribution of profits. It is, no doubt, true that the defendants did not contemplate a partnership, and each supposed that he was simply taking a share in a joint stock enterprise, in which all he risked was the small sum paid for such share, yet it is for the law to determine, on the facts already given, whether a partnership was created, with all its attending liabilities.

In *Mallory v. Hanaur Oil Works*, 86 Tenn. 598, is quoted approvingly the definition of a partnership as given by Judge Story. "A partnership," says that writer, "is usually defined to be a voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them in lawful commerce or business with the understanding that there shall be a communion of the profits thereof between them": Story on Partnership, sec. 2.

The facts found by the court of chancery appeals, a general outline of which is given above, disclose the constituent elements of a partnership, as required by this definition. It is a case where ¹¹⁵ these parties have embarked their money "in lawful commerce," "with the understanding that there should be a division of profits" earned.

In addition to this, they have taken a firm name, and thus have advertised themselves to the world as a commercial partnership. Calling their contributions to the capital of this business a "subscription for stock," and taking certificates for their payments from the company as a joint stock company, it not being incorporated, cannot alter their liability. "There is no intermediate association, or form of organization between a corporation and a partnership, known to the common law, and, unless otherwise provided by statute, as is the case in England and New York, a joint stock company is treated and has the attributes of a common partnership": 1 Bates on Partnership, sec. 72. And Judge Story says that "in joint stock and other large companies which are not incorporated, but are a simple, although an extensive, partnership, their liabilities to third persons are generally governed by the same rules and principles which regulate commercial partnerships." And such has been the conclusion of the courts wherever the character of joint stock companies similar to the one in question has been passed upon, so far as our examination has disclosed. At least such was the holding in *Hodgson v. Baldwin*, 65 Ill. 532; *Kenyon v. Williams*, 19 Ind. 44; *Manning v. Gasharie*, 27 Ind. 399; *Beaman v. Whitney*, 20 Me. 413; *Farnum v. Patch*, 60 N. H. 294; 49 Am. Rep. 313.

¹¹⁶ The supreme court of New Hampshire, in this last-cited case, have delivered an able, exhaustive opinion upon the law of partnership as it applies to an association like the one in question, and we content ourselves with what we have already said, and by making special reference to that opinion.

In the light of these authorities, we think there can be no doubt that these parties were partners in the firm of R. W. McClure & Co.

2. We think it equally clear, on the facts of this case, and in view of the legal principles applicable to them, that there was no termination of the partnership enterprise resulting from the changes occurring during its progress by the introduction and subsequent withdrawal of Mosely, and the accession of Lucas or his capital to it, or the death of one of the original subscribers, intermediate between the start of this business and the final insolvency of McClure, Lucas & Co; that through all

these changes the defendants' relations remained as fixed by themselves in the beginning, and that they are liable as partners for the debts sought to be enforced in this cause. This conclusion we rest on two grounds: 1. It is found by the court of chancery appeals to be a fact that these defendants were members of the Alliance lodge that, by a suspension of its rules, hurriedly qualified Mosely, so that he might bring his capital and his name to the aid of this joint undertaking. They do not claim to have been ignorant of this proceeding, or ¹¹⁷ to have offered any opposition to it, either in or out of their lodge, or that they made any protest against his accession to the business. On the contrary, their zeal for the success of the movement continued undiminished. And so with regard to the withdrawal of Mosely, and the introduction of Lucas in his room and stead. The record shows consultation with quite a number of these defendants as to the advisability of this change, and an agreement with them in regard thereto, and acquiescence, at least by silence, on the part of the remainder. All these parties, through the various changes in the personnel of the organization, by death and purchase, and in the firm name under which the business was carried on, not only stood by and watched the movements of the concern as one in which they had a part, but they made no claim of dissolution by reason thereof, until confronted by the claims of these complainants. It was then too late, for, conceding that either one of these acts might have been availed of by the defendants as working a dissolution of their partnership, yet at their election, they might waive this effect. 2. The nature of this enterprise repels the idea that it was in the contemplation of the parties that either death or any transfer of shares should work a dissolution of the business. Not only was it to continue for five years, "unless two-thirds of the stockholders agreed to discontinue the business in a shorter time," but the shares of the stockholders were transferable.

¹¹⁸ Says Mr. Bates, in his work on Partnership, volume 1, section 72: "The fact of transferable shares makes such an association different, not merely in magnitude, but in kind, from ordinary partnerships, because not based upon mutual trust and confidence in the skill, knowledge, and integrity of every other partner. Hence, a sale of his shares by a member, the shares being transferable, is not a dissolution. Death of a member is not a dissolution, if such was the intent and the character of the association, in that the shares are transferable and it is governed by officers and is in the form of a corporation, is evidence of such intent." What the text-writers and the opinions of

many courts call the *delectus personarum*, an element in an ordinary commercial partnership, is lacking when the partnership assumes the character of a joint stock company with transferable shares: 2 Bates on Partnership, sec. 581; *Machinists' Nat. Bank v. Dean*, 124 Mass. 81; *Walker v. Wait*, 50 Vt. 668; *McNeish v. Hulless Oat Co.*, 57 Vt. 316.

It follows that the assignments of error upon the decree of the court of chancery appeals, in the particulars above indicated, must be overruled. The assignments of error upon the court's decree as to the Lipscomb claim is disposed of only. The decree of that court is in all things affirmed.

PARTNERSHIP—WHAT IS—WHEN CONSTITUTED.—A partnership is the contract relation subsisting between persons who have combined their property, labor, and skill in an enterprise or business as principals for the purpose of joint profit: *Spaulding v. Stubblings*, 86 Wis. 255; 39 Am. St. Rep. 888, and note. A trade arrangement entered into upon such a basis that the parties thereto have a community of interest in the capital stock engaged therein, and a community of interest in the profits resulting therefrom, constitutes a partnership and the parties thereto partners: *Webster v. Clark*, 34 Fla. 637; 43 Am. St. Rep. 217, and note.

JOINT STOCK COMPANY—WHEN PARTNERSHIP.—An unincorporated joint stock company is governed by the general principles of law applicable to partnerships: *Allen v. Long*, 80 Tex. 261; 26 Am. St. Rep. 735. Joint stock companies are mere partnerships except in form: *Robinson v. Smith*, 3 Paige, 222; 24 Am. Dec. 212. See *Townsend v. Goewey*, 19 Wend. 424; 32 Am. Dec. 514.

PARTNERSHIP—DISSOLUTION OF.—It is in the power of one partner at any time to withdraw and thus cause a technical dissolution of the firm, subject to liability to his copartners if the act was wrongful: *Slemmer's Appeal*, 58 Pa. St. 168; 98 Am. Dec. 255, and monographic note on the causes for a dissolution of a partnership.

RAILROAD v. WARD.

[93 TENNESSEE, 123.]

MASTER AND SERVANT—VOLUNTEER ASSISTING SERVANTS, LIABILITY OF MASTER TO.—One who voluntarily assists the servants of another with or without their request, and is injured by their negligence, cannot recover of their employer therefor. He and they are to be treated as fellow-servants.

MASTER AND SERVANT. THIRD PERSONS ASSISTING SERVANT, WHEN NOT DEEMED MERE VOLUNTEERS.—If one is interested in the work being done by the employes of another, and, at their request, or with their consent, undertakes to assist them, he does not do so at his own risk, and, if injured by their carelessness, their employer is answerable.

RAILWAYS, PERSONS ASSISTING EMPLOYES OF, WHEN MAY RECOVER IF INJURED BY THEIR CARELESSNESS.—If a person is employed by shippers to load cars, and it becomes necessary to have such cars moved from one point on a track to another, and, at the request of the brakeman, he assists in moving them, and,

in doing so, is injured through the negligence of the railway corporation, he is not a mere volunteer, and may recover of it for the injuries so suffered. Nor is it necessary to sustain such a recovery to prove that the corporation did not have a sufficient force to perform the service required.

Voorhies & Fowler and James A. Smiser, for Ward.

George T. Hughes & Son, for Railroad.

¹²⁴ WILKES, J. This is an action for damages for personal injuries. There was a trial before the court and jury, and a verdict and judgment for plaintiff for one thousand and seventy-five dollars and costs, and defendant railroad company has appealed, and assigned errors.

Plaintiff was engaged by several parties at Mt. Pleasant to load potatoes in barrels from wagons into the cars which were placed upon the sidetracks. It was necessary, for the more convenient and expeditious loading of the potatoes, to have the cars moved to another point on the sidetracks, where the cars could be more readily reached by the wagons. At the request of Bibb, brakeman on the train, plaintiff went on top of a car to assist in placing it at a convenient and proper place, and while he was so engaged the engine struck the car with force and violence, and plaintiff was thrown to the ground and had his foot crushed by the cars running over it. It was customary to require shippers to load the cars upon the sidetracks, and the railroad company and employes placed the cars at convenient places for that purpose.

The main and perhaps only question in this case is admirably stated by opposing counsel, and plainly and very pointedly put to the jury in an admirable charge by the court. The contention of defendant railroad company is, that the company had sufficient crew to place the cars properly, and would have done so, and there was no emergency or necessity for the plaintiff to aid in this work, and, in so ¹²⁵ doing, he was a mere volunteer, or acting under the unauthorized invitation of the brakeman, and became a fellow-servant with him and the engineer, and hence he was not entitled to recover.

The theory of plaintiff is, that it was necessary to replace the cars in another position, and that he and his employers had an interest in having them so placed in order to expedite their own work, and hence he was not a fellow-servant with company's employes, but was engaged in his employer's work and was entitled to recover for the negligent acts of the company's servants. Upon this point the learned trial judge gave the follow-

ing instructions: "The defendant insists that the plaintiff was a volunteer merely; that is, he was voluntarily assisting the brakeman, whose own duty it was to do the work which plaintiff undertook to do. If this is so—that is, if you find that the plaintiff was a mere volunteer, having no interest, either for himself or his employer, in the work which he was undertaking to do, that is, in assisting brakeman Bibb in his work—then he could not recover for the negligent acts of any of the agents and servants of the defendant company, unless their conduct was so grossly negligent as to show a wanton, willful, and reckless disregard of his safety. If the plaintiff was, as I have just said, simply assisting Bibb, the brakeman, in doing work which it was Bibb's duty to perform, then he cannot recover from the defendant for any injury caused by the negligence or misconduct ¹²⁶ of the engineer or other servants and agents of defendants. And, if you so find, you need not investigate the case further, but you will return a verdict for the defendant. But it is insisted in behalf of the plaintiff that he was not a mere volunteer, and that he did not stand in the relation of a fellow-servant to the employés of defendant, but that he was assisting Bibb, the servant of the railroad company, at his request, for the purpose of expediting his own work, which he was employed to do, in relation to the loading of the cars with potatoes. How this fact was you will determine from the proof. And it is a vital question, and one to be determined at the threshold of your investigation; that is, was this act of the plaintiff in going upon the car, at the invitation and request of the brakeman, Bibb, prompted by desire to promote his own interest, or that of his employers, and expecting thus to expedite and facilitate his own work and promote the interest of his employer, or was he there simply to assist the servants of the defendant in their work or as a matter of accommodation to Bibb? In the former case he would have the right to recover, provided the alleged negligence and injury is made out in other respects. In the latter case he could not recover. If you find from the proof that the plaintiff was engaged in the work of loading potatoes for the parties named in the declaration, and that it was to his interest, or that of his employers, in expediting his own work that he should assist in moving ¹²⁷ the cars to where they were wanted, and that such self-interest prompted him to comply with the request of Bibb to help him about the car, and that Bibb was the man in charge of that part of the work, and the man whose duty it was to do the work plaintiff was requested to do, and you further find

that the action of the plaintiff was a reasonable and prudent act under the circumstances, and that while so engaged he was injured by the negligence of the agents and servants of the defendant company, then, under such circumstances, the plaintiff would be entitled to recover."

Defendant relies upon the cases of *Mayton v. Texas etc. Ry. Co.*, 63 Tex. 77, 51 Am. Rep. 637, *Sherman v. Hannibal etc. R. R. Co.*, 72 Mo. 62, 37 Am. Rep. 423, and *Everhart v. Terre Haute etc. R. R. Co.*, 78 Ind. 292, 41 Am. Rep. 567, as holding the general rule that one who volunteers services, or performs them at the request of an employé not authorized to employ him, stands in the same relation to the company as to liability of the company as those with whom he associates himself. Counsel for the railroad concedes that cases may be taken out of this general rule, but insists there must appear a self-interest in the very work to be done, citing *Welch v. Maine Cent. R. R. Co.*, 86 Me. 552; also the case of *Wischam v. Rickards*, 136 Pa. St. 109, 20 Am. St. Rep. 900, as illustrating the rule and exceptions.

The contention of plaintiffs is illustrated by the case of *Eason v. S. & E. T. Ry. Co.*, 65 Tex. 577; 57 Am. Rep. 128 606. In that case the person injured was not receiving or loading freight. He was attempting to help move a car so as to place it where he could more conveniently get at it in order to load it for his employers. The opinion does not say in that case that the conductor said he was short of hands, and it does not state that it was necessary for the plaintiff to undertake the work at which he was injured. The decision of the court is based upon the broad proposition that his employers were interested in having the work done, and that, therefore, what he did was done in their interest, and not in that of the defendant; and that, therefore, he was not a mere volunteer, and was entitled to protection.

Another case in point is *Street Ry. Co. v. Bolton*, 43 Ohio St. 224; 54 Am. Rep. 803. In that case a passenger on a street railway was injured. The car which he was upon had got off of the right track, and he was assisting the servants of the road in pushing it back, when he was injured by another car belonging to the same road. In this case, it is not shown that he was requested to assist in what he was doing, nor is it anywhere stated that it was necessary for him thus to assist in order to get it back, or that he would save much time by assisting, or that he was in any haste to pursue his journey. The court put the case

upon the distinct ground that he had an interest in having the car shoved back, in order to facilitate his journey; that what he was doing was ¹²⁰ reasonable and prudent; and that it was not contrary to the wishes of the servant of defendant who had the car in charge.

A very carefully considered case is that of *Welch v. Maine Cent. R. R. Co.*, 86 Me. 552. In that case the same arguments urged by counsel for defendant in this case were pressed on the court. It is said in the opinion: "It is undoubtedly true that if one who has no interest in the work to be performed, a mere bystander, voluntarily assists the servants of another, either with or without the latter's request, he must do so at his own risk, and the jury were so instructed in this case. But it is equally well settled that one who has an interest in the work to be performed, and for his own convenience, or to facilitate or expedite his own work, assists the servants of another, at their request or with their consent, is not thereby deprived of his right to be protected against the carelessness of the other's servants. In the former class of cases the master will not be responsible, in the latter he will be. This distinction is sustained by every text-book to which our attention has been called, and is well sustained by adjudged cases."

And a little further on the law is stated thus: "The distinction running through all the cases is this: That where a mere volunteer—that is, one who has no interest in the work—undertakes to assist the servants of another, he does so at his ¹³⁰ own risk. In such a case the maxim *respondet superior* does not apply. But where one has an interest in the work, either a consignee or a servant of the consignee in any other capacity, and, at the request or with the consent of another's servants, undertakes to assist them, he does not do so at his own risk, and if injured by their carelessness, their master is responsible. In such a case the maxim of *respondet superior* does apply. The thing on which the cases turn is the presence or absence of self-interest. In the one case, the person injured is a mere intruder or officious intermeddler; in the other he is a person in the regular pursuit of his own business, and entitled to the same protection as anyone whose business relations with the master expose him to injury from the carelessness of the master's servants." It was there urged, too, that the servants of defendant had no authority to make the request or give the consent relied upon, and the court answered the contention as follows: "But in the present case it is urged by the learned counsel for the railroad company that the crew in

charge of the gravel train had no authority to make such a request or give such consent as will authorize the servants of the consignee to remove or assist in the removal of earth from the cars. We do not think that such a want of authority exists. It seems to us that the persons having the charge of freight cars are the very ones to give such consent, ¹³¹ or to make such a request; and it has been so held, both in England and in this country."

The case of *Wischem v. Rickards*, 136 Pa. St. 109, 20 Am. St. Rep. 900, cited and relied upon by the defendant in this case, is referred to in that opinion as upholding the doctrine herein laid down. The court says of it: "The recent case of *Wischem v. Rickards*, 136 Pa. St. 109, 20 Am. St. Rep. 900, cited by defendant's counsel, is not opposed to it. It sustains it. In that case the plaintiff was hurt while assisting the defendant's servants in unloading a heavy fly wheel from the wagon. The court found, as a matter of fact, that the plaintiff was a mere volunteer, having no interest in the work which he undertook to assist the defendant's servants in performing, and, consequently, that he had no remedy against their master."

It is earnestly insisted, however, that the rule of liability cannot exist unless there was a necessity on the part of the railroad to have the services of the plaintiff, and that if the business was that of the railroad, and it had sufficient force to perform it, then the plaintiff must be considered a volunteer and intermeddler. But none of the cases holding the company liable proceed upon this ground, but upon the more satisfactory one, whether the plaintiff is to be regarded in such cases as expediting and forwarding his own business, or that of the railroad company, either as an accommodation or as a necessary help. In other words, was he engaged in his own business or that of the railroad? If the former, the ¹³² road is liable if there is negligence; in the latter it is not, because the negligence is that of a fellow-servant, and this is equally so whether his aid is necessary to the road's performance of its duty or not. The emergency or necessity which will authorize him to aid the railroad, and protect him in so doing, is one that arises in his own business, and not in that of the railroad company.

The questions of fact in this case were properly left to the jury—that is, as to whether plaintiff was a mere volunteer, aiding the brakeman on his invitation, or whether he was acting in his own interest and that of his employers. The question of negligence in the servants of the railroad company was left to

the jury, and they were told that in no event could the plaintiff recover unless the railroad company was negligent.

We think the matter was properly submitted to the jury, under a proper charge, and they have found for the plaintiff's contention, and the judgment of the court below is affirmed, with costs.

MASTER AND SERVANT—LIABILITY OF MASTER TO VOLUNTEER.—A master owes no contract obligation to one voluntarily assisting his servants. Such volunteer assumes all the risks incident to the situation, and cannot recover from the master for an injury caused by a defect in the instrumentalities used, or by the mere negligence of the servants: *Evarts v. St. Paul etc. Ry. Co.*, 56 Minn. 141; 45 Am. St. Rep. 460, and note; *Rhodes v. Georgia R. R. etc. Co.*, 84 Ga. 320; 20 Am. St. Rep. 362. One volunteering to assist a servant is in the same position as a servant as respects the liability of the master for injuries to him by the servant's negligence: *Mayton v. Texas etc. R. R. Co.*, 63 Tex. 77; 51 Am. Rep. 637. But the master is liable to such volunteer where he is injured by the gross negligence of his servants: *Evarts v. St. Paul etc. Ry. Co.*, 56 Minn. 141; 45 Am. St. Rep. 460.

ARBUCKLE v. KIRKPATRICK.

[8 TENNESSEE, 221.]

CONTRACTS, CONSTRUCTION OF.—The proper construction of a contract is not dependent upon any name given it by the parties, nor upon any one provision, but upon the entire body of the contract and its legal effect as a whole.

TRUST, WHEN NOT IMPOSED ON MONEYS COLLECTED. If persons into whose possession goods are given to be sold sell them and collect the proceeds, but do not keep them separate from their other moneys, and expend and use them in their business, and, then becoming insolvent, make an assignment, there can be no trust imposed upon the funds in their assignee's hands, whether in making such sales they acted as agents of the owners of the goods sold, or had first purchased them and were indebted for the purchase price.

CONTRACT, WHEN ONE OF SALE AND NOT OF AGENCY. A writing which purports to constitute certain persons selling factors and provides that all goods consigned to them shall, until sold in the regular course of business to retail customers, remain the property of the consignors; that the consignees shall never purchase the goods on their own account; that they shall sell the goods in their name, but only as factors, and at such prices as the consignors shall dictate from time to time; that the consignees shall guarantee the sale of each consignment and the payment therefor within sixty days from its date, and shall assume all risks of credit, and make collections at their own expense; that they shall remit the full price of each consignment at the end of sixty days, whether the whole be sold or not, or whether the proceeds of the sale be collected or not; that they shall insure the consignors against any decline in prices, and shall be entitled to any advance in prices of unsold goods; that they shall be entitled to certain commissions, specified therein, for cartage and storage, for insuring against fire, for insuring payment, for insuring against decline in prices, and for selling

the goods; that the consignors will allow a discount on all advances made to them prior to ten days from each consignment, and interest on advances made to them after such ten days and before the sixty days; that if the consignees neglect to remit within sixty days after any consignment, the consignors will be entitled to draw upon them for the amount of the consignment, after deducting the commissions; and that the consignees will maintain the established prices designated to them by the consignors, constitutes a contract of sale on credit and not a mere agency, and hence the consignors are not entitled to recover moneys due to the consignee for sales of goods made by them.

J. C. Reynolds, for Arbuckle Brothers.

D. F. Wilkin, Hamilton Parks, and P. D. Maddin, for Kirkpatrick.

222 WILKES, J. The complainants are dealers in Ariosa coffee, and claim that Kirkpatrick & Co. were their factors to sell this coffee. Kirkpatrick & Co. failed April 5, 1896, and assigned all their accounts, goods on hand, etc., to Keith & Wilkin, to pay several classes of creditors—Arbuckle being in the tenth class. Among the property so assigned were sums due to Kirkpatrick & Co. for Ariosa coffee sold by them, and not collected. They had also collected considerable sums from these sales, and had used the money. The bill seeks to reach: 1. All accounts for the coffee which Kirkpatrick & Co. had not collected; 2. To impress a trust on all the assets assigned, for the sums which Kirkpatrick & Co. had collected from sales of Ariosa coffee before the assignment, and which they had used and appropriated.

No goods on hand are sought to be reached, because there was only about sixty-five dollars' worth on hand when the firm failed, and this was surrendered to Arbuckle's agent, before taking advice upon the contract, by the assignee. The goods sold by Kirkpatrick & Co. were obtained from Arbuckle Brothers under a contract called a "special selling factor appointment." The contract in question is dated January 28, 1895. A similar contract has been in **223** force between the parties for many years before that date. It is as follows:

"Form C.

"SPECIAL SELLING FACTOR APPOINTMENT.

"ARBUCKLE BROTHERS.

"Subject to prompt acceptance, we take pleasure in appointing you a special selling factor for our roasted coffee, restricting and defining your duties and obligations by the following provisions, to wit:

"1. That all goods consigned on your requisitions on us shall, until sold in regular course of business, and to bona fide retail customers, remain our property, with the title in us, and shall merely be held by you as our factor, and shall, at all times, be subject to our order for disposal or removal, on payment of all claims against them for advances of money made to us, and all charges for drayage, storage, and insurance.

"2. That you shall never purchase such goods for your own account.

"3. That such goods shall be sold and billed by you in your own name, but only as our factor, according to the laws relating to factors, and only at such prices and on such terms as we may give you from time to time.

"4. That you shall guarantee the sale of each consignment, and the payment therefor within sixty days from its date, and shall assume all risks as to the credit of the parties to whom you sell, and make all collections for goods sold, at your own expense.

²²⁴ "5. That you shall remit us the full amount of each consignment, less the commission, as herein provided, by the end of such sixty days at a price designated to you at the time of the consignment, whether the whole of said consignment shall have been sold by you or not, and whether or not you shall have collected the proceeds thereof.

"6. That you shall insure us against any decline in the price of the unsold goods held by you as our factor.

"7. That you shall be entitled to any advance in the price of such unsold goods; and

"8. That you shall be entitled to the following allowances and commissions, to wit: 1. For carting and storing, one-eighth cent per pound; 2. For insuring against fire, wind, and water, one-eighth cent per pound; 3. For insuring payment, one-eighth cent per pound; 4. For insuring against decline in price, one-eighth cent per pound; 5. For selling the goods, one cent per pound.

"9. That, in addition to the above we shall, on all advances made to us prior to ten days from date of consignment, allow a discount of one per cent, and on advances made after ten days, but prior to sixty days, we shall allow interest at the rate of six per cent per annum for the time between date of said advance and said sixty days.

"10. That if you neglect to remit to use the full amount of any consignment less the commissions as herein provided, by the

end of sixty days ²²⁵ from its date we shall make draft upon you, and allow you a selling commission of only one-half of one cent per pound; and if said draft be returned unpaid we shall only allow you a selling commission of one-fourth of one cent per pound; and if you do not remit us within four months from date of each consignment, no commissions or discounts of any nature whatever will be allowed.

"11. That you will maintain our established selling price, terms, conditions and limitations, of consignment in such states and territories as may be designated by us; but in the event of any violation thereof you are to pay to us the sum of fifty dollars (\$50) for every such violation.

"12. That this factor appointment may be revoked by us at any time, at our option."

[Copyright, 1891, by Arbuckle Bros.]

This appointment was accepted by Kirkpatrick & Co., on January 28, 1895, in the following language:

"Dear Sir: We beg to herewith accept your appointment as 'special selling factor' of your roasted coffees, subject to all the provisions, limitations, and obligations expressed in your notice of appointment, Form C, dated at New York, January 28, 1895."

Under this contract, from February 5, 1895, to April 3, 1895, twenty-five different lots of five cases each of this coffee were received by Kirkpatrick & Co., the value of which was three thousand and forty-one dollars and seventy cents. The coffee was sold usually in one case lots, and almost daily, and Kirkpatrick & Co., before making their assignment ²²⁶ April 6, 1895, had collected upon such sales eight hundred and thirty dollars and fifty-five cents, and used the proceeds in their business. Four cases were on hand when the assignment was made, and these were delivered up to the plaintiffs upon their demand by the assignee, as before stated. For the remainder there were accounts on the books of Kirkpatrick & Co. against their customers, and these accounts were transferred and went into the hands of the assignee. The accounts for coffee sold by Kirkpatrick to their customers were not kept separate from other items sold them, but the amounts and names of customers can be traced from the books by culling out the items relating to coffee. Kirkpatrick & Co. had never paid or advanced anything on consignments now in question, and complainants have received nothing thereon.

Complainants claim that Kirkpatrick & Co. were their "special selling factors," so constituted by the written agreement above

set out, and that coffee was consigned to and sold by Kirkpatrick & Co. as such. It is therefore maintained for them: 1. That the money collected by Kirkpatrick & Co., upon sales of coffee consigned to them, was complainants' money; and, as Kirkpatrick & Co. mingled same with their own, and finally used it in their business, the claim therefore is a preferred one, and must be first paid out of assets in hands of assignee; and 2. Complainants are entitled to follow into assignees' hands all unpaid accounts created for sales of Arbuckle coffee on or subsequent to February 5, ²²⁷ 1895. Such indebtedness belongs to complainants because created upon sales of their goods by their factor.

These contentions were denied by the chancellor and the court of chancery appeals, the latter holding that the contract between the parties amounted, in legal effect, to a sale of the coffee to Kirkpatrick & Co. Complainants have appealed, and assigned the above-stated actions of court below as error.

Defendants contend, on the other hand: 1. That the contract itself is a sale, and not an agency or factor contract. The mere name given it does not determine its status or effect; 2. That even if, under the contract, the title to the goods delivered to Kirkpatrick & Co. would remain in Arbuckle Brothers until they were sold by Kirkpatrick & Co., that, when sold, Kirkpatrick & Co. became mere debtors of Arbuckle Brothers for what was due for the coffee.

The correct determination of this case must depend upon the proper construction of the written agreement between the parties, and their course of dealing between themselves. Complainants claim that agreement above set out constituted Kirkpatrick & Co. their factors under a *del credere* commission, and that this firm in all things acted as such.

The court of chancery appeals report that: "This firm operated under a previous contract with these complainants for several years. This prior contract was quite similar in its provisions to the one in this ²²⁸ case. It was slightly different in one or more of its terms, but the course of dealing of the parties between themselves, so far as we can see from the record, did not change in any particular material to the issue in dispute. The complainants had a warehouse in Nashville, with a man in charge of it, in which they kept a supply of their coffees. When the defendant firm wanted any coffee, it notified the agent of complainants of the quantity wanted, and it was supplied with a bill or statement, on a prescribed form, of the price and terms of the transfer or consignment, conforming in general outline with

the provisions of the contract made with their merchants dealing in their coffees. When delivered, the firm sold the coffees, as it did other staple articles in its stock, to whom it pleased, when it pleased, and in whatever territory it pleased; and, so far as we can see, on whatever time it pleased. It rendered no account of sales to complainants, and was not called upon to do so. In its sales to its retail merchant customers, this coffee was sold and billed and shipped with other goods, and when its accounts were collected from its customers, embracing these coffees, the proceeds were deposited with the general funds of the firm, and paid out on its checks in meeting its current liabilities. For awhile the firm paid for this coffee by its checks upon its bank in the city of Nashville, just as it paid any other demand upon it. Upon objection being made to receiving these checks in payment, the firm opened an ²²⁹ account with a firm of New York bankers, and forwarded checks upon them to complainants in settlement; and these checks appear to have been received without question or objection until the assignment of the firm. The complainants never inquired whether their coffees were insured, or whether this firm paid for storage, or anything of the kind."

Other facts found by that court have already been adverted to, and still others will be mentioned hereafter so far as necessary. Kirkpatrick & Co. are called in the contract "special selling factors," and the instrument a "special selling factor appointment." Still, the proper construction of the contract is not dependent on any name given to the instrument by the parties, and not on any one provision, but upon the entire body of the contract and the legal effect of it as a whole: *Singer Mfg. Co. v. Cole*, 4 Lea, 439; 40 Am. Rep. 20; *Cowan v. Singer Mfg. Co.*, 92 Tenn. 376; *Heryford v. Davis*, 102 U. S. 244.

We think it very evident that whether we regard the contract as one of sale, or simply one creating an agency to sell, is not material so far as the money already collected from sales and expended by Kirkpatrick & Co. is concerned. The amounts received by them for such sales have not been kept separate from their other funds, and it does not appear that any of the proceeds went into the hands of the assignee, or into the purchase of goods that came to his possession. These sums have been expended ²³⁰ in the general business of Kirkpatrick & Co., but for what purpose does not appear, and they are not traced or identified, and cannot be. As to the money already paid in, Kirkpatrick & Co. are debtors; as they are for any other funds

used by them from goods sold and not paid for, and this must be the case whether they received the proceeds of sale as their own or as agents; and unless they were kept separate and identified, no trust can be imposed upon the funds or goods in the assignee's hands: Story on Agency, 8th ed., sec. 229, p. 290; 3 Am. & Eng. Ency. of Law, 344, and cases cited; Aiken v. Jones, 93 Tenn. 353; 42 Am. St. Rep. 921; Sayles v. Cox, 95 Tenn. 579; 49 Am. St. Rep. 940.

The four cases on hand when the assignment was made have been delivered up to complainants, and as to them there is now no controversy, and the only remaining question is, whether the amounts due Kirkpatrick & Co., on account for coffee sold, can be successfully claimed by complainants. If so, it can only be upon the theory that Kirkpatrick & Co. were the agents of Arbuckle Brothers, to sell their coffee, and on the theory that the proceeds after sale and before collection, as well as the coffee, before sale, remained the property of complainants. In determining this question, it is not material to consider whether the agency (if it be held to be such) is one of ordinary character, or whether the agents in this case occupy the status of factors under "del credere commission."

²³¹ The court of chancery appeals was of opinion that while there were many features of the contract that indicated agency on the part of Kirkpatrick & Co., there were others, and especially the fifth and sixth sections, which could only be construed as rendering the contract one of sale and not agency.

These two clauses, as will be seen, provide that Kirkpatrick & Co. shall remit, for all coffees, at the end of sixty days, whether sold or not, and whether the proceeds have been collected or not, and the firm is made to guarantee complainants against any decline in price, and entitled to any advance; and in the tenth clause, the complainants are authorized to draw drafts if remittances were not made in proper time. The learned court of chancery appeals say, in substance, that complainants cannot receive the price of the goods and afterward claim the goods themselves, and when the price is paid the property could no longer be claimed. It is insisted that these provisions in the contract cannot be considered, because, as a matter of fact, Kirkpatrick & Co. were not made liable for any coffees at the expiration of sixty days, nor were they called upon to make good any decline in price, and hence the conditions allowing these sections to be looked to have not arisen. It is true none of the funds involved in this case arise directly from the operation of these sections,

but they are parts of the same entire contract, prescribe the rights and liabilities of the parties under the contingencies named, and must ²³² be looked to in order to determine the real intent, force, and effect of the instrument. They are not detachable, nor to be considered alone, nor is the remainder of the contract to be considered without them.

We have been cited by the very able counsel of complainants to a large number of cases construing contracts more or less like the contract now under consideration, and it is claimed the principles laid down in them are conclusive in consideration of this contract.

Among the cases cited for complainants are: Metropolitan Nat. Bank v. Benedict Co., 74 Fed. Rep. 182; Burton v. Goodspeed, 69 Ill. 237; Norton v. Mellick, 97 Iowa, 564; Walker v. Butterick, 105 Mass. 237; National Cordage Co. v. Sims, 44 Neb. 148; Sturm v. Boker, 150 U. S. 312; Lenz v. Harrison, 148 Ill. 598; Balderstone v. National Rubber Co., 18 R. I. 338; 49 Am. St. Rep. 772; Barnes Safe etc. Co. v. Bloch Bros. etc., 38 W. Va. 158; 45 Am. St. Rep. 846; National Bank v. Goodyear, 90 Ga. 711; Milburn Mfg. Co. v. Peak, 89 Tex. 209; Moline Plow Co. v. Rodgers, 53 Kan. 743; 42 Am. St. Rep. 317. We examine these cases with reference to the case now on trial.

Metropolitan Nat. Bank v. Benedict Co., 74 Fed. Rep. 182: Stern Auction and Commission Company agreed ²³³ with Benedict & Co., manufacturers of clothing, as follows: "We agree to realize for consignment of ready made clothing of Benedict & Co., as per memorandum received of its president, net prices as per same, without any charges of commissions, freight, or any other charges. We agree to keep amount of consignment at all times, until agreement expires, fully insured, and that no part of consignment shall remain unsold or unpaid by February 1, 1895; and we shall also be entitled, on any cash payment before February 1, 1895, to one and one-half (1½) per cent a month for unexpired time."

In a contest between Benedict Company and parties claiming consigned clothing under bill of sale given in payment of debt due from commission company, it was held: "The contract between the Benedict Company and the Stern Auction and Commission Company was not a sale, but a contract of factorage. The stipulations of the contract are not appropriate to a contract of sale. If it was a sale, and the commission company acquired an absolute title, what concern was it of the Benedict Company

when they were sold? When one merchant sells goods to another, the seller never requires the buyer to enter into a covenant that he will sell the goods within a specified time. Such a requirement is inconsistent with the dominion over the property which absolute ownership confers. The money to be paid by the commission company was not upon a sale of the goods to that company, but upon a sale of the ²³⁴ goods by that company. . . . The commission company covenanted that no part of the consignment should 'remain unsold or unpaid by February 1, 1895.' A failure to sell the goods and account for the same at the prices fixed within the time agreed upon would be a breach of this covenant on the part of the commission company, for which the Benedict Company might recover damages. But such breach of the contract would not have the legal effect to convert the bailment into a sale. . . . The goods not sold would still remain the property of the Benedict Company. There is no provision in the contract for a change of title from the consignor to the consignee in any event. Tested by the written agreement, the contract was clearly one of bailment."

In this case, while the goods were in store, the company failed and sold to the bank all its stock, expressly excepting the goods on hand on consignment. The president of the bank was notified that the Benedict goods would not be included in the sale, and a special clause in the bill of sale was inserted for the purpose of excluding them. The bank, however, claimed the goods, and Benedict & Co. sued for them. The court said the parties had a right to put their own construction on the contract, and, when it was done in good faith, the court would sustain the construction. It is well to note that the commission company were not to pay for the goods as on a purchase, but only to account ²³⁵ for the proceeds of sale at prices fixed by the contract. There was no stipulation to pay for the goods at a fixed time whether they were sold or not. In the case at bar, the goods were to be paid for in sixty days, whether sold or not. It is not here claimed to be a matter for damages if sale is not made, but that it is an absolute engagement to pay, sale or no sale. In addition, the commission company expressly excepted the goods in controversy out of the transfer, while in the case at bar the accounts in controversy are expressly conveyed to the assignee.

Burton v. Goodspeed, 69 Ill. 237: Burton and Holbrook entered into a contract substantially as follows: Burton agreed to furnish Holbrook, afloat at his dock, anthracite coal. Holbrook agreed to receive, hoist from vessel, put it on dock, pay like

freight, and charge amount paid for all this against coal, and to receive for docking, screening, selling, and delivering, including his commissions, one dollar and fifty cents per ton for coal delivered outside the yard, and one dollar for that delivered on the yard, and an additional commission of fifty per cent of net profits on sales. Holbrook also agreed to guarantee payment of sales, to advance Burton on coal as shipped three dollars per ton, and pay over balance of proceeds of sales as coal was sold, not to sell below market price, to keep correct accounts, and to render statement each month.

The court said: "The relation existing between ²³⁶ appellant, Burton, and Holbrook, by virtue of their contract, is neither that of vendor and vendee nor of partners. . . . There is nothing said about selling the coal or any interest in it to Holbrook, nor have we been able to find any language from which we can reasonably presume that the intention of the parties was to invest him with the ownership of the property. The fact that he was to receive a portion of the net profits on sales does not prove that he was a partner, as they were given merely as part of his compensation. We think, under the evidence, Holbrook was, as to the coals shipped him for sale by appellant, Burton, a factor or commission merchant."

It is evident that this is an ordinary consignment contract. The agent was to render a correct account each month to his principal, showing amount of goods sold and prices, and did not have to pay for any goods until sold, and was only to guarantee such sales as he made, and the facts do not make it a contract similar to the one now under consideration.

Norton v. Mellick, 97 Iowa, 564: Norton & Co. agreed to furnish Mellick certain brands of flour at specified prices, to be sold by Mellick for them, as their agent, at prices given. Mellick agreed to receive flour as agent of Norton & Co; to pay freight and charges; to keep same in good order; to sell it at not less than given prices; to render accounts each thirty days, and ²³⁷ make remittances then of the money for all merchandise sold. Mellick further agreed to buy any of the flour unsold at the end of ninety days at prices given, and pay therefor; and it was also agreed that title, ownership, and right of possession of the flour should remain in Norton & Co. until same should be paid for in full.

The court said: "We think there ought to be no question that the contract was a mere agency for the sale of the flour. It is expressly stated in the first paragraph that the flour was to be

sold by the defendant for the plaintiffs, as their agent. The real inquiry is, What was the intention of the parties to the contract? That intention must prevail, and when it is plainly and unequivocally expressed in writing that it is an agency, and not a sale, and the title does not pass, there is no room for construction," etc.

This contract plainly provided that the agent should render an account each month, and make remittances for all merchandise sold. The title to the flour was to remain in the principal until sold, and the agent stipulated to buy such as might be unsold at the expiration of ninety days. The flour was destroyed by fire before the ninety days, and the principal sued the agent for its value. The court held he was not liable; that the contract was one of agency. There was no stipulation to guarantee the principal against decline in prices nor to pay in a fixed time for each lot of goods, whether sold ²³⁸ or not, but simply to buy at the end of ninety days.

Walker v. Butterick, 105 Mass. 237: There was a contract between parties as follows: Alexander & Co. are to take goods from Walker & Co., and to return to them, every thirty days, the amount of sales, at prices charged by Walker & Co., who will furnish Alexander & Co. all goods in their line. Alexander & Co. are worth, in real estate and money, five thousand dollars. After receiving goods, Alexander & Co. made monthly remittances, stating, in substance, that, according to contract, they remitted sales for preceding thirty days. The goods were attached by creditors of Alexander & Co. Held, the terms of contract import a consignment, and not a sale.

This is a simple agency contract, and has none of the peculiar features of the contract now under consideration.

Where a contract provides for consignment of goods, to be sold on commission for prices fixed by consignor, and returns at stated periods, consignee guaranteeing payment thereof, the relation which the law implies is that of an agency, for sale upon a *del credere* commission, and not that of vendor and vendee.

In this case the contract provided that the twine, as well as the proceeds of its sale, should remain the property of the principal, the proceeds to be remitted on the first day of each month. There ²³⁰ was no obligation on the agent to buy any of the twine, or to sell it in any fixed time, and is a case of simple agency.

Sturm v. Boker, 150 U. S. 312: The goods were consigned to the agent to be sold by him to the best advantage, the profits

realized to be divided equally between the principal and agent, and all losses to be borne by the principal. All goods unsold were to be returned to the principal. The agent was to insure the goods, for the benefit of the principal, and to pay the freight. Held, that the contract was a bailment upon the terms stated. The contract contained none of the features of the Arbuckle contract.

Lenz v. Harrison, 148 Ill. 598: The contract provided that the first party appointed the second party his agent to sell wagons in Henry, Illinois. The second party accepted the appointment, and agreed to pay all freight charges, taxes, make good any loss or damage by fire, house them; to sell only to persons of undoubted solvency, indorse all notes taken on sales, guaranteeing prompt payment when due; make sales requiring final payment within twelve months from date of invoice; to transmit to the first party, each day, all cash received from sales that day, and, on the last day of each month, render full account of all sales, and transmit same, with all notes taken, to first party. Also, if required by first party, will take all wagons unsold at end of year, and give note for them, but ²⁴⁰ this stipulation not to be a positive sale to second party unless this requirement is made by first party. Held to be a simple consignment.

Balderstone v. National Rubber Co. (1893), 18 R. I. 338; 49 Am. St. Rep. 772: The rubber company agreed to consign and deliver, free, goods to B. & D. for sale and returns, to pay B. & D. five per cent on net amount of sales as a commission and guaranty, and also interest on any sum which they (rubber company) might owe them. B. & D. agreed to receive goods on consignment, to use best efforts to sell to best advantage, to account to the rubber company for same at price obtained, to charge as commission and guaranty five per cent, and to advise as to goods needed. B. & D. also agreed to advance to rubber company at least fifty thousand dollars per month, upon basis of eighty per cent market value of goods, at rate of interest specified. The prices for which B. & D. were to sell were to be fixed by the rubber company.

The court held: This was an agreement to sell goods for the rubber company, under a *del credere* commission, the relation between parties being that of principal and factor. A factor who has made advances must first enforce his lien therefor against goods before looking to consignor. And, finally, a factor under a *del credere* commission is liable absolutely as a principal, and

becomes a debtor to his consignor, if the debt is not paid by purchaser ²⁴¹ when due; but the principal, notwithstanding liability of factor to him, may collect of his purchaser.

In this case it is to be noted that the rubber company was to pay all freights to Balderston's warehouse. Balderston was to use his best exertion to sell to the best advantage, and to account at the price received, less five per cent. There was no stipulation for a guaranty against decline in price, nor loss by fire or other cause, nor is there any guaranty to sell, or to pay until he did sell. The contract lacks many of the features of the present one.

Barnes Safe etc. Co. v. Bloch Bros. etc. Co., 38 W. Va. 158; 45 Am. St. Rep. 486: The contract stipulated that the safe and lock company appointed the Globe Contract Company its agent to sell safes in certain territory on fixed commissions, and agreed to furnish the agent safes on consignment. The agent was to pay for safes when he sold them, and to diligently work the territory. The agent failed, and his creditors levied on some of the safes in its charge unsold. The court held that the safes were not the property of the agent. The contract contained none of the peculiar features of the Arbuckle contract.

National Bank v. Goodyear, 90 Ga. 711: The contract contained stipulations that the agent should receive goods on consignment to be sold by him as the agent of the consignor. The agent was to make monthly reports ²⁴² of sales of goods on hand; the title to all unsold goods and all proceeds of sales to remain in the consignor; all articles to be settled for as soon as sold. The agent also agreed to insure, store, pay freight, and all charges, without expense to consignor, and have for his pay whatever the goods sold for above the invoice price. The consignor could terminate the agency at his option and retake all goods on hand. This was held a bailment and not a sale.

Milburn Mfg. Co. v. Peak (1896), 89 Tex. 209: The contract provided that the Milburn Company appointed Hood & Co. its agent to sell vehicles. Hood & Co. were to make all reasonable efforts to sell same, and settle for all vehicles sold, take all notes for goods sold on credit, in the name of the Milburn Company, and remit to it all notes and cash received for the vehicles; the notes taken for the vehicles to be indorsed and guaranteed by Hood & Co. and paid, if the makers did not pay at maturity; the ownership of all vehicles and their proceeds of sales to remain in Milburn Company, and under no circumstances to be used by the agent. The contract is plainly very different from the Arbuckle contract.

Moline Plow Co. v. Rodgers, 53 Kan. 743; 42 Am. St. Rep. 317: The contract provides that Underwood was appointed agent of Moline Plow Company, who agreed to consign him certain goods. The agent was to settle for all goods ²⁴³ received by him with farmers' notes taken for such goods as he should sell. The goods remaining unsold at the end of the season, the agent should either settle for with farmers' notes or store for the principal, at the principal's option. A few months later the agent absconded. The principal, after investigation, attached the goods on hand as the goods of the agent. Held, that he thereby elected to treat the goods as the agent's, and was bound by his election.

Defendants cite cases supporting their contentions, and these we have examined and comment upon.

Aetna Powder Co. v. Hildebrand, 137 Ind. 462; 45 Am. St. Rep. 194: The powder company agreed to consign powder, paying freight, to H. & F., to sell as agents, at prices not below those fixed by the powder company, and to allow H. & F., for selling and guaranteeing sales, a given per cent. H. & F. agreed to act as agents, to guarantee sales, to adhere to prices, to make no charge except commissions stated, to make report of all sales at end of each sixty days, and to pay for same with their sixty-day note. Court and counsel for all parties agreed that this contract created H. & F. agents until a sale took place; then, the court held, H. & F. became ordinary debtors of the consignors for the amount due them for goods at catalogue price.

This case cites the following as authorities sustaining a similar holding: *Nutter v. Wheeler*, 2 Low. 346; Fed. ²⁴⁴ Cas. 10384; *Ex parte White*, L. R. 6 Ch. App. 397; *In re Linfuth*, Fed. Cas. 8369.

Ex parte White (1871), L. R. 6 Ch. App. 397: There was no written agreement between parties. The court found the course of dealing was substantially this: N. was to dispose of goods sent him by T. & Co., and was not to pay for them unless he disposed of them. He was to return, at end of every month, an account of sales actually made, and, then, after lapse of another month, was to pay, in cash, for amount of goods which he so disposed of, according to values fixed by price list sent him. It does not appear that he ever was expected to return any particular contract or names of customers. He pursued his own course in dealing with goods, and frequently, before sale, manipulated them to a very considerable extent, by pressing, dyeing, and otherwise altering their character changing them as much as wheat would be changed by being turned into flour; and he sold them on what

terms he pleased as to price and credit. T. & Co. undertook to impose a trust on certain funds alleged to have been collected by N. upon sales of their goods.

The court held the course of dealing between parties was inconsistent with the idea that N. was dealing in a fiduciary character in respect to these goods, or that relation of vendor and purchaser existed between T. & Co. and parties to whom N. sold. The proceeds of sale were the moneys of N.

Mellish, S. J., said: "It appears to me that ²⁴⁵ the real question is, When N. sold the goods, did he sell them as the agent of T. & Co., so as to make T. & Co. the vendors and the persons to whom he sold purchasers from T. & Co., or did he sell on his own account, so as to create the relation of purchaser and vendor between himself and the persons to whom he sold? Now, it is said that he was a *del credere* agent; and no doubt it requires a very minute examination of the course of business to distinguish between a *del credere* agent and a person who is an agent up to a certain point—that is to say, until he has sold the goods, but who, when he has sold the goods, has purchased them on his own credit, and sold them again on his own account. . . . Now, if it had been his (N's) duty to sell to his customers at that price (the price fixed by T. & Co.), and to receive payment for them at that time, then the course of dealing would be consistent with his being merely a *del credere* agent. But, if the consignee is at liberty to sell at any price he likes, but is to be bound if he sells the goods to pay the consignor for them at a fixed price and time, in my opinion, whatever the parties may think, their relation is not that of principal and agent. The alleged agent, in such a case (as this), is making, on his own account, a contract of purchase with his alleged principal, and is again reselling.

Nutter v. Wheeler (1874), 2 Low. 346; Fed. Cas. 10384; Dist. Ct., Mass: *W. & Co., manufacturers* ²⁴⁶ of tools, were in the habit of sending their goods to G., at his shop in B., who sold them at such prices, to such persons, on such terms, as he pleased. Whenever G. sold tools, he was to pay W., in thirty days, prices shown by the list, less agreed discount. W. had the right at any time to sell goods remaining in G's shop unsold; and G. was permitted to sell goods at factory of W., who then delivered them, and charged G. the trade price, less agreed discount. Instead of paying in thirty days, G. sometimes gave his note for balance due, one of which W. held at the time of G's bankruptcy. G. ordered three drills to be sent by W. to a

customer. They were sent, and bill made out to G. as purchaser for trade price, less discount, and sent him in a letter, in which W. & Co. said they had taken off fifteen per cent, and hoped to get cash in thirty days. G. went into bankruptcy. The purchasers had not paid for drills, and W. & Co. collected price therefor. G's assignee brought this suit against them for money had and received.

Lowell, J., said, among other things: "It has been settled for a long time that, upon the bankruptcy of a factor, his principal may recover from the assignees any of the goods remaining unsold, or any proceeds of the sale of such goods which the assignees themselves have received, or which remain specially distinguishable from the mass of the bankrupt's property; . . . and it makes no difference ²⁴⁷ that the factor acted under a *del credere* commission or sold the goods in his own name. As to those goods sent to Boston, he (G.) may be described as a *bailee*, having power to sell as principal. But after the goods were sold, the agreement appears to have been that G's credit alone was looked to."

Relying upon the authority of *Ex parte White*, L. R. 6 Ch. App. 397, the court finally said: "If the relation of the parties was such as I have considered it, then, even as to the goods which had been once consigned to G., he should be considered as the purchaser, subject only to the understanding that he was neither the owner of them nor liable to pay for them until he had succeeded in finding a purchaser; but when he did sell, he immediately became the principal, and the defendants ceased to have the rights of a consignor, and could not follow the goods or their proceeds as undisclosed principals."

Ex parte Flannagans (1875), 2 Hughes, 264; Fed. Cas. No. 4855; U. S. Dist. Ct. Va: F. & Son, manufacturers, and R. & H., commission merchants, in 1873, agreed as follows: "We, F. & Son, propose to give you entire agency for Stonewall fertilizer at Norfolk and for ———, on condition you push sale and have proper man to look after it, and to allow you a commission of ten per cent for sales and guarantee, we to draw on you at sight or short time for \$30 a ton. The price to be sold at \$65 in Baltimore. ²⁴⁸ For balance, after paying \$30, you to give your acceptances, say payable first December, 1873, accounts to be rendered and settlement after selling season is over, no charge to be made for storage during the season. Any guano left over and not sold is to be at the risk and on our account. We agree to furnish the guano deliver-

ed in Baltimore, one hundred tons to be delivered in ——— and balance as ordered ———. Will ship in lots to any point you may direct.”

R. & H. accepted the above. The court held that, under authority of *Ex parte White*, L. R. 6 Ch. App. 397, and *Story on Agency*, section 215, consignments under above contract were sales, and not shipments under a *del credere* guaranty. The judge held R. & H. were primarily liable to F. & Son for a fixed price on their acceptances, and that they might sell to planters at a different price, and then stated that “the now well-settled law of *del credere* guaranty is, that the factor is not the primary debtor; that his engagement is merely to pay the debt, if it is not punctually paid by the person to whom he sells” (citing *Story on Agency*, sec. 215), and held that, therefore, R. & H. were not factors, but purchasers.

In *re Linforth* (1877), 4 Saw. 370; Cir. Ct. Cal; Fed. Cas. 8369: June 1, 1876, F. agreed to furnish L. such manufactured goods as he should order, to allow L. certain specified discounts from price lists, and to give L. exclusive sale of such ²⁴⁹ goods. L. agreed to pay freight charges, etc., on goods shipped, to insure, at his own cost, for benefit of F., to render account of sales every three months, and to settle for all goods sold or shipped from his (L's) warehouse, by giving his note, payable in sixty days from date fixed for rendering account of sales, as provided. L. further agreed to settle for such goods as might be on hand June 1, 1877, by giving notes, payable in six months, if so required by F. F. agreed to allow additional discount for all cash paid in advance of times specified. The court held that transactions under this contract were sales on a credit: Citing *Nutter v. Wheeler*, 2 Low. 346; *Ex parte White*, L. R. 6 Ch. App. 397.

Gindre v. Kean (1894), 31 Abb. N. C. 100; 7 Misc. Rep. 582; 28 N. Y. Supp. 7: The suit arose out of an effort by principals to recover of the assignee in insolvency of their *del credere* agent the amounts due for goods furnished him, and which he had sold. The principle is tersely stated by *Brischoff, J.*, as follows: “The principles which should control the decision of the case at bar, and which are to be deduced from the adjudged cases are, that whenever the agreement of the alleged principal and factor, whatever they may style themselves or their relation, and whether the agreement be express or only inferable from the course of business, clearly manifests an intention that the alleged factor shall become definitely and primarily liable, upon

a sale, for the purchase price of the goods consigned, it is, in legal effect, a sale by ²⁵⁰ the alleged principal to the alleged factor, out of which arises the ordinary relation of debtor and creditor. The liability of the alleged factor, under such an agreement, is repugnant to that of a mere agent, whose duty to remit is commensurate only with the amount of the money which he has actually received upon a sale for his principal's account." The court cites the case of *In re Linforth*, 4 Saw. 370, *Nutter v. Wheeler*, 2 Low. 346, and *Ex parte White*, L. R. 6 Ch. App. 397, with approval.

Without attempting to run a parallel between the present case and those which have been cited and commented upon, we merely state some of the more prominent features which we think characterize this contract as one of sale, and not of agency. It will be noted that under no circumstances were any goods ever to be returned to Arbuckle & Co; all must be paid for in sixty days, whether sold or not. There is no stipulation to buy at the expiration of sixty days, but the contract clearly contemplates a payment without further bargain when that time arrives, and implies a present sale, on a credit of sixty days. Kirkpatrick & Co. could sell when and on what time they chose, but no matter how sales were made, the amount to be paid was fixed in advance, whether sold or not, whether collected or not. No account of sales was to be rendered. Arbuckle & Co. had nothing to do with Kirkpatrick & Co.'s customers. They were not in privity with complainants, and no credit was given to them. If cash was taken, it was not to be kept separate. ²⁵¹ If notes were taken, Arbuckle & Co. had no concern in them. Kirkpatrick & Co. were to have all advance in prices and bear all declines; if the goods were destroyed by fire, wind, or water, it was the loss of Kirkpatrick & Co., and the insurance was optional, and only designed to place them in position to account for the goods.

Whether the goods were carted or stored or insured was optional with Kirkpatrick & Co., but in any event they were to be credited therefor. They were allowed a sum for commissions, whether they sold or not, and discount was to be allowed for quick payment, as is usual in case of sales. The course of dealing shows that the proceeds of sale were not to be kept separate, but Kirkpatrick & Co. remitted their check on general account, and it was accepted without question or comment. This was a virtual agreement that Kirkpatrick & Co. might use the proceeds as they chose, and account for them out of their general

funds. These features are all evidences of a sale, and cover every risk, obligation, and duty that rests upon a purchaser, and cover every right in handling the goods that an owner could have, except simply the price was to be sustained. This was evidently provided in order to keep the price uniform in all markets and stifle competition.

Kirkpatrick & Co. could sell in any territory, in any amount, to any purchaser, on any terms, for cash or credit, take notes or make accounts, and dispose ²⁵² of the goods as absolutely and free of limitation as any owner could, except they could not vary the price. In *Nutter v. Wheeler*, 2 Low. 346, it is said that a stipulation that a vendee or consignee shall not sell below a fixed price is a very common one, made to prevent competition, and has but little weight in determining the question of sale or agency, and is consistent with either.

We are of opinion that complainant cannot collect from customers of Kirkpatrick & Co., but must look alone to them, and not to purchasers from them, and we are also of opinion that under the peculiar provisions of this contract, the relation of complainant to Kirkpatrick & Co. was that of vendor to vendee, at least as to outsiders and persons to be affected by the relation, no matter what the parties may have agreed or intended as between themselves. The contract is certainly a remarkable one, partaking in many of its provisions of a contract of agency and in many others of a sale. It is evidently intended as either or both, as might suit the convenience or subserve the purposes of the complainants. It purports to be copyrighted, for what reason is not stated, but the copyright is evidently procured on account of the unusual and extraordinary provisions of the instrument (if there be a copyright).

In construing such a contract, whenever it affects the rights of others, it will be so construed as to protect such rights, and not to enable the complainants ²⁵³ to carry out any double purpose. In view of its uncertainty and contradictory provisions, the court will see that third persons are not prejudiced by its construction.

The decree of the court of chancery appeals is therefore affirmed.

SALES—CONTRACT CONSTRUED TO BE ONE OF SALE AND NOT OF AGENCY.—Language in an agreement between a manufacturing company and a merchant, making him the agent of the company to sell its tobacco at such prices as it may direct, and providing that he is to be paid a certain commission on all sales made by him at the price fixed by the company, but that if he sells for

less he is to have no commission, is not controlling, where the agreement requires a warranty that the merchant shall pay for all tobacco received by him from the company, and further provides that he is to execute and deliver his promissory notes, due in sixty days, for all tobacco furnished him by the manufacturer. Such a contract is one of sale, and not a contract of agency for the sale of the manufacturer's goods by the merchant, on commission, and tobacco furnished to him under it is his property when he gives his notes in payment therefor: *Mack v. Drummond Tobacco Co.*, 48 Neb. 397; 58 Am. St. Rep. 691, and note.

CONTRACTS — CONSTRUCTION OF.—In determining the real character of a contract the court will look to its purpose rather than to the name given to it by the parties: *Dederick v. Wolfe*, 68 Miss. 500; 24 Am. St. Rep. 283, and note.

TRUST RESULTING FROM COLLECTION FOR ANOTHER.—If a collection indorsed to a bank is collected by it, and it afterward makes an assignment for the benefit of creditors, the relation between it and the owner of the property is that of debtor and creditor, and he cannot impose any trust upon the proceeds in the hands of the assignee, unless there is some agreement or course of dealing whereby the funds were to be held separate and the identical proceeds remitted: *Akin v. Jones*, 93 Tenn. 353; 42 Am. St. Rep. 921, and note; *Sayles v. Cox*, 95 Tenn. 579; 49 Am. St. Rep. 940, and note.

UNION CASUALTY COMPANY v. HARROLL.

[18 TENNESSEE, 591.]

INSURANCE, ACCIDENT, LOSS OF LIFE BY, WHAT IS.—The death of the assured is regarded as due to an accident, though he was intentionally killed by one upon whom he was moving aggressively, if he did not know, and had no reason to believe, that his adversary was armed with a deadly weapon, with intent upon such advance to slay, and the assured was unarmed. Under such circumstances, he had a right to presume that, if a fight occurred, it would be carried on without the use of deadly weapons.

INSURANCE, LIFE—VOLUNTARY EXPOSURE TO UNNECESSARY DANGER, WHAT IS NOT.—Though the assured approaches another, applying vulgar and abusive language to him, and the latter retreats, warning the assured not to approach, but he nevertheless continues his threatening demonstrations, and is thereupon shot and killed, he does not commit a breach of the condition of a policy exempting the insurer from liability for death caused by voluntary exposure to unnecessary danger, unless the assured knew, or had reason to apprehend, that his adversary was armed with a deadly weapon and would use it for the purpose of taking his life or inflicting serious bodily injury.

Turley & Wright and Buchanan & Monor, for Union Casualty Company.

Perkins & Watson, for Harroll.

592 BEARD, J. This is an action on a policy which insured defendant in error against loss of life of her husband, resulting from "bodily injuries sustained through external, violent, and

accidental means," within the meaning of the policy and its conditions. Among the conditions is that "this insurance does not cover voluntary exposure to unnecessary danger."

The husband of defendant in error was killed by a pistol shot fired by one McNeal, and the main defense set up was that the death of Harroll occurred within the terms of this condition. The evidence in the case discloses that the deceased and McNeal were employes of a railroad leading into Memphis; that there had been more or less of bad feeling between them, breaking out into occasional quarrels, in which profane and insulting language was used by Harroll toward McNeal; that the morning of the homicide, and a very short time before it occurred, the parties met and agreed that they would stop quarreling, but that soon after this agreement was made the deceased gave an order to McNeal to perform some service about the train, then being made up, which the latter thought was beyond the scope of his duty, and therefore declined to obey, and thereupon the quarrel was offensively ⁵⁹³ renewed by Harroll. To this point the case rests exclusively on the testimony of McNeal, the survivor of the tragedy, and a witness for plaintiff in error, and at this point the divergence in the evidence begins. This witness says immediately upon his refusal to obey the order, Harroll, applying a vulgar and abusive epithet to the witness, advanced threateningly upon him four or five steps, when witness, having retreated a corresponding distance, believing himself to be then in danger of death or great bodily harm, suddenly drew a pistol, which, up to that moment was concealed, and fired the fatal shot. He also states that at the moment of time Harroll renewed the quarrel and began his menacing advance, he (the deceased) was standing on or near the steps of the rear end or platform of the last car in the train, and when shot he was about five steps from that position, and still moving toward the witness.

Upon this evidence, it was insisted by the insurance company the death of Harroll was the result of voluntary exposure to unnecessary danger on his part. On the other hand, and in rebuttal of this statement of McNeal's, the defendant in error introduced testimony strongly tending to show that the deceased, at the time of the shot, was in the act of ascending the steps of the car, with his left hand on the iron rod or railing, and his right arm hanging by his side, and that when he received the shot he lifted his right hand to his breast, where the ⁵⁹⁴ pistol ball entered, and, gradually relaxing his hold on the iron rod or

railing, sank to the ground dead. This testimony also disclosed that the assured was unarmed at the time of the difficulty. Upon this state of the record, it was insisted for defendant in error that when killed Harroll was making no aggressive demonstration toward his slayer, but, on the contrary, was on the point of entering a coach for the purpose of discharging his duties as porter of the train; and, this being so, the condition in question could not be invoked to defeat a recovery on this policy. Upon these two contentions of fact, the case was submitted to a jury, who returned a verdict in favor of the defendant in error. With this finding we cannot interfere, unless some error was committed by the court.

The first assignment of error is upon that part of the charge of the trial judge in which he said to the jury, though they "believed from the evidence that the deceased was advancing on McNeal in a threatening manner at the time the latter shot him, yet this injury would be accidental as to Harroll, if he did not know at the time, or had not reason to believe, McNeal was armed with a deadly weapon." It is to be observed, in this paragraph of his charge, that the trial judge was not dealing with the condition of the policy which has been before set out, as the one on which the defense is rested, but was instructing them on the subject of an accidental killing, and he properly said to them ⁵⁹⁵ that upon the hypothesis presented in this paragraph, the death of Harroll would be accidental as to him. The death was none the less an accident so far as he was concerned, under the authorities, though he was moving aggressively upon his slayer when shot, if the deceased did not know and had no reason to believe that McNeal was armed, and intended, upon his advance, to slay.

He was unarmed, and, though he advanced with offensive words and a manner constituting a challenge to fight, yet ignorant of the fact that there was a deadly weapon on the person of his adversary, and receiving no warning from him that he would shoot if the advance continued, Harroll had the right to presume, if the fight occurred, it would be carried on without the use of such a weapon: *Price v. State*, 36 Miss. 531; 72 Am. Dec. 195. And the death under such conditions would be accidental as to the assured, though the act producing it was intentional on the part of McNeal: *Insurance Co. v. Bennett*, 90 Tenn. 256; 25 Am. St. Rep. 685; *Lovelace v. Travelers etc. Assn.*, 126 Mo. 104; 47 Am. St. Rep. 638.

It is next assigned for error that the trial judge declined to give the special request: "If you find that the insured, Harroll, approached McNeal cursing him, and applying to him a vulgar epithet, and that McNeal retreated, but Harroll continued to advance, with threatening demonstrations, although McNeal warned him not to approach, and that then McNeal shot the insured, then the court charges ⁵⁹⁶ you that, under such circumstances, the death of said insured was not covered by the policy, and your verdict will be for the defendant."

It will be seen this request omits from the hypothesis presented the elements of knowledge or reasonable apprehension on the part of Harroll of the fact that his adversary was armed, and, on his continued approach, would shoot to kill. If granted, the trial judge, in effect, would have told the jury, upon the case stated, that the death of the assured was the result of a voluntary exposure to unnecessary danger, although he neither knew, nor could reasonably have apprehended, that McNeal had a pistol which he would use upon him. The trial judge was right in declining this request. A voluntary act is an intentional one—one which the actor of his own will, with the power of choice, determines to do or perform. So this condition is to be read as the equivalent of one exempting the insurer from liability where death results from an intentional exposure of one's self to unnecessary danger. Both terms imply some degree of knowledge or apprehension of the danger incurred and a purpose to take the risk. If the danger be concealed and unknown to the party who ultimately suffers from it, then it cannot be said he has voluntarily exposed himself to it. To constitute such exposure, one "must intentionally have done some act which reasonable or ordinary prudence would pronounce dangerous" (*Burkhard v. Travelers' Ins. Co.*, 102 Pa. St. ⁵⁹⁷ 263; 48 Am. Rep. 205), or, as expressed by this court in *Miller v. Insurance Co.*, 92 Tenn. 167, "some degree of consciousness of the danger is necessary before there would be that voluntary exposure to unnecessary danger required to prevent indemnity."

In every case which we have examined where this condition has operated to defeat a claim under the policy, the assured had voluntarily or intentionally done some act which reasonable prudence would have pronounced dangerous and in which death had followed as a consequence. As an illustration of this class of cases, we refer to *Travelers' Ins. Co. v. Jones*, 80 Ga. 541, 12 Am. St. Rep. 270, where a party going home at night knowingly left other and safe paths of travel and betook himself to a dan-

gerous railway trestle, to *Williams v. United States etc. Assn.*, 133 N. Y. 366, where the assured sat down on a railway track when an engine, moving toward him, was only twenty-five feet away, and to *Tuttle v. Travelers' Ins. Co.*, 134 Mass. 175, 45 Am. Rep. 316, where the assured was killed by a train while running in front of it to take a train approaching him and moving on a parallel track. In all these cases the danger was so obvious that it should have been avoided by a man of ordinary prudence, and the exposure to it was voluntary and unnecessary. Under such circumstances, the courts have properly held that a death thus resulting falls ⁵⁹⁸ within this clause of exemption. On the contrary, that this condition is only operative where there is some degree of consciousness of the danger which results in the accidental death of the insured, is clearly announced, not only in *Miller v. Insurance Co.*, 92 Tenn. 167, but in *Scheiderer v. Travelers' Ins. Co.*, 58 Wis. 13; 46 Am. Rep. 618; *Pierce v. Travelers' Life Ins. Co.*, 34 Wis. 389; *Lovelace v. Travelers' Protective Assn.*, 126 Mo. 104; 47 Am. St. Rep. 638; *Jones v. United States etc. Acc. Assn.*, 92 Iowa, 652. See, also, Am. & Eng. Ency. of Law, 2d ed., 307, note 1. Both on principle and authority we are entirely satisfied with the action of the trial judge in declining this request.

There are other assignments of error upon the court's refusal to give other special requests, but we find that such of them as correctly announce the law applicable to the case were embraced in the general charge, while others not so included were not pertinent or were unsound. These assignments are therefore overruled.

The judgment is affirmed.

INSURANCE—ACCIDENTAL INJURY.—The killing of the insured by a third person, though intentional, is deemed accidental within the meaning of an insurance policy if the injury was not brought about by the agency of the insured: *American Acc. Co. v. Carson*, 99 Ky. 441; 59 Am. St. Rep. 473, and note. See extended note to *Paul v. Traveler's Ins. Co.*, 8 Am. St. Rep. 763-766; *Button v. American etc. Assn.*, 92 Wis. 83; 53 Am. St. Rep. 900, and note.

INSURANCE.—VOLUNTARY EXPOSURE TO UNNECESSARY DANGER means intentional exposure to such danger: *De Loy v. Traveler's Ins. Co.*, 171 Pa. St. 1; 50 Am. St. Rep. 787, and note. See *Follis v. United States etc. Assn.*, 94 Iowa, 435; 58 Am. St. Rep. 408, and note; *Collins v. Banker's Acc. Ins. Co.*, 96 Iowa, 216; 59 Am. St. Rep. 367, and note; extended note to *Traveler's Ins. Co. v. Jones*, 12 Am. St. Rep. 272-274.

CASES

IN THE

SUPREME COURT

OF

UTAH

IN RE ATWOOD.

[14 UTAH, 1.]

WILLS—CHILD OMITTED—STATUTE—PRESUMPTION.—

If a statute declares that, when a testator omits to provide in his will for any of his children, such child must have the same share of the estate of the testator as if he had died intestate, unless it appears that such omission was intentional, and he does fail to provide in his will for one of his children, the presumption under such statute is, that the omission was not intentional.

WILLS—CHILD OMITTED—REBUTTABLE PRESUMPTION—PAROL EVIDENCE.—The presumption raised by a statute, that the omission by a testator to provide for any of his children was not intentional, may be rebutted by extrinsic evidence, whether of declarations of the testator, or collateral facts showing the intention of the testator to have been that which the language of the will expresses.

EVIDENCE—CONTENTIONS BETWEEN HEIRS—STATUTE—DISQUALIFICATION.—Under a statute disqualifying heirs, legatees, and devisees, in contentions between themselves, from testifying as to statements of the deceased, unless called as witnesses by the adverse party, the heirs, devisees, and legatees under a will are not, in a proceeding to establish the rights of a child omitted from the will, competent witnesses to testify as to certain conversations before and after the will was executed, in which the testator stated that the child omitted was not his child, and that he did not intend to provide for her in his will. They not only belong to the class of persons named by the statute as disqualified, but appear to come within the reason of the rule of exclusion established by the statute, because such testimony is of statements of a deceased person in their favor, and is not allowable, especially where there is no other means of showing what the testator did say, or of contradicting the witnesses.

Petition by Florence Atwood, by her guardian, Amelia A. Sutton, in the matter of the estate of Millen Atwood, deceased. The executors and others appealed.

Richards & Richards, for the appellants.

Brown, Henderson & King, for the respondent.

⁵ ZANE, C. J. It appears from the evidence in this record that the late Millen Atwood, of Salt Lake county, made his last

will on the thirtieth day of September, 1890, in which he devised all his real estate, and bequeathed all his personal property remaining after the payment of his just debts and his funeral expenses, to his wife, Relief C. Atwood, and to his three children, Millen M. Atwood, Abbie Angenette Sermon, and Rosalie Esther Kelch; and that he died on the seventh day of December, of the same year, possessed of real and personal property; and that his widow, Relief, and his children named, are still living. It also appears that the will was duly probated, and that Florence Atwood, by her guardian, filed her petition in the office of the clerk of the probate court of said county on the thirtieth day of March, 1892, in which she alleged, with other facts, that she was of the age of fifteen years; that she was a daughter and heir at law of the testator; that he omitted to provide for her in his will; and that it did not appear that such omission was intentional. Upon final distribution of the estate, she prayed that the same portion thereof might be awarded to her that she would have succeeded to if the testator had died intestate. The executors, devisees, and legatees named in the will filed an answer to the petition, denying all its material allegations. This is an appeal from a decree granting the prayer of the above petition.

The principal question presented upon this appeal for our consideration and decision arises upon the ruling of the lower court excluding declarations of the testator made before, about the time of, and after, he executed "his will, offered to prove that the omission to provide for the petitioner, Florence Atwood, herein, was intentional. The petitioner bases her claims upon section 2677 of the Compiled Laws of Utah of 1888, viz: "When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share of the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section." The meaning of this section is clear. It declares, in effect, that the intent not to provide for a child, or the issue of one, shall not be inferred from the omission to make such provision in his will, though he expressly gives all his estate to heirs or other persons named. The statute presumes that he did not intend to omit to provide for a child not named, unless it otherwise appears that he did. The statute presumes that the omission was from mental incapacity, or from inadvertence or mistake. The presumption of a want of intention is contrary to the intent which the language of the will expresses, viz., to give

all his estate to the persons named. If, in construing the language of the will in the light of all the circumstances under which it was made, the court can say it provides for the child, the statute has no application. On the contrary, if, after construing its language under all such circumstances, the lower court can say the child is omitted, the statute does apply, and raises the presumption that the omission was not intentional. The petitioner insists that the intention not to provide, as well as the omission to provide, must appear from the language of the instrument; while the appellants claim that the intent to omit may be shown by parol evidence. The statute does not say from what the intention to omit shall appear. The phrase, "unless it appears that such omission ⁷ was intentional," must be held to signify that the intent to omit must appear according to the rules of evidence, not contrary to them; but the statute does not indicate the means by which such intent must appear. As a part of the science of the law, rules have been established by which to determine the competency, the relevancy, and the materiality of evidence offered to prove or disprove disputed facts. Such facts can only be established in courts of justice by such means as the rules of evidence permit.

The language of the testator's will gives his entire estate, after the payment of his debts, to his wife and the three children named. No mention or reference to any other heir is made in it. While it is true that no reference is made in the will to the petitioner, Florence, and that there is evidence tending to prove that she was not the testator's child, in our opinion the weight of the evidence supports the finding of the trial court that she was his daughter. The law quoted above raises the presumption, from the absence of any reference to her in the will, that the omission was not intentional; but the presumption is not conclusive, and it may be overcome by legitimate evidence. It is to overcome this presumption that evidence is admissible in the first instance and afterward to support it. So that the evidence is not admitted to aid the lower court in the construction of the will. It is admitted solely to rebut the presumption which the law raises. It is admitted for the sole purpose of rebutting a prima facie presumption raised by the statute, contrary to the intent which the language of the will expresses. The statute presumes that the testator did not mean what he said, while the evidence offered says he did. Taylor, in his work on Evidence, distinguishes the rule regulating the admission of parol evidence to rebut legal presumptions from those excluding ⁸ such testimony to aid the court in the construction of wills or contracts, as follows: "With

the view of clearly understanding the subject under discussion, it is essential to distinguish between mere legal presumptions and rules of construction, because, while the former may be rebutted, and, if rebutted, supported also by parol evidence, no evidence can be received on either side if the court, by construction, can arrive at a conclusion respecting the meaning of the instrument": 2 Taylor on Evidence, sec. 1231. The statute quoted does not state a rule of construction, but a rule of presumption. It does not contradict or vary the language of the will or its meaning. It is offered to show that the testator meant what his language expressed. The evidence is offered to rebut the presumption which the statute raises that he did not mean what he said.

In the discussion of the rules respecting the admission of extrinsic evidence as to wills, Abbott says: "The considerations to which I have adverted, however, it will be seen, do not militate against evidence impeaching or disproving the validity of the testamentary act, nor, on the other hand, against evidence tending to show that the intention was really just what it expressed on the face of the will": Abbott's Trial Evidence, 132. We are of the opinion that the presumption raised by the statute, that the omission by a testator to provide for any of his children was not intentional, may be rebutted by extrinsic evidence, whether of declarations of the testator, or collateral facts showing the intention of the testator to have been that which the language of the will expresses: Taylor on Evidence, 1043-1046; 1 Greenleaf on Evidence, sec. 299. The law was so determined by the supreme court of the late territory of Utah, under a statute substantially the same as the one quoted above, in the case of Coulam v. Doull, 4 Utah, 267, and affirmed by the supreme court of the ⁹ United States: Coulam v. Doull, 133 U. S. 216. The same doctrine is announced in Converse v. Wales, 4 Allen, 512; Lorieux v. Keller, 5 Iowa, 196; 68 Am. Dec. 696; Wilson v. Fosket, 6 Met. 400; 39 Am. Dec. 736; Buckley v. Gerard, 123 Mass. 8.

On the trial of the issues raised by the petition and answer in this proceeding, Relief C. Atwood, the widow of the deceased, devisee and legatee under the will, and Millen M. Atwood, Abbie A. Sermon, and Rosalie E. Kelch, children of the testator, also devisees and legatees, testified to certain conversations with the testator, before and after the will was executed, in which he stated that the petitioner, Florence, was not his child, and that he did not intend to provide for her in his will. These statements were excluded by the court, and the respondents to the petition excepted to the ruling of the court, and assign it as error. This assignment of error raises the question, Were such

legatees and devisees competent witnesses, under "An act amending subdivision 3 of section 3877 of the Compiled Laws of Utah of 1888, relating to witnesses," in force March 7, 1894? Subdivision 3 of section 3877 of the Laws of 1888, which the act of March 7, 1894, proposes to amend, is as follows: "The following persons cannot be witnesses: . . . Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person, and equally within the knowledge of both the witness and the deceased person." This subdivision applied only to contentions between estates of deceased persons and other parties, not to contentions between heirs, legatees, or devisees as to their respective interests in such estates,¹⁰ and rights thereto. While the act of 1894 professes to be an amendment of subdivision 3 of the statute of 1888, it covers its entire subject, and is more comprehensive. It is as follows: "A party to any civil action, suit, or proceeding, and any person directly interested in the event thereof, and any person from, through, or under whom such party or interested person derives his interest or title, or any part thereof, when the adverse party in such action, suit, or proceeding claims or opposes, sues or defends as guardian of any insane or incompetent person, or as the executor or administrator, heir, legatee, or devisee of any deceased person, or as guardian, or assignee or grantee, directly or remotely, of such heir, legatee or devisee as to any statement by, or transaction with, such deceased, insane, or incompetent person, or matter of fact whatever, which must have been equally within the knowledge of both witness and such insane, incompetent, or deceased person, unless such witness be called to testify thereto by such adverse party, so claiming or opposing, suing, or defending in such action, suit, or proceeding." This act may be more easily understood with respect to the case in hand by omitting a part of its language: "A party to any . . . proceeding, . . . when the adverse party claims or opposes . . . as heir, legatee, or devisee of any deceased person, . . . person as to any statement by such deceased . . . person . . . which must have been equally within the knowledge of . . . the witness and such . . . deceased person, unless such witness be called by such adverse party."

The petitioner was heir. The parties opposing were heirs, legatees, and devisees. The statements were by the testator, and expressed an intention not to provide for the petitioner in his

will, and were, in effect, favorable ¹¹ to his heirs named in the will, and unfavorable to the petitioner. Such intent was not equally within the knowledge of the witnesses and the deceased testator, it is true. But the witnesses belonged to the class of persons named by the statute as disqualified; and they appear to be within the reason of the rule of exclusion established by the statute, because they were testifying to statements of a deceased person made in their favor. There is no other means of showing what the testator did say, or of contradicting the witnesses. We are of opinion that there was no error in the ruling of the court in excluding the statements of the witnesses named above. We see no legitimate objection to the competency of the other witnesses called by the appellants, or to their testimony, because of irrelevancy or immateriality, or otherwise.

For the reasons stated, the decree of the court below is reversed, with costs, and that court is directed to grant a new trial.

Miner, J., and Street, district judge, concur.

WILLS—CHILD OMITTED — EVIDENCE — STATUTES.—Parol evidence is admissible in some of the states to show that a child was intentionally omitted from a will: See monographic note to *Wilson v. Fosket*, 39 Am. Dec. 743, on the rights of a child or issue unintentionally omitted from a will; note to *Whittemore v. Russell*, 6 Am. St. Rep. 203. In other states, it has been definitely determined that parol evidence is inadmissible to show whether or not a testator's omission of any of his children or their issue was intentional, and that the question must be determined by the will itself: Notes to *Wilson v. Fosket*, 39 Am. Dec. 743; *Lurie v. Radnitzer*, 57 Am. St. Rep. 162; *Hill v. Hill*, 7 Wash. 409.

McGREGOR v. SILVER KING MINING COMPANY.

[14 UTAH, 47.]

INJUNCTION—TRESPASSES—FOUNDATION OF EQUITY JURISDICTION.—The foundation of the jurisdiction of a court of equity to issue injunctions to restrain trespasses is the probability of irreparable injury, the inadequacy of pecuniary compensation, and the prevention of a multiplicity of suits, where the rights of numerous persons are involved.

INJUNCTION — IRREPARABLE INJURY—COMPLAINT.—A complaint for an injunction upon the ground of irreparable injury must show affirmatively why the injury is irreparable, or allege facts which will justify that reasonable conclusion; otherwise the injunction will be refused.

INJUNCTION—TRESPASS—ACQUISITION OF EASEMENT OR SERVITUDE.—In a complaint to restrain the construction of a ditch across barren, rocky, uncultivated, and comparatively valueless land, and the laying of pipes therein, an allegation that the trespass will ripen into an easement unless enjoined, forms no basis for injunctive relief pending the final hearing, as no such easement or servitude can be acquired, except by the consent or acquiescence of the plaintiff.

INJUNCTION—IRREPARABLE INJURY—WHAT IS NOT.—The digging of a trench, and the laying of a pipe line therein, across plaintiff's land, which is rocky, barren, vacant, and comparatively valueless, is not such an irreparable injury as to justify the issuance of an injunction, where it appears that the damages, if any, are merely nominal; that the defendant is solvent and able to respond in damages; and that proceedings have been taken, under the statute, for condemnation.

INJUNCTION TO RESTRAIN TRESPASS.—It is not usual to issue an injunction to restrain a trespass merely because it is such, without showing that the property trespassed upon has some peculiar value that could not admit of due recompense, or that it would be destroyed by repeated or continuous acts of trespass.

INJUNCTION—SETTLED RIGHT OF COMPLAINANT—ADEQUATE REMEDY AT LAW.—An injunction will not, ordinarily, be granted when the right of the complainant is doubtful, and has not been settled at law; and, even when it has been so settled, an injunction will not be granted when the remedy at law is adequate.

INJUNCTION—IRREPARABLE INJURY—ADEQUATE REMEDY AT LAW.—It must depend upon the circumstances of each particular case as to when injuries shall be regarded as irreparable at law; and no injunction will issue unless there is cause to fear substantial and serious damage, for which courts of law could furnish no adequate remedy.

INJUNCTION—LOSSES TO BE CONSIDERED.—If the granting of an injunction would necessarily cause great loss to the defendant, a loss disproportionate to the injuries sustained by the plaintiff, that fact should be considered in determining whether the application should be granted, and, in some cases, it would justly have great weight.

INJUNCTION—LOSSES—SETTING ASIDE RESTRAINING ORDER.—If the continuance of a temporary restraining order until the hearing of an application for an injunction is likely to work great injury to the defendant, without corresponding benefits to the plaintiff, and the latter has his remedy in damages, such order should be set aside.

Action by James McGregor against the Silver King Mining Company. The defendant undertook to dig a trench across the plaintiff's mining lands, and justified the act under condemnation proceedings authorized by statute. The defendant appealed from an order granting a temporary injunction.

Dickson, Ellis & Ellis, for the appellant.

Moyle, Zane & Costigan, and Marshall & Rayle, for the respondent.

49 PER CURIAM. The plaintiff in this case alleges that he is the owner of certain mining claims named in the complaint; that on the sixteenth day of October, 1895, the defendant company entered, with a large force of men, upon the mining claims of plaintiff, dug a trench thereon for the purpose ⁵⁰ of laying a pipe line in said trench across the surface of said claims, and threatened to maintain the same, which trespass, plaintiff claims, will ripen into an easement, cause a cloud upon plaintiff's title,

and a multiplicity of suits, unless enjoined; and asks a restraining order and judgment. The defendant files its answer, admitting that it entered upon the claims as aforesaid, and dug the trench and laid the pipe line across the surface of said claims, which were rocky, barren, and of no value whatever, for the purpose of maintaining the same across said land of the plaintiff; denies the damage, trespass, force, irreparable injury, and easement alleged; denies its intention to construct said pipe line across said land of the plaintiff, which lies between the defendant's water supply, in Thayne's mine and tunnel, and its mining works below, except by virtue of condemnation proceedings begun and concluded under section 2788 of the Compiled Laws of Utah of 1888, as amended, wherein damages were awarded and tendered the plaintiff, which damages he refused to accept; and alleges that it had a right to construct said pipe line, in order to carry water, which was necessary to operate its said mine, from Thayne's tunnel and mining claim, which it owned, to the defendant's mine; that said water supply was the only source of supply for water to its mine, and the same could not be operated without said water; that at, before, and since the time in question, it had owned, operated, and developed the Silver King Mines, and was then engaged in working, operating, and extracting ores therefrom, and employed over one hundred and fifty men for that purpose; that defendant is, and for many months last past has been, desirous of conducting said water by means of a pipe line from said source to its said Silver King mines; that owing to the topography of the country between said Thayne mining claim, and the tunnel ⁵¹ thereon, and the said Silver King mines, it is not practicable to construct a pipe line for the carrying of said water from said Thayne tunnel to said Silver King Mines without crossing the said mining claims of the said plaintiff; that the surface, and the whole of the surface, of said mining claims of the said plaintiff is rocky and barren, and that a trench or a pipe line across said lands would not result in any damage to said plaintiff; that the defendant, being unable to obtain the consent of said plaintiff to construct said trench and pipe line over and across said lands of said plaintiff by offering to pay full compensation to said plaintiff for said right of way for such trench and pipe line over said lands of said plaintiff, and for all injury that might be done thereto, proceeded, under the provisions of an act of the legislature aforesaid, to construct the same; that the plaintiff will suffer no irreparable or other damage by the running of said pipe line; that the defendant is solvent, and able to pay any sum plaintiff may recover as damages; and that the plaintiff has a remedy

at law. Upon the hearing the court granted an interlocutory injunction enjoining the defendant from digging of said trench, and from laying a pipe line therein, and from continuing to maintain any trench or pipe line upon said McGregor consolidated group of mines. From this order this appeal is taken.

Defendant assigns as error the making of said order, and that the proofs do not establish facts which constitute any ground of equitable relief, and because all the equities of the bill were denied in the answer, and a complete defense affirmatively interposed under the statutes of Utah in relation to eminent domain. The plaintiff takes issue upon this contention, and claims that section 2788 of the Compiled Laws of Utah of 1888, as amended, under which the condemnation proceedings were had, is unconstitutional ⁵² and the condemnation sought was not for public use, and was not necessary. In this somewhat collateral proceeding, we are not disposed to discuss the constitutional question here presented, as the result must depend upon other questions. The foundation of the jurisdiction of a court of equity to issue injunctions to restrain trespasses is the probability of irreparable injury, the inadequacy of pecuniary compensation, and the prevention of a multiplicity of suits, where the rights of numerous persons are involved. It is not sufficient that the complaint alleges that the injury would be irreparable, when that is the ground of equitable relief. But the plaintiff, in addition thereto, should affirmatively show by its complaint why it would be so, or allege facts which will justify that reasonable conclusion; otherwise, the extraordinary remedy by injunction should not be allowed. The allegation in the complaint that the defendant may or will acquire an easement in the land proposed to be covered by the pipe line, under the circumstances in this case, is sufficiently answered by the fact that no such easement or servitude could be acquired, except by consent or acquiescence of the plaintiff, and in any event forms no basis for injunctive relief pending the final hearing: Washburn on Easements, 4th ed., secs. 86, 110, 111; Thorn v. Sweeney, 12 Nev. 251. And the digging of a trench and pipe line across plaintiff's lots, which are alleged to be rocky, barren, vacant, and comparatively valueless, is not such an irreparable injury as to justify this extraordinary remedy by injunction, when taken in connection with all the other facts in the case. Ordinarily, this remedy by injunction will not be exercised when the right of the complainant is doubtful, and has not been settled at law. Even when it has been settled, an injunction will not be granted when the remedy at

law is adequate: *Waldron v. Marsh*, 5 Cal. 119; *Real ⁵³ Del Monte etc. Min. Co. v. Pond etc. Min. Co.*, 23 Cal. 83; *Thorn v. Sweeney*, 12 Nev. 251.

But when the title is not disputed, or has been settled by an action at law, and the plaintiff is shown to be liable to irreparable injury by continued acts of trespass, or such acts will result in the destruction of his property, then the fact that the defendant is willing and able to pay for the damage is immaterial, for in such a case there is no means of determining whether the value would compensate the plaintiff for its destruction. While this is so in such cases, yet if no appreciable injury will arise by the acts done or threatened to be continued, it does not follow that the same rule prevails, as a matter of course, in cases where the title or right is in dispute. Injunctions are not usually granted to restrain a trespass, merely because it is such, without showing the property itself trespassed upon has some peculiar value that could not admit of due recompense, or that it would be destroyed by repeated or continuous acts of trespass.

This alleged threatened continuation of the trespass by continuing the pipe line over the plaintiff's land is, therefore, the principal ground upon which the injunction may have been granted. All the allegations in the complaint are denied, so far as they are material, except the ownership of the claims in question, and the trespass alleged is attempted to be justified upon proceedings taken under the statute for condemnation. The title or right of the defendant to lay its pipe line is, therefore, in dispute. The damages, if any, in laying the pipe line, are not shown to be more than merely nominal. The defendant is shown to be operating a mine, with one hundred and fifty men employed. The land over which the pipe line would run is alleged to be rocky and barren, and is not shown to be ⁵⁴ of any particular value. Whether or not the plaintiff will suffer any material damage at all is in dispute. It is not disputed that the defendant is solvent, and able to pay any damages recovered. The defendant alleges that it has no other source of supply of water to its mine and works than that flowing from the Thayne tunnel and lake. Damages awarded by the commissioners for the taking of such land under the statute have been found, and tendered to the plaintiff, and such tender refused. "It is not enough that the injury complained of is merely nominal, theoretical, or is apprehended, even though an action at law might be maintained; but, to justify the interposition of this summary power of a court of equity, there must be a cause to fear substantial and serious

damage, for which courts of law could furnish no adequate remedy." If the granting of an injunction would necessarily cause a great loss to the defendant pending the hearing on the merits—a loss altogether disproportionate to the injury sustained by the plaintiff—that fact should be considered in determining whether the application should be granted, and in some cases would justly have great weight. Courts of equity will not ordinarily exercise this summary and extraordinary power when substantial justice can be done by courts of law, or by such other means as the court may exercise in order to prevent injustice during the interval preceding a final hearing on the merits: *Thorn v. Sweeney*, 12 Nev. 251; *Wood v. Sutcliff*, 2 Sim., N. S., 163; 42 Eng. Ch. 165; *Bassett v. Salisbury Mfg. Co.*, 47 N. H. 437; *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565; 36 Am. Dec. 502; *Wason v. Sanborn*, 45 N. H. 170; *High on Injunctions*, secs. 459-483; 2 *Story's Equity Jurisprudence*, 925; *Jerome v. Ross*, 7 Johns. Ch. 334; 11 Am. Dec. 484.

In *Bassett v. Salisbury Mfg. Co.*, 47 N. H. 437, the court says: "The power to grant injunctions to prevent injustice has always been regarded as peculiar and extraordinary. It is not controlled by ordinary and technical ⁵⁵ rules, but the application for its exercise is addressed to the conscience and sound discretion of the court. Ordinarily, it will not be exercised when the right of the complainant is doubtful, and has not been settled at law; and, even when it has been so settled, an injunction will not be granted when the remedy at law is adequate. It is not enough that an injury merely nominal or theoretical is apprehended, even although an action at law might be maintained for it; but, to justify the interposition of this summary power, there must be cause to fear substantial and serious damage, for which courts of law could furnish no adequate remedy. When injuries shall be regarded as irreparable at law must depend upon the circumstances of the particular case. If the injury be trivial, as by . . . raising the water of a river a few inches upon its rocky shore, doing him no appreciable or serious damage, equity would not ordinarily interfere by injunction, even in cases where the right has been established at law; for the power is extraordinary in its character, and is to be exercised, in general, only in places of necessity, and when the court can see that other remedies are inadequate to do justice between the parties, and even then it is to be exercised with great care and discretion. If the granting of an injunction would necessarily cause great loss to the defendant—a loss altogether disproportionate to the injuries sustained

by the plaintiff—that fact should be considered, in determining whether the application should be granted, and in some cases it would justly have great weight. It has often been supposed that when the right has been established at law the plaintiff would be entitled to an injunction as a matter of course; and this misapprehension has arisen, probably, from the fact that, in a large number of cases, injunctions have been refused upon the express ground that the title of the plaintiff had not been established ⁵⁰ at law, leaving room for inference that if it had been so established the injunction would have been issued. This, however, is clearly not the doctrine of courts of equity, for they will not ordinarily exercise this summary and extraordinary power when substantial justice can be done by courts of law.” The doctrine announced in this case is fully supported by the following authorities: *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565; 36 Am. Dec. 502; *Wason v. Sanborn*, 45 N. H. 170; *Blake v. Brooklyn*, 26 Barb. 301; *Murray v. Knapp*, 42 How. Pr. 462; 62 Barb. 566; *Nicodemus v. Nicodemus*, 41 Md. 537; *Weigel v. Walsh*, 45 Mo. 560; *Bechtel v. Carslake*, 11 N. J. Eq. 244; *Catching v. Terrell*, 10 Ga. 578; *Wooding v. Malone*, 30 Ga. 980; 1 High on Injunctions, secs. 459, 483; *Eden on Injunctions*, 231; 2 *Story’s Equity Jurisprudence*, 925, 928; *Thorn v. Sweeney*, 12 Nev. 251.

It appears to us that to continue the restraining order until the hearing may work great injury to one of the parties, without corresponding benefit to the other, and that the plaintiff has his remedy in damages. If it is finally decided that the law is constitutional, and the proceedings regular, then the plaintiff will be bound by the decree made by the arbitrators; otherwise he will be entitled to recover damages for whatever injury he has sustained by reason of the acts complained of. The restraining order appealed from, granting the injunction *pendente lite*, is set aside and reversed.

Miner, J., and Ritchie and Street, district judges, concur.

INJUNCTION AGAINST TRESPASS will be granted where the injury is irreparable, or where adequate relief cannot be granted at law, or where the trespass goes to the destruction of the property, or where it is necessary to prevent a multiplicity of suits, or where the trespasser is insolvent: *Notes to Carney v. Hadley*, 37 Am. St. Rep. 108; *Kellogg v. King*, 55 Am. St. Rep. 82. But a mere trespass of ordinary character, either upon the person or property, will not be enjoined: *Mobile v. Louisville etc. R. R. Co.*, 84 Ala. 115; 5 Am. St. Rep. 342. To authorize an injunction, it must be a case of mischief and of irreparable ruin to the property in the character in which it has been enjoyed: *Jerome v. Ross*, 7 Johns. Ch. 315; 11 Am. Dec. 484. No injunction will be granted where the damage that will be

done is very small: *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565; 36 Am. Dec. 502; *Quackenbush v. Van Riper*, 3 N. J. Eq. 350; 29 Am. Dec. 716. A bill, to justify an injunction in case of trespass, in addition to an allegation that complainant has no adequate remedy at law and that his damage will be irreparable, must also allege such facts as will enable the court to determine whether or not his alleged injury will be irreparable: *Indian River etc. Co. v. East Coast etc. Co.*, 28 Fla. 387; 29 Am. St. Rep. 258. It must be shown how and why it will be so: Note to *Godfrey v. Black*, 7 Am. St. Rep. 546; and the plaintiff's title must be established at law, or admitted: *Carney v. Hadley*, 32 Fla. 344; 37 Am. St. Rep. 101; note to *Lewis v. North Kingstown*, 27 Am. St. Rep. 727; *Roath v. Driscoll*, 20 Conn. 533; 52 Am. Dec. 352; *Lyerly v. Wheeler*, Busb. Eq. 267; 59 Am. Dec. 596. The imposition of an additional burden upon an owner's land entitles him to damages as well as to an injunction: Note to *Lynch v. Metropolitan etc. Ry. Co.*, 26 Am. St. Rep. 533. For two elaborate notes on injunctions against trespass, see *Jerome v. Ross*, 11 Am. Dec. 498-507; *Smith v. Gardner*, 53 Am. Rep. 346-355.

INJUNCTION—IRREPARABLE INJURY—ADEQUATE REMEDY AT LAW.—An injunction is not the proper remedy when the applicant has an adequate remedy at law: Note to *Janesville v. Carpenter*, 20 Am. St. Rep. 135; but it is where the injury is irreparable: Note to *Carney v. Hadley*, 37 Am. St. Rep. 108. It ought not to issue if the injury is comparatively small, and may be compensated in damages: *Quackenbush v. Van Riper*, 3 N. J. Eq. 350; 29 Am. Dec. 716; *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565; 36 Am. Dec. 502. An injury is not irreparable so as to justify an injunction against its continuance if it is susceptible of being compensated in damages: *Richard's Appeal*, 57 Pa. St. 105; 98 Am. Dec. 202; *Puckette v. Hicks*, 39 La. Ann. 901; 4 Am. St. Rep. 242. As to what is a reparable injury, see *Troe v. Larson*, 81 Iowa, 649; 35 Am. St. Rep. 336; *Puckette v. Hicks*, 39 La. Ann. 901; 4 Am. St. Rep. 242. Illustrations of reparable and irreparable injuries are given in the monographic notes to *Dudley v. Hurst*, 1 Am. St. Rep. 374-379, on irreparable injury within the meaning of the law of injunctions, and *Jerome v. Ross*, 11 Am. Dec. 498-507, on injunction against trespass. An injury caused by constructing a ditch across a rocky, barren, and uncultivated tract of land is not irreparable: Note to *Dudley v. Hurst*, 1 Am. St. Rep. 378.

GILLETT v. TAYLOR.

[14 UTAH, 190.]

NEGOTIABLE INSTRUMENTS—DEFENSE—PROOF BY PAROL, THAT COMAKER WAS ONLY A SURETY.—In a suit on a promissory note, it is competent for one of two makers to aver affirmatively in his answer, and to prove by parol, that he signed the note as surety, and that he was discharged by an extension of time, granted, without his knowledge or consent, to the principal debtor by the payee, who had knowledge that one maker was merely surety for the other. It is, therefore, error to exclude such evidence, as it does not vary the terms of a written contract or change its legal effect. The rights of a surety arise out of the circumstances of the case, and do not depend upon the written instrument.

SURETYSHIP—RELEASE OF SURETY ON NOTE BY EXTENDING TIME OF PAYMENT.—After the payee of a promissory note signed by two persons as makers has knowledge that one of them is merely surety for the others, the law does not permit him

to enter into a new agreement with the principal debtor to extend the time of payment, or to do any other act to continue the liability of the surety, without his consent; and, if he does so, the surety is discharged.

NEGOTIABLE INSTRUMENTS—DEFENSE—COMAKER AS PRINCIPAL—PAROL PROOF OF SURETYSHIP.—If a person signs a note as maker, but is, in fact, a surety, and there is nothing on the face of the note to show his true relation, he will be treated and considered as a principal, with respect to all who have no notice of the suretyship; but, whenever it is material in his defense to an action against him on the note, he may aver, and prove by parol evidence, that he made the note merely as surety, without consideration, and that such fact was known to the plaintiff before the equities, through which such evidence became admissible, arose.

Action on a promissory note, brought by Granville Gillett against Thomas E. Taylor. The defendant appealed from a judgment for the plaintiff.

Richards & Richards, for the appellant.

Barlow Ferguson, for the respondent.

193 BARTCH, J. This is a suit upon a promissory note, dated April 1, 1891, and signed by John W. Taylor and the appellant herein. The defendant, having set up an affirmative defense, offered to prove that, although the appellant signed the note as principal, he was in fact only a surety; that he received no part of the money for which the note was given, or any consideration for its execution or delivery; that at or shortly after its maturity the plaintiff, without the knowledge or consent of the appellant, extended the time of payment for a valuable consideration; and that the plaintiff, at the time he accepted the note, knew that this appellant was only a surety. This offer was rejected, and the proof of defendant limited to an express agreement between the payee and makers, or either of them, that the payee had accepted Thomas E. Taylor as a surety. The note was drawn up in the singular form, and there is no word of description attached to either signature. It appears that, after the note became due, John W. Taylor, the real principal, asked the plaintiff for further time, which was granted, and a new note accepted for the loan, without the knowledge of the appellant. It is also shown that the appellant's signature did not appear on the new note. The court instructed the jury that the only question in the case was whether or not there was an express agreement between the plaintiff and John W. Taylor that the new note, introduced in evidence, was accepted by the plaintiff in payment of the old note. The burden was thus upon the appellant to show, not that he was a surety within the knowledge of the payee when

he accepted the note, but that there was an ¹⁹⁴ express agreement between the principal maker and the payee whereby the payee accepted the appellant as a surety.

Counsel for the appellant insist this was contrary to law, and the first question which we will consider is whether, upon suit brought on a promissory note, it is competent for one of two makers to aver affirmatively in his answer, and prove by parol, that he signed the note as surety, and that he was discharged by an extension of time given to the principal debtor by the payee with knowledge of the suretyship. The great importance of this question must be conceded, because of its bearings on business relations; and that there has been some confusion in the authorities regarding such a defense must be admitted. This doubtless arose from the fact that some of both the English and American courts entertained doubts whether such a defense could avail in a court of law. In *Pooley v. Harradine*, 7 El. & B. 431, Mr. Justice Coleridge, holding such a defense good in equity, said: "In the more recent cases at law, however, the rule in question has apparently been treated as arising out of the original contract with the creditor; and, if this was a plea of a legal defense, we would probably have felt bound by those authorities, and have left it to a court of error to consider the whole question, taking into their consideration whether the same rule in such matters ought not to exist in courts of law and equity, and to decide, if there be a difference, what the rule should be. As we are, however, called upon to deal with this case as if we were sitting in a court of equity, we think we ought to decide it according to what we believe to be the doctrine in courts of equity." In *Rees v. Berrington*, 2 Ves. Jr. 540, Lord Loughborough said that the form of the security forced these cases into equity, because, when they were bound ¹⁹⁵ jointly and severally, the surety could not aver, by pleading, that he was bound as surety. And Mr. Chief Justice Spencer, in *King v. Baldwin*, 17 Johns. 384, 8 Am. Dec. 415, disagreeing with this proposition, said: "Now, we could not assent to his lordship's proposition that the fact of a man's being bound as a security could not be averred at law, if it became material to a legal inquiry; for we understood the rules of evidence to be the same in both courts, and we in vain sought for the principle which allowed the inquiry in a court of equity and denied it in a court of law." In *Artcher v. Douglass*, 5 Denio, 509, Mr. Chief Justice Beardsley, delivering the opinion of the court, said: "The fact, when ascertained, if sufficient in equity, is equally valid as a legal defense. The doubt is as to the recep-

tion of parol evidence to prove the fact in a court of law": *Strong v. Foster*, 17 Com. B. 201; *Pintard v. Davis*, 21 N. J. L. 632; 47 Am. Dec. 172; *People v. Jansen*, 7 Johns. 332; 5 Am. Dec. 275.

The main objection urged against such a defense at law appears to be that it is an attempt to vary the terms of a written instrument; but, if this objection be sound, it will obtain equally in equity, because at law and in equity the same general rules of evidence are applied. It is true that, in an action at law, the terms of a written instrument cannot be varied by parol evidence; but this is equally true in an action in equity, except in cases where an action or defense is maintained under some recognized head of equity jurisdiction. It seems difficult to ascertain a good reason why, in a case of the character under discussion, a court of law should reject evidence which would be admissible in a court of equity. Whatever distinction may, under the old system, have obtained respecting the admission of evidence at law and in equity, it cannot be maintained in courts of both legal and equitable jurisdiction, as constituted under the code. Without, however, invoking the rules of equity, it seems clear ¹⁹⁰ that the evidence admissible under such a defense does not vary the terms of a written instrument, nor change the legal effect thereof. The requirement that the payee, with knowledge of the suretyship existing between the comakers, shall not do any act, without the knowledge and consent of the surety, which will prejudice the rights of the surety against the principal, in no way impairs the obligations of the contract. It simply prohibits the creditor who has knowledge of the suretyship from ingrafting a new agreement into the contract without the consent of him whose rights will be injuriously affected thereby. Whether a comaker is principal or surety, the contract is the same. In either case there is a binding obligation to pay, and the presumption is, that all the makers are equally liable to the creditor. This presumption, however, may be rebutted by equities affecting the creditor, with knowledge of the true relation existing between the debtors at the time he performs the act by which he injuriously affects the rights of the surety. The rights of the surety arise out of the circumstances of the case, and do not depend upon the written instrument. The fact that one of the debtors is a surety is collateral to the contract, and hence may be shown by extrinsic evidence. If a comaker should add the word "surety" to his signature, such signature would not affect the contract, as between him and the payee. His liability to pay would still be absolute, the same as if there were nothing on the face of the

instrument to indicate his relation to the principal maker. In either case, the obligation to the creditor would be effectual until, with knowledge of the relation of the debtors, the creditor had done some act which had injuriously affected the position and rights of the surety. The principal and surety being equally liable to the payee, the surety has the undoubted right, at the maturity of the note, to request the payee to enforce payment, ¹⁹⁷ or to pay himself, and then be placed in the position of the payee, and be permitted to sue the principal. Such a course may be absolutely necessary as a protection of the surety against the insolvency of the principal debtor. If the payee, with knowledge of the suretyship, has voluntarily placed himself in such a position that neither he nor the surety can enforce payment, there seems to be no sound reason why the payee should longer have recourse against the comaker, because, under such circumstances, the case falls within the general doctrine relating to principal and surety, whereby the surety is discharged. The payee's action may deprive the surety of a valuable right—the power to save himself by bringing suit against the real principal. In such case, whether the creditor received the note with knowledge of the suretyship is immaterial. If he had such knowledge at the time when he did the act which injuriously affected the rights and altered the position of the surety, the surety is discharged. All that justice to the creditor requires is, that such contract shall not prejudice his rights against the surety until he has notice of the relation between the makers. After he has such notice, the law will not permit him to enter into a new agreement with the principal debtor to extend the time of payment, or do any act to continue the liability of the surety, without his consent. The creditor cannot keep the surety bound beyond the terms of his contract without consulting him, and this produces no inconvenience to, and imposes no hardship upon, the creditor. It follows that evidence is admissible which shows that the creditor, affected by knowledge of the true relation of the debtors, has undertaken to continue the liability of the surety beyond the terms of his contract, without his assent, by a new agreement with the principal debtor. The rule appears to be that, where a person signs a note as maker, but is in fact a surety, and there is nothing on ¹⁹⁸ the face of the note to show his true relation, he will be treated and considered as a principal, with respect to all who have no notice of the suretyship, but that, whenever it is material in his defense to an action against him on the note, he may aver, and prove by parol evidence, that he made the note

merely as a surety, without consideration, and that such fact was known to the plaintiff before the equities through which such evidence became admissible arose.

This view of the law, herein expressed, we think, is supported by the weight of authority, both in England and in this country. In *Bailey v. Edwards*, 4 Best & S. 761, Mr. Justice Blackburn, speaking of this doctrine, said: "The principle has been imported from the courts of equity into those of law." And Mr. Justice Coleridge, in *Pooley v. Harradine*, 7 El. & B. 431, speaking of the right of the surety to pay the debt when due, and to be subrogated to the right of the creditor to sue the principal, said: "Now, does this right of placing himself, as it is said, in the shoes of the creditor, depend on a prior contract between the creditor and surety, or on an implied duty of the creditor not to injure the surety's rights when he knows the relation subsisting between him and his principal? We do not see that, by the doctrine asserted in the courts of equity, the primary liability is at all altered. In truth, the defense, either at law or in equity, does not arise by any alteration of the original contract, which, indeed, it assumes and relies on in its original terms, but that the creditor cannot fairly or equitably sue the surety where, knowing of the existence of the relation of suretyship, he has voluntarily tied up his hands from proceeding against the principal." In *Guild v. Butler*, 127 Mass. 386, Mr. Chief Justice Gray said: "The fact that one debtor is surety for the other is no part of the contract with the creditor, but is a collateral fact, showing the relation ¹⁹⁹ between the debtors, and, if it does not appear on the face of the instrument, this fact, and notice of it to the creditor, may be proved by extrinsic evidence." So, in *Mariner's Bank v. Abbott*, 28 Me. 280, Mr. Justice Wells, delivering the opinion of the court, said: "Where the creditor makes an arrangement with one of several debtors, extending the time of payment of the debt, the others, by proving that such arrangement is injurious to them, because they are sureties, do nothing to impair the validity of the original contract, or to vary its terms. The original contract remains in full force and effect. But the right to ingraft the new matter is defeated by the proof of a relation not exhibited by the note. The testimony to show that the defendants were sureties was properly admitted. It appears to be a well-settled rule of law that, where the creditor, by a contract with the principal, extends the time of payment, upon a sufficient consideration, without the consent of the surety, the latter is discharged." In *Hubbard v.*

Gurney, 64 N. Y. 457, Mr. Chief Justice Church said: "If the word 'surety' had been added to the name of the defendant, it is conceded that the defense sought to be interposed would be available in any court; and yet that word, as we have seen, would not affect the contract. The fact, proved by extrinsic evidence, and that the creditor had knowledge of it, is as potent as if added to the name of the surety; and it is potent, not in varying the contract, but in imposing certain duties and obligations upon the creditor in his subsequent dealings with the principal debtor in respect to the contract." So, in *Meggett v. Baum*, 57 Miss. 22, Mr. Justice Campbell, delivering the opinion of the court, said: "It has been the established doctrine in this state that one of several makers of a promissory note or a writing obligatory is not precluded by the fact that he appears on the instrument to be a principal, and primarily bound, from averring ²⁰⁰ and proving that he is a surety, and entitled to be discharged by the act of the creditor in so dealing with the principal as to discharge him as a surety; and this is the constant practice in courts of law. . . . The holder of the paper, having no knowledge except that imparted by it, may regard the parties to it as bound accordingly; but, if he has knowledge of the actual relations between the parties, he has no greater right in the one case than in the other to deal with the real principal in such way as to discharge the surety": 1 *Parsons on Notes and Bills*, 234; *Wheat v. Kendall*, 6 N. H. 504; *Barron v. Cady*, 40 Mich. 259; *Harris v. Brooks*, 21 Pick. 195; 32 Am. Dec. 254; *Ward v. Stout*, 32 Ill. 399; *Strong v. Foster*, 17 Com. B. 201; *Swire v. Redman*, 1 Q. B. Div. 536; *Greenough v. McClelland*, 2 El. & E. 424; *Grafton Bank v. Kent*, 4 N. H. 221; 17 Am. Dec. 414; *Harmon v. Hale*, 1 Wash. Ter. 422; 34 Am. Rep. 816; *Orvis v. Newell*, 17 Conn. 97; *Rose v. Williams*, 5 Kan. 483; *Vary v. Norton*, 6 Fed. Rep. 808; *Carpenter v. King*, 9 Met. 511; 43 Am. Dec. 405; *Coats v. Swindle*, 55 Mo. 31; *Barry v. Ransom*, 12 N. Y. 462; *Rees v. Berrington*, 2 Ves. Jr. 540; *Lauman v. Nichols*, 15 Iowa, 161.

In the case at bar, the defense averred, and offered to show by proof, that while the appellant had signed the note in question as maker, he was in fact only a surety; that he received no part of the money, the loan having been made for the benefit of his comaker; and that the plaintiff, knowing the true relation which existed between him and his comaker, for a valuable consideration extended the time of payment to the principal without the appellant's knowledge or consent. It is obvious that the evi-

dence offered is admissible, because, if the facts indicated were established, they would show that the payee had undertaken to continue the liability of the appellant beyond the terms of his contract, and this would be a complete defense to the action; so, if it were shown that the plaintiff, with the knowledge of the suretyship, ²⁰¹ had accepted the new note, due one year after date thereof, in full payment of the old one, without the knowledge and consent of the appellant. It is apparent that the exclusion of the evidence in question was error, and an inspection of the record shows that the case was tried under a mistaken view of the law.

There are various errors assigned, but, as the cause must be reversed, a further discussion is not deemed necessary. The case is reversed, and remanded, with directions to grant a new trial and proceed in accordance with this opinion.

Zane, C. J., and Minor, J., concur.

NEGOTIABLE INSTRUMENTS—APPARENT MAKER—SURETY—PAROL EVIDENCE.—An apparent maker of a note may be proved, by parol evidence, to be a surety: Note to McDougall v. Walling, 55 Am. St. Rep. 874; Kulenkamp v. Groff, 71 Mich. 675; 15 Am. St. Rep. 283. Parol evidence is admissible to show that the holder of a note knew that an apparent principal maker thereof was merely a surety: Irvine v. Adams, 48 Wis. 468; 33 Am. Rep. 817; Harmon v. Hale, 1 Wash. 422; 34 Am. Rep. 816; Kelly v. Gillespie, 12 Iowa, 55; 79 Am. Dec. 516.

SURETYSHIP—EXTENDING TIME OF PAYMENT—RELEASE OF SURETY.—A surety is discharged if the creditor, by a valid and binding agreement, without the assent of the surety, gives further time for payment to the principal debtor: Note to McDougall v. Walling, 55 Am. St. Rep. 875; monographic note to Scott v. Fisher, 28 Am. St. Rep. 691, on what will release or discharge a surety. An extension of the time for the payment of a note releases a comaker who was known to the payee to have signed merely as a surety: Kelly v. Gillespie, 12 Iowa, 55; 79 Am. Dec. 516.

AM. ST. REP., VOL. LX.—57

EMERY COUNTY v. BURRESEN.

[14 UTAH, 328.]

EXECUTION DOES NOT RUN AGAINST A COUNTY.—No execution can issue upon a judgment against a county, unless expressly authorized by statute. It does not possess property liable to execution in the same sense that an individual possesses it.

EXECUTION—COUNTIES—CONSTRUCTION OF STATUTE. A statute giving a judgment creditor a right to execution and a statute exempting certain classes of property from execution against a county do not confer the right to levy an execution against the property of a county, if there is no statute granting such right in express terms.

COUNTIES—JUDGMENT AS CLAIM AGAINST.—A judgment against a county, after a certified copy of it is filed, has the force and effect of an audited claim, which must be enforced in the same manner as other audited claims that are provided for by an application of unappropriated funds, or the levy of a tax, etc. It cannot be otherwise enforced, for execution does not run against the county.

Action by Emery county against P. C. Burresen and others. The plaintiff appealed from a judgment for the defendants.

W. K. Reed and Thurman & Wedgwood, for the appellant.

J. W. N. Whitecotton, for the respondents.

329 **MINER, J.** Killpack commenced suit in the justice's court against Emery county for six dollars and seventy-five cents, claimed to be due him from the county for fees as justice of the peace, which claim had been presented and disallowed by the county court, and twenty-five dollars attorney's fees for trying the case against the county, taxed as costs. Killpack recovered judgment, which, together with costs, amounted to fifty-two dollars and fifty cents. Execution was issued by the justice against Emery county, which was levied by Burresen, the sheriff, upon property of the county, consisting of scrapers, plows, estray brands, etc., and sold the same to satisfy the execution. This action is brought by Emery county against the plaintiff Killpack, who brought the action, Burresen, the sheriff, who took the property, C. P. Anderson, the justice, and C. E. Kofford, the attorney, who advised the suit, for conspiracy and unlawful conversion of the property of the county, claiming damages of three hundred and twenty-four dollars. The respondents justify upon the judgment and execution issued by the justice of the peace. The respondents obtained judgment, and for costs, in the district court, from which judgment the plaintiff Emery county appeals.

The question presented is, whether the property of Emery county is liable to be levied upon and sold upon execution, in

satisfaction of a judgment obtained against Emery county, one of the political divisions of the state. It appears that the claim, duly itemized, was presented to the county court for allowance before suit, and that it was wholly disallowed; that, after judgment, a certified copy thereof was filed with the county court. The respondents base their right to the issuance, levy, and ³³⁰ sale by execution upon section 3419 of the Compiled Laws of Utah of 1888, which gives a party in whose favor judgment is rendered a right to a writ of execution for its enforcement, and upon subdivision 10 of section 3429 of the Compiled Laws of Utah of 1888, which exempts certain specified classes of property belonging to the county, not included in the execution and sale, from execution. The nature, objects, and liabilities of political, municipal, or public corporations, like a county in a state, stand upon a different ground from private corporations. A county is one of the political divisions of the state, signifying a community, clothed with such extensive authority and political power as may be deemed necessary by the superior controlling power of the state for the proper government of its people residing within its borders, and for the proper administration of its local affairs. A county can raise revenue by taxation, make public improvements, and defray the expenses of the same by taxation, exercise certain specified judicial powers, and generally act within the authorized sphere created and abridged by the statute or constitution of the state. The power of taxation furnishes the means by which it may pay its debts and meet obligations necessarily incurred for the many purposes of its existence and welfare. The county has control of the county property to be used and disposed of to promote corporate purposes. It does not possess property liable to execution in the same sense that an individual possesses it. Levying upon and selling the property or revenues of a county, or removing it, may work irreparable injury, and ruin its inhabitants.

We are unable to find, nor has our attention been called to, any statute in this state expressly giving authority to levy an execution, and sell property of the county for a debt. It is a general rule that the people or the sovereign ³³¹ are not bound by general words in a statute restrictive of a prerogative right, title, or interest, unless expressly named: *People v. Herkimer*, 4 Cow. 345; 15 Am. Dec. 379; *Leonard v. Brooklyn*, 71 N. Y. 498; 27 Am. Rep. 80; *Chicago v. Hasley*, 25 Ill. 486; *Sedgwick's Statutory and Constitutional Law*, 337.

So, it has been held that, in rendering judgment against a city, it is error to award execution, or to levy it: *Morrison v. Hinkson*, 87 Ill. 588; 29 Am. Rep. 77; *Klein v. New Orleans*, 99 U. S. 149. It has also been held by this court that the board of education is not liable to the process of garnishment for a salary due a teacher, and that the statute authorizing the garnishment of corporations only applies to private corporations: *Chamberlain v. Watters*, 10 Utah, 298; *Van Cott v. Pratt*, 11 Utah, 209.

Section 3419 of the Compiled Laws of Utah of 1888, giving a party in whose favor judgment is rendered a right to execution, and subdivision 10 of section 3429, exempting certain classes of property from execution against a county, cannot be extended so as to include the right to levy an execution against the property of the county, state, or municipal organization, in the absence of a statute expressly granting such right in express terms. "The property of such public corporations, and the taxes levied and collected for public purposes, are a constituent part and a necessary ingredient of their public power, and are no more liable to seizure and sale than the whole power itself would be; and before we can assent to the proposition that a political corporation, clothed with so many powers and duties of government, so essential to be sustained by the exercise of their rights and privileges, cannot be secured in their property and means by which their functions can be properly exercised for the benefit of the citizen, we must see some positive act of the legislature authorizing the issuance of the writ." We ³³² cannot admit that any individual possesses such power under our laws as would enable him, in securing a private end, to put an end to the functions of a political organization, and thus disorganize and destroy the government. It is true that a county can sue and be sued, and the rights of a creditor are preserved under section 199, page 307, of 1 Compiled Laws of Utah of 1888, which provides as follows: "A claimant dissatisfied with the rejection of his claim or demand, or with the amount allowed him on his account, may sue the county therefor at any time within six months after the final action of the court, but not afterward; and if, in such action, judgment is recovered for more than the court allowed, on presentation of a certified copy of the judgment, the court must allow and pay the same, together with the costs adjudged; but if no more is recovered than the court allowed, the court must pay the claim, but no more than was originally allowed." A judgment, when obtained against a county, under this act, has the effect of an audited claim against the county. It is conclu-

sive evidence that the county owes the money for which the judgment is obtained. The county court has, after judgment, no discretion to exercise as to the justice and legality of the demand. Nevertheless, it appears to be contemplated by the statute that, after judgment has been obtained, it shall be presented to the county court, and placed among the audited demands against the county; and then it is made the duty of the county to allow and pay the claim, together with the costs adjudged. The payment of costs is contingent upon the amount recovered. It was evidently intended by the statute that, when a judgment was obtained, it should have the force and effect of an audited demand, and that the claim was no longer open to contest. The county court, after judgment, and after the ³³³ filing of a certified copy thereof with it, has no longer any discretion in the premises. The claim then stands upon the same footing as all other claims and demands against the county, and is therefore subject to all the conditions and limitations applicable to other audited claims, and payment may be enforced in the same manner, and not otherwise. No execution can issue upon a judgment against the county. When the judgment is rendered, and a certified copy thereof is filed with the county court, it then becomes the duty of the county court to apply such funds in the treasury of the county as are not otherwise appropriated to its payment; or if there are no funds, and the county court possesses the necessary power to levy a tax for that purpose, and if it fails or refuses to apply the funds, or to exercise the power, the plaintiff can then resort to his writ of mandamus.

A similar question, under a similar statute, has been before the courts of California and other states, where the same conclusion is reached: *Alden v. Alameda Co.*, 43 Cal. 270; *Emeric v. Gilman*, 10 Cal. 404; 70 Am. Dec. 742; *Sharp v. Contra Costa Co.*, 34 Cal. 285; *Gilman v. Contra Costa Co.*, 8 Cal. 52; 68 Am. Dec. 290; *Chicago v. Hasley*, 25 Ill. 485 (595); *Leonard v. Brooklyn*, 71 N. Y. 498; 27 Am. Rep. 80; *High's Extraordinary Remedies*, sec. 232; *Taylor v. County Court*, 2 Utah, 405; *Dillon on Municipal Corporations*, sec. 100; *Klein v. New Orleans*, 99 U. S. 149; *Sedgwick's Statutory and Constitutional Law*, 337; *People v. Herkimer*, 4 Cow. 345; 15 Am. Dec. 379.

Upon the grounds stated, the judgment of the court below is set aside and vacated, with costs, and a new trial ordered.

Zane, C. J., and Bartch, J., concur.

EXECUTION—COUNTIES.—No execution can issue upon a judgment against a county: *Gilman v. Contra Costa*, 8 Cal. 52; 68 Am. Dec.

290, and monographic note thereto on the liability of counties, mode of its enforcement, and power of the legislature to impair. An execution cannot issue against a municipal corporation: *Pekin v. McMahon*, 154 Ill. 141; 45 Am. St. Rep. 114.

COUNTIES—ENFORCEMENT OF CLAIMS AGAINST.—The method of satisfying a judgment against a county provided by statute must be pursued: note to *Gilman v. County of Contra Costa*, 68 Am. Dec. 297. The California statute authorizes suit against a county but gives no remedy by execution. When judgment is rendered against it, it is the duty of the supervisors to pay the claim out of funds in the county treasury, provided there be funds not otherwise appropriated; or, if there is no fund, and they possess the power, they must levy a tax for the purpose of payment; and if they fail or refuse to pay, or to levy the tax, the creditor can resort to mandamus against them; but if there is no fund, or power to tax, the legislature must be invoked for authority: *Emerie v. Gilman*, 10 Cal. 404; 70 Am. Dec. 742. Compare note to *Gilman v. County of Contra Costa*, 68 Am. Dec. 291-300; and monographic note to *Commissioners v. Heaston*, 55 Am. St. Rep. 208-209, on the effect of the allowance or rejection of claims against counties and other municipal corporations.

HODSON v. UNION PACIFIC RAILWAY COMPANY.

[14 UTAH, 402.]

JUDGMENT—CONCLUSIVENESS OF, THOUGH LAW IS MISAPPLIED.—If a court has jurisdiction to render judgment in an action, which it does, and the judgment is not reversed or modified, it is binding on the parties and their privies, and conclusive of the questions litigated, even though erroneously decided; and, even where the court misapplies the law as to any question, the judgment must, nevertheless, stand until corrected in some appropriate way.

JUDGMENT—PART REMISSION—EFFECT UPON ASSIGNOR OF CLAIM.—If a party obtains a judgment for damages, and voluntarily, without specifying any purpose, remits a part thereof, he abandons his claim to the sum so remitted, and cannot afterward bring an action to recover such sum. This principle applies to one who has, in fact, assigned a claim for the purposes of an action, as well as to one who is a party of record. Such remission is, in effect, and to the amount thereof, a credit on the judgment.

JUDGMENT—RES ADJUDICATA—ASSIGNED CLAIM—PRIVITY—ESTOPPEL AS TO ASSIGNOR.—If a person, having a cause of action against a railway company for the negligent killing of his horse, assigns his claim to another, who has a like cause of action against the same company, and who sues, setting up both causes of action, one for the value of his own horse, and the other to recover as assignee, and a general verdict is rendered for the plaintiff on both causes of action, upon which judgment is rendered for one entire sum, but, upon a motion for a new trial, the plaintiff remits a sum equal in value to that claimed for the assignor's horse, and the defendant pays the judgment, the assignor must be regarded as in privity with the assignee, and is estopped, in another action, brought by himself, from litigating the claim for his own horse against the same defendant, where the assignment was made an issue in the former action, was declared valid, and there was no appeal or reversal of judgment in that action. The assignor cannot be heard to say that he was not a party to the first action, because, having been represented therein by his assignee, the judgment is just as binding on him as if he had been a party of record.

Action by J. R. Hodson against the Union Pacific Railway to recover damages for the killing of a horse. The defendant appealed from a judgment for the plaintiff.

Williams, Van Cott & Sutherland, for the appellant.

Evans & Rogers, for the respondent.

403 BARTCH, J. This action was brought to recover damages for the negligent killing of the plaintiff's horse by the defendant. It is averred, in substance, that on December 9, 1890, the plaintiff was the owner of a certain mare, of the value of seventy dollars, which was negligently killed by the defendant near Layton, Davis county, Utah. After denying the allegations **404** of the complaint, it is alleged in the answer that on or about October 15, 1891, in an action pending in the district court, wherein Thomas H. Hodson was plaintiff and this defendant was defendant, a judgment was duly rendered in favor of said Thomas H. Hodson and against the said defendant for the value of the horse sued for herein, together with damages for another horse, with interest from the time of the killing, and for costs of suit; that said Thomas H. Hodson obtained said judgment for the horse sued for herein as assignee of the plaintiff in this action; that by said judgment it was ascertained and adjudged that said Thomas H. Hodson was such assignee of the plaintiff herein; and that afterward, in 1891, the defendant fully paid and satisfied said judgment. At the trial of this cause, the defendant introduced in evidence, without objection, the record of the former trial, from which record it appears that the same subject matter herein was in controversy therein, and that the assignment by this plaintiff of his interest in the value of the horse sued for herein to the plaintiff in that suit was made an issue both in the pleadings and proof in that suit, and was submitted to the jury, who returned a verdict in favor of the plaintiff therein, and against the defendant, for one entire sum, including damages and interest, of two hundred and eighty-one dollars and seventy cents, although there were two horses sued for, and there being two separate counts in the complaint, one for the value of a horse by right of ownership, and the other (being the one in controversy herein) by right of assignee. It further appears from such record that the court entered judgment in favor of the plaintiff therein, in accordance with said verdict, and that, thereafter, upon the hearing of defendant's motion for a new trial, the plaintiff, by his counsel, in open court, remitted from the verdict the sum of seventy-three dollars and five cents,

which was the amount ⁴⁰⁵ of the principal and interest for the second cause of action, being the cause on which this suit is founded, and on which the plaintiff has recovered judgment against the defendant for the sum of ninety-one dollars and forty cents and costs. It also appears that the assignment was made by the plaintiff in this case with the intention that an action should be brought for the value of the horse in question. Such are the pleadings and the material evidence on which the appellant relies to release itself from the obligation created by the judgment in this suit.

The only question which is necessary to be considered on this appeal is, whether the former judgment on the second cause of action is a bar to this suit, and operates as an estoppel to another judgment for the same cause of action. We think this must be decided in the affirmative. There is no question that the court in the former suit had jurisdiction to render that judgment, and the judgment has never been reversed or modified. It is therefore binding on the parties and their privies, and conclusive of the questions litigated, even though erroneously decided. The question whether the plaintiff in this suit had assigned his interest in the subject matter, on which the second cause of action in that suit was based, to the plaintiff in that suit, was an issue therein, and the court held that he had assigned his interest. This being so, he cannot now be heard to say that he was not a party to that suit, because, having been represented therein by his assignee, the judgment is just as binding on him as if he had been a party of record. Having litigated his claim in the former suit, and obtained judgment, which has neither been reversed nor modified, he is estopped from again litigating the same claim against the same defendant. To hold otherwise would be to permit a person to assign his claim for the purpose of an action thereon ⁴⁰⁶ by the assignee, and after final judgment, unreversed, allow him, if he should desire the experiment, to commence another suit against the same defendant on the same cause of action, to be proved by the same testimony. The law does not recognize such experiments. The plaintiff in this case must be regarded as in privity with the plaintiff in the former, because the judgment establishes the fact of the assignment, whether right or wrong, and identity of the causes of action having been established, and the judgment in the former action having been rendered in conformity with a general verdict on the whole cause, the plaintiff in this action is bound by the judgment in the former, in the absence of a reversal or modifi-

cation thereof. That judgment is conclusive, not only between the same parties, but also their privies, of every question decided; and, if the court misapplied the law as to any question, the judgment must nevertheless stand until corrected in some appropriate way: Freeman on Judgments, secs. 249, 272; Herman on Estoppel, secs. 107, 108, 247; Black on Judgments, sec. 609; State v. Hayes, 14 Utah, 118; Dowell v. Applegate, 152 U. S. 327; Claflin v. Fletcher, 7 Fed. Rep. 851; Godding v. Colorado Springs Live Stock Co., 4 Colo. App. 114; Elder v. Frevert, 18 Nev. 446.

The fact that at the hearing of the motion for a new trial in the former action the plaintiff, by his counsel, remitted from the judgment an amount equal to the sum claimed in the second cause of action is immaterial, and does not militate against the force and effect of the judgment, in the absence of any understanding or agreement between the parties, so far as appears from the record, as to what effect such remission should have. That judgment was an entirety on the whole cause of action, and the remission of a part thereof, without specifying, by agreement or otherwise, for what purpose it was made, ⁴⁰⁷ simply had the effect of crediting the defendant with the amount remitted on the judgment. Where a party obtains a judgment for damages, and voluntarily, without specifying any purpose, remits a part thereof, he abandons his claim to the sum so remitted, and may not afterward bring an action to recover such sum. This is so as to a person who has in fact assigned a claim for the purposes of an action, as well as to one who is a party of record. If, in the former action, the plaintiff and his assignor did not wish to abide by the judgment as to the second cause of action, they had the right to dispose of such cause, either by withdrawal thereof, or by submission to nonsuit, or in some other proper way, before the judgment was pronounced. Having failed to do so, this plaintiff cannot now be heard to complain. The record shows nothing which entitles him to maintain this suit. The judgment is reversed and remanded, with directions to the court below to dismiss the action.

Zane, C. J., and Hart, J., concur.

JUDGMENT — CONCLUSIVENESS OF—PARTIES AND PRIVIES.—A judgment of a court having jurisdiction of the cause and parties is conclusive upon parties and privies in all courts until reversed by a court having jurisdiction for that purpose, however erroneous it may be: Note to Tadlock v. Eccles, 73 Am. Dec. 217; Morrill v. Morrill, 20 Or. 96; 23 Am. St. Rep. 95; note to Hunter v. Ruff, 58 Am. St. Rep. 932; and protects the plaintiff in enforcing it: Peck

v. McLean, 36 Minn. 228; 1 Am. St. Rep. 665. It is conclusive, in all subsequent controversies between the same parties or their privies, depending on the same point or question: Notes to Doty v. Brown, 53 Am. Dec. 355; Young v. Byrd, 46 Am. St. Rep. 466. It is conclusive as against parties and privies on all questions adjudicated by it: Barrick v. Horner, 78 Md. 253; 44 Am. St. Rep. 283. The principle of estoppel by judgment includes all persons who are substantially parties, although not parties to the record: Notes to Curtis v. Bradley, 48 Am. St. Rep. 191; Hill v. Bain, 2 Am. St. Rep. 877. A judgment obtained in good faith is as conclusive upon privies as upon the parties themselves: Notes to Hill v. Bain, 2 Am. St. Rep. 878; Bensimer v. Fell, 29 Am. St. Rep. 792. A judgment is conclusive as to issues raised and determined between parties on the same side of the cause: Nave v. Adams, 107 Mo. 414; 28 Am. St. Rep. 421. A judgment for a part of one entire demand is a conclusive bar to any other suit for another part of the same demand: Bullard v. Thorpe, 66 Vt. 599; 44 Am. St. Rep. 867. Under statutes authorizing the assignee of a chose in action to sue in his own name, the judgment rendered in such an action is binding on the assignor, so that the debtor cannot be exposed to a second action: Note to Collins v. Loftus, 34 Am. Dec. 723.

HECHT v. METZLER.

[14 UTAH, 408.]

DAMAGES—FRAUD IN EXCHANGE OF REAL ESTATE—OFFER, IN OPEN COURT, TO SELL AND CONVEY BACK.—If two parties agree to exchange lands, but one is deceived by the false representations of the other as to the value, location, and rentals of the property he receives in exchange, and which he has not examined, and sues to recover damages for the fraud and deceit, an offer by defendant, in open court, to sell and convey back to the plaintiff the property received of him, for less than one-fifth of the damages claimed, and for less than one-sixth of its value as originally agreed upon, an offer in open court to tender a deed for the same on payment of the money, and an offer to give time on stated payments, should not be allowed to stand, as it is not a method recognized by law for proving value, and it is error for the court to permit it to stand. The right of damages, in such a case, is absolute upon the happening of the wrong, and nothing but the act of the injured party can release it. Such an offer might well prejudice the plaintiff before the jury; and, besides this, where no fraud or deceit is alleged, in the pleadings, as to the lands received of the plaintiff, the value of that land is not in issue, so far as it affects the question of damages. The plaintiff is, therefore, entitled to the benefit of his bargain, and the jury has no right to fix a new price on the plaintiff's land, where it has already, without deception, been fixed by the parties.

FRAUD—EXPRESSION OF OPINION—VALUE.—The mere expression of opinion, estimate, or judgment of the value of property, even if false, does not, as a rule, constitute actionable fraud.

FRAUD OR MISREPRESENTATION—WHEN ACTIONABLE.—A false statement concerning a fact material to a contract, and which is influential in producing it, constitutes actionable fraud or misrepresentation.

FRAUD—MISREPRESENTATION AS TO RENTALS.—A willful misrepresentation by one who exchanges land, that the rental from the property given in exchange is greater than it really is, is when relied upon by the other party, an actionable fraud.

FRAUD—MISREPRESENTATION AS TO LOCATION OF LAND.—A willful misrepresentation by one who exchanges land, that the property given in exchange is high and dry, and located in a particular place, and which operates to the injury of the other party, is, when relied upon by the latter, without an inspection of the premises, an actionable fraud.

DAMAGES—FRAUD IN EXCHANGE OF REAL ESTATE.—In an action for fraud and deceit in the sale or exchange of real estate, the measure of damages is the difference between the actual value of the land as it would have been if as represented and as it actually was.

Action by Charles Hecht against Joseph Metzler to recover damages for fraud and deceit in an exchange of lands. The plaintiff appealed from a judgment for the defendant.

Maginnis & Weber and J. N. Kimball, for the appellant.

E. M. Allison and Evans & Rogers, for the respondent.

410 MINER, J. On August 1, 1893, at Denver, Colorado, appellant and respondent exchanged real estate by written contract, which was afterward executed by interchange of deeds of conveyance. By the terms of the written contract, appellant agreed to exchange 3,250 acres of land in Colorado, at a stipulated price of \$30 per acre, and some personal property, for four pieces of property belonging to respondent in Ogden, Utah. The price of the Ogden property was not fixed in the contract, but was fixed in the deeds of conveyance. Plaintiff alleged in his complaint that the price of each piece of Ogden property was fixed and represented by the defendant at the following stated sums in the negotiations which culminated in the written contract: One piece of the Ogden property consisted of residence property on the corner of Washington avenue and Twenty-first street, valued at \$10,000, and represented by the defendant to be renting at \$240 per year. The second piece was business property on the corner of Twenty-third street and Washington avenue, of the value of \$60,000, and was represented by the defendant to be producing a rental of \$4,000 a year. The third piece consisted of a vacant lot on Twenty-eighth street and Washington avenue valued at \$16,000. The fourth piece consisted of a number of lots and a piece of unplatted ground in South Ogden, known as "Central Park Annex to the City of Ogden," valued at \$33,000, and represented by the defendant to be sufficient to cut into 100 full-sized building lots, and situated southeast of the Pingree avenue schoolhouse, and that they were high, dry, and smooth, were full lots, accessible to the streets,
411 and with buildings built up around them. Plaintiff alleges

that the representations as to the value, location, and rental of said lots were false, and known to be false by the defendant, and that the lots conveyed were not the lots sold, and that he relied upon the representations as being true, and made the exchange in reliance thereon. Plaintiff also claims that the defendant went over and examined the Colorado property, but that he (the plaintiff) never examined the Ogden property with a view of purchasing it; that he saw the first three descriptions named, but was not shown the lots in question, and had no information as to the rental of the improved property, except what he obtained from the defendant, as aforesaid, before the contract was made. The answer denied the allegations in the complaint; alleged that the Colorado property was not worth to exceed \$15,000, and offered to reconvey and deliver the whole thereof for \$15,000; that the plaintiff had inspected the lots and property in question before the exchange was consummated; and denied that the value inserted in the Ogden deed was fictitious.

This action was brought to recover damages for fraud and deceit, and the measure of damages relied upon was the difference between the actual value of the several pieces of Ogden property as it was and what it would have been worth had the representations been true. After the plaintiff's attorney had made his opening statement to the jury, and before the trial proceeded, the attorney for the defendant made the following opening statement to the jury: "That we right here and now offer to deed that ranch to Mr. Hecht for the sum of \$15,000, when he is asking for a judgment of \$85,000, and keeps the Ogden real estate. We right here say now to the gentleman that claims he has been damaged in the sum of ⁴¹² \$85,000, that here and now we do in our testimony, and have in our answer, said, 'Take the ranch at \$15,000.' Maginnis: I object to his making a statement of that kind to the jury. (Objection overruled. Exception.) Allison: . . . I desire to say in that connection, before the verdict, for fear that it may be replied that the gentleman has not got \$15,000 in ready cash, we will give him time on the account for which he can have that ranch. He can pay part in cash and the rest on time. Maginnis: I suppose we have our exception to that statement? Allison: We have the deeds in our possession, and we tender them a deed of that ranch conveying this property to him in the presence of the jury, where he is asking \$85,000 damages. We offer to convey that ranch and all the personal property to him for \$15,000, and in addition to that— Maginnis: We want this taken down, and note an exception. Court: I don't know

what the gentleman means by offering a deed here. Allison: We propose to keep our offer good during the whole trial. Court: I think they have a right to do that. Maginnis: Counsel has no right in the opening statement to get matter before the jury that the court could not admit at another stage of the case. I would like the remarks noted, and take an exception to them. I would like to see those deeds, please. Allison: The name of Mr. Hecht is not in them, but we will have it inserted. Maginnis: This is a deed from Stowe. Allison: We said in our answer that we would convey it or cause it to be conveyed. He has not got a deed back from the gentleman who owns it, and will produce an abstract showing that the gentleman now owns the ranch. Maginnis: He has got a deed signed by Theodore Stowe. I simply call attention to the fact to show how loose this matter is. We don't know who Stowe is, whether his warranty is any good, who he is, or ⁴¹³ what he is, whether he is responsible, or whether he is married, or whether his wife joins with him in the deed—Court: It don't make any difference if you don't accept it. Maginnis: Counsel has no right to make the statement. Counsel is dealing improperly in this case. Court: Is it claimed that there was any money paid? Maginnis: No, sir; it was an agreed price. Court: Was there anything else than an exchange? Was there a money consideration? Allison: No, sir. Maginnis: There was personal and real property on our side. Court: No notes and no mortgages? Maginnis: None, except assumed. We desire now an exception to allowing counsel to make this statement. Court: I think the statement may stand. (Exception by plaintiff.)” The appellant now contends that the offer to sell to appellant the Colorado property for \$15,000 at the time of the trial, May 10, 1895, and the tender of a deed from respondent's grantee, upon payment of \$15,000, in the presence of the jury, and the remarks and order of the court in permitting the offer to stand against his objection and protest, were error.

The price of the Colorado land was fixed and expressed in the contract of sale at \$30 per acre, besides the personal property. The price of the Ogden property was not fixed in the contract of sale, but the consideration, as alleged, was stated in the deeds. The answer does not allege any deceit or fraudulent representations on the part of the appellant with reference to the Colorado property. The trial took place about twenty-one months after the contract was made, at a time when values may have greatly depreciated. With reference to damages, the case must be tried just as it would have been tried the day after the contract was

made, if the question had arisen at that time. The deed tendered was signed by Mr. Stowe, with no assurance of title, and when there ⁴¹⁴ was not time to ascertain whether or not the title was perfect. Who Stowe was, and whether he had a wife or not, does not appear. The offer was not to trade back, but to sell to appellant at a given price, below the price stated in the deed and contract. When the objection was made, the court remarked, "It don't make any difference, if you don't accept it," and permitted the offer to stand. By this remark the court emphasized the propriety of the offer, and from it, if the offer was not accepted, the jury might have inferred without proof that the appellant had placed an exorbitant price upon his land, and was seeking to recover unjust damages at their hands. The appellant may not have had a dollar with which to purchase, even if the price asked was one-quarter its actual value. Or he may have been so impoverished by the results of the trade or otherwise that to accept would not only be to lose his case, but the land besides. To refuse to accept the offer might be used as an argument to the jury that his demand was unjust. If the offer was made in good faith, it proved nothing. It was not a method recognized by the law for proving value. Nor was it competent as tending to show that appellant had lost nothing by the exchange. A party should not be permitted to create testimony in this manner. There is some force in the remarks of counsel for the appellant "that courts of justice are not organized to be turned into market places, where suitors, for the purpose of bluff or otherwise, are expected to enter into a wager on real estate, or any other transaction, in order to maintain a remedy which the law gives for frauds practiced upon them." The appellant could not, under any rule of law, be compelled to buy back his property, although offered to him at less than the market value. The right of damages in such a case is absolute upon the happening of the wrong, ⁴¹⁵ and nothing but the act of the injured party could release it: 1 Sedgwick on Measure of Damages, 8th ed., sec. 53; Weld v. Reilly, 16 Jones & S. 531. The offer was doubtless made as affecting the value of the Colorado property exchanged by the appellant. As before stated, the answer alleges no fraud or deceit on part of the appellant in making this exchange. The value of the Colorado property was stipulated in the contract of sale to be \$30 per acre, and the price was carried into the deed of conveyance as the agreed consideration for appellant's Colorado property. This price was so fixed after the respondent had visited the Colorado farm and examined it.

The action was brought to recover damages for fraud and deceit on the part of the respondent. We think the offer was not competent for this purpose.

In Stanhope v. Swafford, 80 Iowa, 45, the court held that, "in an action for false representations in an exchange of land, allegations in the answer as to the value of the land traded by plaintiff were properly stricken out when its value was fixed by the written contract between the parties, and that an action for false representations inducing plaintiff to enter into the land trade is distinct from an action on the contract of exchange, and may be maintained, although such representations do not appear in the written contract." In Matlock v. Reppy, 47 Ark. 148, it is held in a similar case that in an action for false representations as to land, evidence as to the value of the land exchanged by the plaintiff is immaterial when the value was agreed to. In Drew v. Beall, 62 Ill. 164, in an action brought for fraud and deceit in the exchange of land, the defendant offered to prove the value of the house and lot he received from the plaintiff in exchange, as affecting the question of damages, which the court refused to allow, ⁴¹⁶ and the supreme court held that the proof was properly rejected, and that the plaintiff was entitled to the benefit of his bargain, and it was not for the jury to make a new contract for the parties, or fix a new price on plaintiff's property. The offer made was improper. The ruling thereon was clearly erroneous, and doubtless operated to the disadvantage and injury of the appellant.

On the trial the appellant introduced testimony tending to establish the allegations in his complaint, and, among other things, evidence tending to prove that respondent fraudulently represented that the Twenty-third street property was producing \$4,000 rental per year, and was worth \$75,000, when in fact it was renting for about \$90 per month, and was not worth more than \$17,000; that the Twenty-first street property was represented to be of the value of \$16,000, and renting for \$240 per year, whereas the value did not exceed \$5,000, and it was renting for not over \$90 per year; and that the lots in question were not located as represented, did not contain the land as represented, and were partly located in a swamp; that appellant relied upon the representations made as true, and believed them to be true, and made the exchange in reliance thereon; that had the representations been true, the land in question would have been worth the amount paid for it, but, as it was, the land was not worth over one-third to one-fifth the price paid; that in consid-

eration for this property he gave the respondent the contract and deed of the Colorado land, valued in the contract and deed at \$30 per acre, besides a lot of personal property. At the close of the plaintiff's case, the court, on motion of the defendant, struck out all of the testimony of the plaintiff with reference to the false representations and rental of the Twenty-third and Twenty-first street properties, and confined the proof ⁴¹⁷ to the Central Park annex, and remarked to the jury that "these lots were the only matter involved in the case," and afterward instructed the jury that they should wholly disregard the testimony with reference to the Twenty-first and Twenty-third street properties, as to the false representations made concerning them, and the rentals thereof, and further remarked to the jury: "In other words, he cannot complain of the thing he bought when he does not show what he paid for it; in other words, all he would be entitled to under such circumstances would be to recover what he paid, and, as there is no evidence as to what he did pay, there is no question for you to determine in regard to these two pieces of property." The plaintiff excepted to the ruling and charge of the court, and assigns error thereon. Generally, the mere expression of opinion, estimate, or judgment of the value of property, even if false, does not constitute actionable fraud. As a general rule, actionable fraud or misrepresentation consists in a false statement concerning a fact material to the contract, and which is influential in producing it. Mere statements of value, made by a vendor, during negotiations between the parties, although known to be excessive, do not ordinarily constitute either a warranty or a fraud, unless the peculiar relation of confidence and trust existing between the parties is such that the person making the false representations had reason to believe that the other would rely and act upon them. But a willful misrepresentation by a vendor, affirming that the rental from the property sought to be exchanged was greater than in truth it was, is an actionable fraud, and an action will lie against a vendor for falsely representing that a greater rent is paid for the land than is actually received, for that is ⁴¹⁸ a fact peculiarly within the knowledge of the vendor: *De Frees v. Carr*, 8 Utah, 488. In this case the appellant exchanged the Colorado land, which respondent had examined, at a stipulated price per acre for the properties falsely represented to bring certain annual rentals. Had the income been as represented it would have affected the value of the property obtained by the appellant, and was, therefore, a material representation.

In *Griffing v. Diller*, 50 N. Y. St. Rep. 535, 21 N. Y. Supp. 407, the court held that, "although false representations as to value are not alone sufficient to sustain an action for damages suffered in an exchange of lands in reliance on such representations, yet such misrepresentations, in connection with others as to the net revenue derived from the land, are sufficient to support such action, and to entitle plaintiff to recover." In *Wise v. Fuller*, 29 N. J. Eq. 257, it is held that the statement that a greater rent is received than is in truth received, or that the income from the property is greater than it is in fact, being matters peculiarly within the knowledge of the vendor, are fraudulent representations, for which an action will lie. This seems to be the general rule, and is adopted in *Utah: De Frees v. Carr*, 8 Utah, 488; *Speed v. Hollingsworth*, 54 Kan. 436; 3 *Sedgwick on Measure of Damages*, 8th ed., secs. 1027, 1028; 2 *Warvelle on Vendors*, sec. 10, p. 969.

The court, in its instruction to the jury, limited the appellant's right of recovery to what he paid, and, notwithstanding the testimony was clear that he gave 2,250 acres of land, valued at \$30 per acre, the court held that there was no evidence as to what he did pay, and that he was only entitled to recover what he paid. We are of the opinion that the measure of damages as laid down by the court was erroneous. *Sedgwick*, in his excellent ⁴¹⁹ work on *Measure of Damages*, eighth edition, volume 3, sections 1027-1029, lays down the general rule of damages in cases of this character as follows: "In such actions, as in actions for fraud in the sale of chattels, it has usually been held that the measure of damages is the difference in value between the land as it would have been if as represented and as it actually was at the time of the sale." Judge Sutherland says: "In case of sales, where there is a fraudulently false representation of quantity, quality, or title, the measure of damages is the difference in value between that which is actual, and that which is represented to exist": 3 *Sutherland on Damages*, 1st ed., 589-592. In *Drew v. Beall*, 62 Ill. 165, the court held that: "In case of an exchange of land, wherein the defendant was fraudulently induced to make the exchange for other property, the plaintiff was entitled to have a tract of land as it was represented to be; and, if he did not get it, the measure of damages was the difference between the actual value of the land and the value of the same if it had been such as it was represented to be." The rule is well established that in an action for fraud and deceit in the sale or exchange of real estate the measure of damages is the difference between the actual

value of the land as it would have been if as represented and as it actually was: *Stiles v. White*, 11 Met. 356; 45 Am. Dec. 214; *Drew v. Beall*, 62 Ill. 164; *Matlock v. Reppy*, 47 Ark. 148; *Griffing v. Diller*, 50 N. Y. St. Rep. 435; 21 N. Y. Supp. 407; *Lynch v. Mercantile Trust Co.*, 18 Fed. Rep. 486; *Antle v. Sexton*, 137 Ill. 410; *Wright v. Roach*, 57 Me. 600; *Herfort v. Cramer*, 7 Colo. 483; 3 *Sedgwick on Measure of Damages*, secs. 1027-1029; *Page v. Wells*, 37 Mich. 415; *Vail v. Reynolds*, 118 N. Y. 297; *Stevens v. Allen*, 51 Kan. 144; *Krumm v. Beach*, 96 N. Y. 399.

We are of the opinion that the court erred in striking out plaintiff's testimony with reference to the fraudulent ⁴²⁰ misrepresentations of the defendant as to the rentals of the Twenty-first and Twenty-third street properties, and also in its instruction to the jury on the measure of damages, as applied to that property, and in its instructions to the jury that plaintiff would only be entitled to recover what he paid. In the view taken of the case, we do not consider it necessary to review other assignments of error presented by the record. The judgment of the court below is reversed, with costs, and a new trial granted.

Zane, C. J., and Barch, J., concur.

FRAUD—FALSE REPRESENTATIONS.—A mere expression of opinion, as of the value of property, does not constitute a legal representation, and is not sufficient to sustain an action for false representations. A false representation, to be the ground of an action for deceit, must be of a material fact: See monographic note to *Cottrill v. Krum*, 18 Am. St. Rep. 556, 559, on action to recover for false representations. Such an action may be sustained for a false statement as to the location of land or other injuries caused by relying on the assurances of the seller: Note to *Cottrill v. Krum*, 18 Am. St. Rep. 557. A representation, if a falsehood, and acted upon by one deceived thereby, is always fraudulent: Note to *Mooney v. Davis*, 13 Am. St. Rep. 431.

DAMAGES—FALSE REPRESENTATIONS—SALE OF LAND.—The rule of damages for false representations in the sale of land is the difference between its actual value and its value if the alleged facts regarding it had been true: Note to *Reynolds v. Franklin*, 20 Am. St. Rep. 543; note to *Cottrill v. Krum*, 18 Am. St. Rep. 562.

CASES
IN THE
SUPREME COURT
OF
VERMONT

HAYES v. COLCHESTER MILLS.

[69 VERMONT, 1.]

MASTER AND SERVANT—FELLOW-SERVANTS—NEGLIGENCE TOWARD MINOR EMPLOYÉS.—A servant engaging in a dangerous employment assumes all the risks ordinarily incident thereto, including those which arise from the negligence of a fellow-servant. A minor, though a child of tender years, is within the application of this rule, but, in his case, it is modified by the duty of the master to warn him of the perils of the work and instruct him how to avoid them.

MASTER AND SERVANT—FELLOW-SERVANTS.—One who is engaged with another in the same employment is not divested of the character of a fellow-servant by the mere fact that he has authority to direct the other in his work.

MASTER AND SERVANT—MINOR EMPLOYÉS.—It is the duty of one who employs an immature and inexperienced person for a dangerous service to explain to him the perils of the work, and instruct him how to avoid them; but the giving of proper instructions will not relieve an employer from liability to a child, if the work required of him was not within the scope of his employment and not such as ought to have been required of a person of his capacity.

MASTER AND SERVANT—MINOR EMPLOYÉS—CAPACITY.—If a minor employé is engaged to do such work as is suited to his capacity, it is for the jury to determine whether the work required of him was within or beyond his capacity; and if the service was beyond his capacity, and so outside the scope of his employment, he did not assume the risks attendant upon it.

MASTER AND SERVANT—MINOR EMPLOYÉS—NEGLIGENCE OF FELLOW-SERVANT.—If a fellow-servant, acting within the sphere of his own duty, requires of a minor employé a service outside of his employment, and which a prudent master would not have imposed upon a person of his years, strength, and judgment, the master is liable for the consequence of the improper order.

MASTER AND SERVANT—HAZARDOUS EMPLOYMENT—EVIDENCE.—If the mere description of a service shows it to be hazardous, other evidence of its character is not necessary.

MASTER AND SERVANT—MINOR EMPLOYÉS—BURDEN OF PROOF.—In an action by a minor employé to recover for injury received through the negligence of his master in failing to properly instruct him, the burden of proof is upon the employé to show that the master failed to give him such instructions. Although the trial court fails to enforce this rule, objection to its action cannot be made available for the first time on appeal.

MASTER AND SERVANT—MINOR EMPLOYÉS—NEGLIGENCE OF FELLOW-SERVANT.—If a servant, acting within the

scope of his employment, requires his minor fellow-servant to perform a service requiring warning and instruction, the negligence of such servant in failing to give such instruction and warning is the negligence of the master, who is liable therefor.

MASTER AND SERVANT—NEGLIGENCE OF FELLOW-SERVANT.—If an employé, although a fellow-servant of an injured employé, is charged with the master's duty to such employé, his failure in that duty is the negligence of the master, and the doctrine of fellow-servants does not apply.

W. L. Burnap, H. Ballard, and H. F. Wolcott, for the appellant.

C. M. Wilds, S. Hazelton, and E. R. Hard, for the appellee.

4 **MUNSON, J.** The plaintiff, a boy of fourteen, was one of several helpers employed in the defendant's spinning-room. He lost an arm while at work under the immediate direction of one Sturgis, who was mending a belt which hung from a revolving shaft. The plaintiff was standing near the top of a stepladder holding the belt from the shaft to prevent it from crawling, when he was caught by the belt in some manner and drawn over the shaft. He had been employed in this room about two years. His evidence tended to show that his ordinary duties were to sweep the floor, pick up waste, change bobbins, mend broken threads, and occasionally oil and clean some parts of the machinery when it was ⁵ not running; that up to this time he had not been called upon to render such service as he was engaged in when injured, nor assisted in mending a belt, nor made use of a stepladder; that Sturgis was the second hand in the spinning room, and had the oversight of the machinery, and the immediate charge of the helpers, and entire charge of the room when the first hand was absent from it, as was the case at the time of the accident; that Sturgis generally hired the helpers, and set them at work, and discharged them if dissatisfied, and that the first hand could retain them notwithstanding Sturgis' action if he thought best.

The shaft from which this belt was hanging was the main shaft, elevated thirteen feet above the floor, and having three hundred revolutions a minute. Attached to this shaft was a drum four feet in diameter, which was connected by a twelve-inch belt, with the gearing of the water power beneath. There was a space of five or six feet between the drum and the wall of the building. The stepladder was set up in this space, by the side of the drum and main belt, and about a foot from them. It was a stepladder of the ordinary construction, twelve feet high, somewhat worn, and not entirely firm. There was nothing by which the plaintiff could steady himself but the ladder. The

rapid motion of the drum and connecting belt produced a considerable movement of the air where the ladder stood. It was not claimed that the plaintiff came in contact with either the drum or the main belt. The evidence of the plaintiff tended to show that on going up the ladder he became frightened, and returned to the foot of the ladder and told Sturgis he did not want to stay up there for fear he would be hurt, and that Sturgis thereupon clapped his hands together and told him with an oath to go up or take his hat and go home, and that upon this he went up the ladder again and received his injury.

The case was submitted to the jury on the theory that there was evidence tending to show that Sturgis was negligent in requiring of the plaintiff a dangerous service not ⁶ suited to his capacity, and in failing to give him such advice and instructions as the case required, and that the negligence of Sturgis in these respects was the negligence of the defendant. The defendant insists that there was no evidence tending to show negligence in the respects claimed, and that if there was any negligence on the part of Sturgis it was the negligence of a fellow-servant.

It is well settled that one who engages in a dangerous employment as the servant of another takes upon himself all the risks which are ordinarily incident to that employment, and that among the risks thus assumed are those which arise from the negligence of a fellow-servant. It is also true that one who is engaged with another in the same employment is not divested of the character of a fellow-servant by the mere fact that he has authority to direct the other in his work. A minor, even if a child of tender years, is held to be within the application of these general rules. But in the case of young persons their effect is modified by other rules, which impose special duties upon the employer in view of the inexperience and want of judgment of servants of this class. It is the duty of one who employs an immature and inexperienced person for a dangerous service to explain to him the perils incident to his work, and instruct him how to avoid them. But the giving of proper instructions will not relieve an employer from liability to a child, if the work required of him was not within the scope of his employment and not such as ought to have been required of a person of his capacity.

The plaintiff was not engaged for the performance of any specific work. He was to do such general work in the spinning-room as was suited to his capacity. His engagement contemplated the undertaking of more difficult work as he became fit-

ted to do it. It is evident that this is not a case in which it can be said, as matter of law, that the service the plaintiff was called upon to render was or was not such as it was his contract duty to perform. This new service ⁷ had come within the line of his employment if his advancing years and experience had prepared him to undertake it. It had not come within the line of his employment if it was still beyond his capacity. It was therefore proper for the court to treat the question of the defendant's negligence in requiring the service as depending simply upon the plaintiff's capacity.

If this service was beyond the plaintiff's capacity, and so outside the scope of his employment, he did not assume the risks attendant upon it. A person of mature years might have been held to have assumed them by consenting to do the work; but the rights of a child are not permitted to depend upon his ability to discriminate promptly as to the work required of him, or to refuse obedience to the command of his superior. This limitation of the plaintiff's risk renders the doctrine of fellow-servant inapplicable. In entering the defendant's service, the plaintiff assumed only such risks arising from the negligence of his coemployés as might be incurred within the scope of his employment. So it is not necessary to determine whether the nature and extent of Sturgis' authority over the plaintiff were such as to exclude him from the relation of fellow-servant. The effect of his authority over the plaintiff is to be considered without reference to that relation. The defendant assigned Sturgis to the care of the machinery and placed the plaintiff under his orders. If Sturgis, acting within the sphere of his own duty, required of the plaintiff a service which was outside his employment, and which a prudent master would not have imposed upon a person of his years, strength, and judgment, the defendant is liable for the consequences of the improper order.

In *Union Pac. R. R. Co. v. Fort*, 17 Wall. 553, a boy of sixteen had been engaged as a helper in a machine shop. After he had been employed for a few months in receiving moldings as they came from a machine, he was sent by the person under whose direction he was working ⁸ into the midst of rapidly revolving machinery to adjust a belt, and, in attempting to do this, received an injury. It was found that this service was beyond the scope of the boy's employment, and was one which a prudent man would not have required him to undertake. It appeared, also, that the person giving the order had the care and management of the machinery. The plaintiff in error was held liable. The court considered that the rule exempting the

master from liability for the negligent conduct of a coemployé in the same service did not apply; that the rule stood upon the presumption that an employé, in entering the service of his principal, took upon himself the risks incident to the undertaking; and that this presumption could not arise where the risk was not within the contract of service and the servant had no reason to believe that he would have to encounter it.

It is apparent that the plaintiff's evidence entitled him to go to the jury upon the question of negligence as depending upon his capacity for the service, irrespective of the giving of instructions, and that this alone would have prevented the direction of a verdict for the defendant.

But assuming that the service required of the plaintiff was such as he might properly have been called upon to undertake with suitable instructions, it remains to consider whether there was evidence tending to show that the defendant was negligent in failing to instruct him.;

It is said there was no evidence that the service was hazardous. It was not necessary to have the service so characterized by witnesses. The mere description of the work was evidence tending to show that it was hazardous. It is said that the previous service of the plaintiff had been such that his employer was justified in assuming that he was fitted to undertake the work required of him. The length of time the plaintiff had been employed there, the nature of the work he had been engaged in, and the knowledge he had acquired of the machinery, were important to be considered by the jury, but afforded no basis for a conclusion of law. Inasmuch ⁹ as the evidence tended to show that this was a service essentially different from any before required of him, it could not be assumed that his experience was such that instructions were unnecessary. It is also said that it does not appear but that instructions were given. It is true that the burden is upon the plaintiff to show a failure in this respect, and that the statement of the case contains nothing as to any evidence on this point. But the defendant is not in a position to avail itself of this objection. The point was not brought to the attention of the court by the request which is treated as a motion to direct a verdict. It was in no way suggested by the request relating to the subject of instructions. The only reference made in the charge to the situation of the case in this respect was the statement that it did not appear that any instructions were given. The jury were thus told, in effect, that they were to start in their consideration of the subject of instructions with the fact that none were

given, and no exception was taken to this method of submitting the case.

It is further insisted that however different this service may have been from the work plaintiff had previously done, it must be supposed from his long employment in the room that he knew the shaft was in motion and that contact of the belt with it would be dangerous, so that any instructions that could have been given would have simply covered what he already knew. In *Buckley v. Gutta Percha etc. Mfg. Co.*, 113 N. Y. 540, a boy who was in the performance of his duty about a machine at which he had worked for several days slipped on the floor, and involuntarily threw out his hand in such a manner as to thrust it into a set of cogwheels. Here it was said to be "impossible to perceive how the absence of instructions had anything to do with the injury." In *Ogley v. Miles*, 139 N. Y. 458, the plaintiff lost his fingers by a buzz saw soon after he was set to work at one by the defendants without instructions. It appeared, however, that he had operated such a saw before, long enough¹⁰ to learn the nature of it, and the danger attending its use; and the court considered that this placed him "in the same position as to knowledge that he would have been in had the defendants imparted to him oral information of the dangerous character of a buzz saw."

But we think the case under consideration is not fairly within this line of decisions. The plaintiff was suddenly called upon to perform a service which was essentially different from any he had before undertaken. The danger of the service lay somewhat in the place where it was to be done, and the position it was necessary to take in doing it. It cannot be assumed from the fact that the plaintiff knew in a general way of the movement of the shaft, and its effect upon a belt, that he so understood the dangers connected with the performance of this particular service that the caution and instruction of an experienced workman would have been of no benefit to him. We think the plaintiff's knowledge in the respects stated will not justify us in holding, as matter of law, that he was not entitled to caution or instruction under the circumstances disclosed by his evidence.

It being for the jury to determine whether instructions should have been given the plaintiff, it is necessary to consider whether any omission of Sturgis in this matter was the negligence of the defendant. It is evident that the right of an employé to receive instructions cannot be made to depend upon the presence of the employer or his general representative. The duty must

often rest upon the one whose order creates the necessity for the instruction. In such a case the employer cannot excuse himself for the employé's failure to receive instruction by saying it was the neglect of a fellow-servant. If it became the duty of the defendant to instruct the plaintiff, the performance of that duty devolved upon Sturgis, and any negligence of Sturgis therein would be chargeable to the defendant. This holding is not upon the ground that Sturgis was not a fellow-servant of the plaintiff in the general sense, but upon the ground that his connection ¹¹ with the plaintiff in this transaction was such that when occasion arose for instructing the plaintiff he was in that matter the representative of the defendant. When an employé, although a fellow-servant of the injured employé, is charged with the master's duty to such employé, his failure in that duty is the negligence of the master, and the doctrine of fellow-servant does not apply.

So there was evidence tending to show that the defendant was negligent in the matter of instructions.

The defendant's fourth request, to the effect that the duty of instruction would depend upon the plaintiff's need of it, and not upon the fact of his minority, was fully complied with.

The defendant requested the court to charge that if this service was within the scope of the plaintiff's employment, he took the risk of any peril attending it "that was apparent and obvious and comprehensible to him." We think this request was substantially complied with. The jury received the following instruction: "It is true, as a general rule of law, that employées take the ordinary risks incident to their employment. And this applies to children if they are able to understand clearly the risks and dangers. If they are not able to understand the risks and dangers, then they should be informed and apprised of them." The jury had before this been told that "if a child has mind enough, discretion enough, to fully appreciate the danger, then the caution would not be required." And again: "If a child has mind and discretion sufficient to see and fully appreciate the danger to which he is exposed, then the law requires that he shall use that capacity in order that he may recover." We are satisfied from a careful examination of the whole charge that the jury must have understood that if this service was within the scope of the plaintiff's employment, and the danger attending it was obvious and comprehensible to him, he took the risk of it, and was not entitled to recover.

No exception was taken to the charge as given.

Judgment affirmed.

MASTER AND SERVANT—ASSUMPTION OF RISKS—DUTY TO INSTRUCT MINOR SERVANT.—Minor or inexperienced servants, as well as ordinary servants, in their contracts of employment assume all risks ordinarily incident to the service, and this includes all of which they have notice and all that are patent and obvious to them: *Taylor v. Wootan*, 1 Ind. App. 188; 50 Am. St. Rep. 200, and note. Owners of dangerous machinery employing an inexperienced minor about it, unacquainted with its nature or use, are bound to take care that he is instructed therein: *Foley v. California Horseshoe Co.*, 115 Cal. 184; 56 Am. St. Rep. 87, and note.

FELLOW-SERVANTS—WHO ARE.—Fellow-servants are those who are so far working together as to be practically co-operating, and who have an opportunity to control or influence the conduct of, and who have no superiority over, one another: *Flannegan v. Chesapeake etc. Ry. Co.*, 40 W. Va. 436; 52 Am. St. Rep. 896, and note. The mere fact that one of them has power to employ or discharge the others does not make him a vice-principal: *New Pittsburgh Coal etc. Co. v. Peterson*, 136 Ind. 398; 43 Am. St. Rep. 327, and note. His character as fellow-servant or vice-principal cannot be determined solely from his grade or rank: *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409; 19 Am. St. Rep. 180, and note.

MASTER AND SERVANT—INJURY TO MINOR SERVANT IN OBEYING SUPERIOR SERVANT—LIABILITY OF MASTER.—A minor cannot be expected to set up an opinion, however mature, against the judgment and experience of those maturer and older to whom he is given in charge, and it would be an extreme case in which a minor should be held guilty of contributory negligence in obeying the orders of his foreman representing his master: *Foley v. California Horseshoe Co.*, 115 Cal. 184; 56 Am. St. Rep. 87. See *Orman v. Mannix*, 17 Colo. 564; 31 Am. St. Rep. 340, and note; *Brazil Block Coal Co. v. Gaffney*, 119 Ind. 455; 12 Am. St. Rep. 422.

FIRST NATIONAL BANK v. BRIGGS.

[69 VERMONT, 12.]

OFFICIAL BONDS—LIABILITY, WHEN TERMINATES.—

The bond of a cashier of a bank conditioned for the faithful discharge of his duties as cashier forever, so long as he shall occupy such position, is in force and extends but one year when given soon after his first election, which was for the ensuing year, and he was thereafter re-elected annually, and a by-law of the bank provided that he should be appointed to hold his office during the pleasure of the board of bank directors.

OFFICIAL BONDS—LIABILITY—EXTENT OF.—If a definite period of appointment to office is recited in the condition in the officer's official bond, the obligation thereof cannot be extended beyond that period by any subsequent general words.

OFFICIAL BONDS—LIMIT OF LIABILITY.—If an appointment to office is for a definite period fixed by law, a recital of that term in the officer's bond is not necessary to limit the effect of the general words therein, which in themselves would indicate a continuing liability.

OFFICIAL BONDS—WANT OF SEAL—VALIDITY.—An instrument in the form of an official bond, though without a seal, is a valid contract obligation, if executed upon a sufficient consideration and delivered to take effect as security.

Appeal from the allowance of a claim against the estate of George Briggs, an insolvent debtor, as surety upon the official bond of F. E. Briggs as cashier of the plaintiff bank.

Stewart & Wilds, for the appellant.

J. C. Baker, for the appellee.

¹⁴ MUNSON, J. The plaintiff is a corporation organized under the national bank act. The board of directors was empowered by that act to appoint a cashier and dismiss him at pleasure, and to prescribe by-laws, not inconsistent with law, regulating the manner in which the cashier should be appointed. A by-law was adopted which provided that the cashier should be appointed to hold his office during the pleasure of the board. The insolvent's first election as cashier was for the year ensuing, and he was thereafter for ten years annually re-elected. Soon after his first election, he gave the bond in controversy which is conditioned for the faithful discharge of his duties as cashier forever, so long as he should occupy the position. The defaults complained of occurred after the expiration of his first official year.

We are not aware that the precise question raised by this statement has been passed upon; but a review of the course of decision by which courts have arrived at what must now be regarded the settled law upon the subject of official bonds will aid us in the disposition of the case.

In *Lord Arlington v. Merricke*, 3 Saund. 411 a, the delinquent was a deputy postmaster, who was originally appointed for six months, but whose bond was for and during all the time that he should continue in the office. The time for which he was appointed was recited in the condition, and it was considered that the terms of the obligation must be held to refer to the recital, and that the liability was thereby limited to six months. In *Liverpool Waterworks Co. v. Atkinson*, 6 East, 507, there was a recital in the condition of the bond that the defendant had agreed with the plaintiff to collect its revenues for twelve months, and the ¹⁵ condition was, that the defendant should justly account during the continuance of such his employment, and for so long as he should continue to be employed; and it was held that the obligation was confined to the twelve months mentioned in the recital. These cases are authority for saying that when a definite period of appointment is recited in the condition, the obligation will not be extended beyond that period by any subsequent general words.

In *Wardens of St. Saviour's v. Bastock*, 5 Bos. & P. 175, it was shown by the recital in the condition that the principal was appointed collector of the church rate of the parish, but the period of appointment was not stated. It appeared from the

replication that the first appointment was for one year, and that the incumbent was continued in office by annual reappointments. The office was apparently an annual one by virtue of the local act under which the rates of the parish were managed. The bond was upon condition that the collector should, from time to time, account for all moneys received by him on account of the rate assessed, or of any other rates which might thereafter be made and collected by him. The court considered that the case could not be distinguished from that of the Liverpool Waterworks Co. v. Atkinson, 6 East, 507. In Peppin v. Cooper, 2 Barn. & Ald. 431, the condition recited an appointment as collector of land taxes under an act of parliament, but the term of appointment was not stated. The condition of the bond was to account for moneys received at all times thereafter. The court held that these words must be construed with reference to the recital and the nature of the appointment therein mentioned; and that inasmuch as the fact that the appointment was an annual one could be learned from the act of parliament under which it was made, it was unnecessary to state that fact, either in the bond or in pleading. These cases are authority for saying that when the appointment is for a definite period fixed by law, a recital of the term in the bond is not necessary to limit the effect of general words ¹⁰ which in themselves would indicate a continuing liability.

The above cases, and others of the same holding, were reviewed by this court in *State Treasurer v. Mann*, 34 Vt. 371, 80 Am. Dec. 688, and it was then considered upon their authority to be perfectly settled that when the appointment is for a limited period, which is recited in the condition of the bond, or, if not recited, is fixed by law, the liability will be confined to the period named in the condition or fixed by law, although the language of the condition is general and unlimited. In that case the delinquent was the director of a bank by whose charter the office was made annual: Acts 1842, p. 107. At his first election he gave a bond conditioned to secure the due performance of his duty as director while he should continue in the office, and gave no bonds when subsequently re-elected. The bond was held to cover the defaults of the first year only. It is sufficient to say that the authorities in this country are entirely in accord with this decision.

Kitson v. Julian, 4 El. & B. 854, covers ground in advance of these cases. In that case, the delinquent was appointed an officer of a private corporation, and gave a bond conditioned to account for all moneys collected by him "from time to time and

at all times so long as he should continue to hold the said office or employment." The bond contained no recital of the period for which he was appointed. The plea averred that the appointment was for one year from a day named. The replication averred that the appointee continued in his employment, with the assent of the defendants and the company, after the expiration of the year. It was held that inasmuch as the condition of the bond recited the appointment, it was to be assumed that the extent of that appointment was known to the signers of the bond, and that they contracted with reference to it. This case is authority for saying that general words will not extend the liability beyond the term of the appointment named in the ¹⁷ recital, although the extent of the appointment is neither given in the recital nor fixed by law.

It is not to be understood, however, that words may not be used in the condition sufficiently specific to extend the liability beyond the time of the original appointment. But to have this effect the words must be such as clearly to indicate that the parties contracted with reference to a further liability. In *Hassell v. Long*, 2 Maule & S. 363, the officer was a collector of taxes imposed by act of parliament, and the condition was to account for moneys received on any tax then imposed or which might thereafter be imposed. The court held that inasmuch as the imposition of further taxes within the year, however improbable, was not impossible, the words employed were not sufficiently clear and certain to extend the liability beyond the current year. But whenever the words clearly indicate that it was the intention of the parties to furnish security for the time the appointee should continue in office without regard to the term of his appointment, they are to be given their full effect. In *Augero v. Keene*, 1 Mees. & W. 390, the condition, after reciting the appointment, held the appointee to an accounting for such moneys as he should receive "from time to time at all times thereafter during such time as he should continue in his said office of collector, whether by virtue of his aforesaid appointment, or of any reappointment thereto." The court considered the liability of the obligors for the entire period to be beyond question. The same effect was given to words of like import in *Oswald v. Berwick-upon-Tweed*, 5 H. L. 856.

It is also held that when the office is by term annual a further provision that the incumbent shall remain in office until his successor is appointed does not take the case out of the rule above presented. In *State Treasurer v. Mann*, 34 Vt. 371, 80 Am. Dec. 688, already cited, it was said that the office was to be

regarded as annual notwithstanding such a provision. In *Welch v. Seymour*, 28 Conn. 387, the articles of association of a ¹⁸ corporation provided that its treasurer should continue in office until the next annual meeting and until another should be elected in his stead. It was held that the office was an annual one, and that the obligation of the bond did not extend beyond the year. In *Dover v. Twombly*, 42 N. H. 59, the incumbent of an annual office held through another year by force of a statutory provision in default of the appointment of a successor. It was held that the bond, although general in terms, was good only for the time for which the principal was appointed. In *Chelmsford Co. v. Demarest*, 7 Gray, 1, it was provided that the treasurer of a corporation should be chosen annually and hold office until the election and qualification of his successor. Here it was said that the obligation of the bond extended to the next annual meeting or the meeting at which the next annual election should be made, and for such reasonable time after that as would enable the successor to complete his qualification, and no further.

The plaintiff does not question the doctrine of these decisions; but it contends that, in view of the statutory provision regulating the tenure of these appointments, it must be considered that the cashier, although appointed for a year and re-elected at the end of the year, was holding his office during the pleasure of the board; and that his various re-elections did not create new terms, but were simply expressions of the will of the directors that he should continue in office.

Much of the reasoning relied upon in support of this contention is derived from *Amherst Bank v. Root*, 2 Met. 522. In that case it appeared from the records of the corporation that the cashier's first appointment was for the year ensuing, and that at the expiration of the year he was again appointed for the year ensuing, after which he continued to serve for several years without reappointment. There was, however, a statutory provision that a cashier should retain his place until removed or until another was ¹⁹ appointed in his stead; and it was considered that although the election was for a year the law made it a continuing office. *Dewey, J.*, dissented on the ground that the appointment having been in fact made for a year, the sureties could not be holden for defaults occurring after the year.

It is said in 1 *Morse on Banks*, section 27, upon the authority of *Amherst Bank v. Root*, 2 Met. 522, that a mere usage of the directors to re-elect every year does not impart to the office the legal character of annual duration, that sureties will not be pre-

sumed to have contracted with reference to such a usage, and that a re-election in pursuance of the usage will not limit the obligation of the bond. But this must be read with a remembrance that in the case under review the court considered that the office was a continuing one by force of the statute.

The controlling effect of the statute upon the disposition of *Amherst Bank v. Root*, 2 Met. 522, is emphasized by a later case. In *Richardson School Fund v. Dean*, 130 Mass. 242, where the statute left with the corporation the right to fix the term of office as it saw fit, it did not appear what the by-laws of the corporation were, but the corporation had for a long series of terms elected its treasurer triennially. It was held that as there was no statute which made the office a continuing one, the reasoning in *Amherst Bank v. Root*, 2 Met. 522, was not applicable; and that the corporation had by its long and uniform practice made the office a triennial one, so that when the defendants made their contract it was with reference to a fixed and limited term.

It is evident that the case of *Amherst Bank v. Root*, 2 Met. 522, if followed, will not be decisive of the case at bar, unless the United States statute is held to have the same effect that was given to the Massachusetts statute. The two provisions are not similar in terms. The federal regulation is simply that the directors may appoint the necessary officials and remove them at pleasure. The only case that has come to our notice in which this provision has been considered is the case of ²⁰ *Harrington v. First Nat. Bank*, 1 Thomp. & C. 361. There a teller, who had been employed for a year, was discharged before the expiration of the year, and sought to recover compensation for the full term. The court held that the appointment was subject to a right of dismissal given the defendant by law. The decision goes no further than the express provision of the statute. As is said in 2 *Morse on Banks*, part 2, section 108 d, the cashier of a national bank cannot be irrevocably appointed for a definite time. It is evident that the further statement in section 109, that a national bank cannot hire its officers for any specified time, was not intended to convey a broader meaning.

The Massachusetts statute contemplated a termination of the incumbency by an act removing or superseding the incumbent, which implied a continuing office. We see nothing in the language of the bank act which requires that a limited appointment under it be treated as of this character. The provision that an officer may be dismissed at pleasure can apply as well to an ap-

pointment limited to a given time as to an appointment for an indefinite period. It does not impliedly prohibit the fixing of a time beyond which the appointment shall not extend. Its effect is simply that the appointment, however made, shall be terminable at the pleasure of the appointing power. An appointment may be made which, if not previously terminated by the action of the directors, will continue for the period designated, and expire by its own limitation. There is nothing in the statute which requires us to hold that this surety contracted with reference to an unlimited period, when the appointment was in terms for a specified time. The cashier's re-election was something more than a meaningless expression of the pleasure of the directors; it was the filling of a vacancy occasioned by the limitation of their previous appointment.

It remains to determine whether the defendant's liability is affected by the provision of the plaintiff's by-law, that the cashier should be appointed to hold his office during the ²¹ pleasure of the board. It is claimed by defendant's counsel that this provision does not contemplate an appointment for an indefinite period; but in disposing of the point stated we shall assume that it does. It thus becomes necessary to consider whether the surety shall be held to have contracted with reference to the term contemplated by the by-law, or the term fixed by the vote of the directors in making the appointment.

The case cannot be put on the ground that the corporation had, by long and uniform practice, made the office an annual one, notwithstanding the provision of its by-law. This bond was given at the cashier's first election, and the case does not show what the previous course of the corporation had been. But, irrespective of any previous action of a similar character, we think the liability of the surety is to be determined with reference to the appointment as made. The case discloses nothing to place the surety in any other position as regards the by-law than that of a stranger; and the doctrine is, that by-laws of this nature are merely provisions for the government of the corporation, that strangers are not bound to know them, and that notice of them will not be presumed: *Morawetz on Private Corporations*, secs. 500, 502, 593. The early decisions to the contrary in New York have been ignored in recent cases: *Rathbun v. Snow*, 123 N. Y. 343. But if the surety were to be held charged with notice of the by-law, we think his liability would not be extended by it. The by-law, and the vote making the appointment, were expressions of the same authority. It is not necessary to consider what the situation may be when the by-law is adopted by one quorum

and the appointment made by another, or when the votes are taken at meetings held upon different notices; for the case does not present these questions. The identical power which made the by-law could formally abrogate it, or ignore it in a particular instance. It was dispensed with for the time being when a vote inconsistent with it was passed; and having been disregarded in limiting the cashier's appointment, it cannot now be invoked to extend the liability of his surety.

The instrument in question in this suit is in form a bond, but without seals. Such an instrument is a valid contract obligation, if executed upon a sufficient consideration and delivered to take effect as security: *United States v. Linn*, 15 Pet. 290.

Judgment reversed and cause remanded.

OFFICERS—OFFICIAL BONDS—WHEN LIABILITY THEREUPON TERMINATES.—When the office is in fact annual, although not so recited in the bond, still the bond only covers the official acts of the year for which it was given: Monographic note to *Crawn v. Commonwealth*, 10 Am. St. Rep. 859; *Wapello County v. Bigham*, 10 Iowa, 39; 74 Am. Dec. 370, and note; *Moss v. State*, 10 Mo. 338; 47 Am. Dec. 116. A preponderance of authority holds that the sureties on an official bond for a particular term of office, cannot have their liability continued indefinitely by the failure of the successor of their principal to qualify: Monographic note to *Crawn v. Commonwealth*, 10 Am. St. Rep. 856.

OFFICERS—OFFICIAL BONDS—VALIDITY OF.—For a consideration of informalities which do not invalidate official bonds, see extended note to *Whitehurst v. Hickey*, 15 Am. Dec. 170-172. See, also, monographic note to *People v. Hartley*, 82 Am. Dec. 760-764, on official bonds, when valid and when void.

CAMP v. WARD.

[69 VERMONT, 286.]

JUDGMENTS—RELIEF IN EQUITY.—The acts for which a court of equity may, on account of fraud, set aside or annul a judgment at law between the same parties have relation only to fraud, extrinsic or collateral to the matter tried by the first court, and not to fraud in the matter on which the judgment was rendered.

JUDGMENTS—RELIEF IN EQUITY.—A court of equity will not set aside a judgment at law because it was founded on a fraudulent instrument or perjured testimony, nor for any matter that was actually presented and considered in the judgment assailed.

JUDGMENTS—RELIEF IN EQUITY—BILL OF DISCOVERY. A bill in equity seeking to set aside a judgment at law between the same parties, on the ground that it was based upon perjured testimony, cannot be sustained as a bill of discovery, for the reason that the judgment is conclusive that the complainant has no interest in the matter concerning which discovery is sought.

J. W. Gordon and R. A. Hoar, for the appellant.

J. P. Lamson and E. W. Bisbee, for the appellees.

²⁸⁷ ROWELL, J. The question arises on demurrer to a bill for relief from a judgment rendered on a verdict obtained by perjury in a suit in favor of the defendants against the orator for false warranty of the title of a horse that he sold ²⁸⁸ to them at sheriff's sale on an execution against McKane. The main issue tried in that case was, as alleged in the bill, whether McKane's wife bought and owned the horse, and whether Mann Brothers acquired a legal title thereto by purchase from her. She testified that she bought the horse with money that she inherited from her father's estate, and sold it to Mann Brothers. This testimony both surprised and defeated the orator, and when it was too late to petition at law for a new trial, he discovered and can prove that it was wholly and purposely false. But the bill does not implicate the defendants in the fraud otherwise than by alleging that the orator is informed and believes that Mann Brothers were in collusion and fraudulent combination and conspiracy with McKane and his wife and the defendants to defraud and defeat him in that suit, and that Mann Brothers and the defendants knew, or ought to have known, that Mrs. McKane's testimony was knowingly and purposely false. But the allegation on information and belief is obviously not sufficient to implicate the defendants; and the allegation that they knew, or ought to have known, charges neither with certainty, and if the demurrer is taken as admitting the averment, it can at most be said that they ought to have known but did not, for as here is an equipoise, no intendments on demurrer are to be made in favor of the pleader's case that do not naturally result from the allegation: Story's Equity Pleading, Redfield's ed., sec. 452 a; Simpson v. Fogo, 6 Jur., N. S., 949.

There was, then, no subornation of perjury by the defendants, nor even knowledge on their part that the testimony was false, and it was relevant to the main issue tried, which was decided against the orator, who had his day in court.

It is said in *Burton v. Wiley*, 26 Vt. 430, that the early English cases, and some of the American cases, go upon the ground that a bill will be entertained for a new trial in an action determined at law upon much the same grounds that ²⁸⁹ new trials are granted at law, when the courts of law have no means of granting such trials, either for want of authority or from lapse of time; but that in this state the rule has been established on a much narrower basis, and that the party must have failed of obtaining redress in the suit at law by the fraud of the other party or by inevitable accident or mistake without fault on his part

or that of his attorney. This is said to be the doctrine of the best considered and more recent cases. It is not enough to show that injustice has been done; it must appear that it was done in circumstances that authorize a court of equity to interpose—that afford ground of equity jurisdiction: *Bateman v. Willoe*, 1 Schoales & L. 201. But surprise is not such a ground, unless accompanied with fraud and circumvention: *McDaniels v. Bank of Rutland*, 29 Vt. 230; 70 Am. Dec. 406. Nor is the lapse of the statutory period for petitioning at law for a new trial: *Burton v. Wiley*, 26 Vt. 430.

The maxim that fraud vitiates every proceeding must be taken to apply to cases in which proof of fraud is admissible. But when the same matter has been actually tried, or was so in issue that it might have been tried, it is not again admissible, for the party is estopped to set up such fraud, as the judgment is the highest evidence and cannot be contradicted: *Shaw, C. J.*, in *Greene v. Greene*, 2 Gray, 361, 366; 61 Am. Dec. 454.

The acts for which a court of equity will, on account of fraud, set aside or annul a judgment or a decree between the same parties, rendered by a court of competent jurisdiction, have relation to fraud extrinsic or collateral to the matter tried by the first court, and not to fraud in the matter on which the judgment or the decree was rendered. This is the precise point ruled in *United States v. Throckmorton*, 98 U. S. 61. This rule is based upon the maxims that it is for the public good that there be an end of litigation, and that a man shall not be twice vexed for one and the same cause. The court there says that when, by reason of something done by the successful party to the suit, there was in fact no ²⁹⁰ adversary trial nor decision of the issue in the case, equity will grant relief; but that it is well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument or perjured testimony, nor for any matter that was actually presented and considered in the judgment assailed. This has long been the settled doctrine in this state. Thus, in *Emerson v. Udall*, 13 Vt. 477, 483, 37 Am. Dec. 604, it was said that, notwithstanding some early cases to the contrary, it was then well settled that a court of equity will not examine into the foundation of a judgment of a court of law upon any ground that either was, or might have been, tried in such court, but that equity will sometimes grant relief when a party, by accident or mistake without his own fault, or by the fraud of the other party, has failed of an opportunity to present his case, and also when his defense is purely of an equitable character, and there-

fore could not avail at law. Beyond this, the court said, it was not aware of any good ground on which equity could enjoin a judgment at law, although cases were to be found, but not of very high authority, that have gone somewhat farther.

So in *Fletcher v. Warren*, 18 Vt. 45, it is said that the fact that a judgment at law has worked injustice between the parties is not, of itself, enough to authorize a court of equity to grant relief, for suggestions of injustice can always be made, and if it was competent for equity to interpose on such grounds alone, no determination at law would ever be final; that it would, moreover, be a manifest repugnancy in any system of jurisprudence that the decisions of one ultimate and final jurisdiction should be subject to the revision and correction of another; that therefore it is only on collateral grounds, not passed upon by the court of law, that a court of equity can proceed in such cases, and then it acts upon the conscience of the party in fault, and not upon the court of law; and hence that it is usual to allege and show that the party seeking relief has a just defense, of which, through the fraud or wrongful act of the other party, he was unable to avail himself at the trial.

²⁰¹ *Pico v. Cohn*, 91 Cal. 129, 25 Am. St. Rep. 159, is a very strong case to the same effect. It decides that neither a judgment nor a decree will be set aside in equity on account of any fraud that is not extrinsic or collateral to the question examined and determined in the original action, and that a fraud is not extrinsic or collateral within the meaning of the rule, unless it prevents the party from having a trial. There the successful party bribed a witness to swear falsely, and it was claimed that the bribery was the fraud, and as it was not, and could not have been, the subject of investigation at the trial, it was extrinsic and collateral, and brought the case within the rule. But the court held that the production of the perjured testimony was the fraud, and that the means by which the witness was induced to swear falsely was but an incident.

In a note to that case Mr. Freeman says there is little or no doubt of the truth of the proposition there stated, but he thinks that subornation of perjury is an extrinsic or collateral fraud within the meaning of the rule, and ought to be held such; but he does not intimate that the credibility of testimony relevant to the issue tried is extrinsic or collateral, as it clearly is not: *Herman on Estoppel and Res Judicata*, sec. 394. See monographic note to *Oliver v. Pray*, 19 Am. Dec. 603, on the power of a court of equity to relieve from judgments at law.

If the bill can be treated as a bill of discovery concerning the supposed chattel mortgage of the horse from McKane to Mann Brothers, it cannot be sustained as such, for the orator has no title nor interest in the matter respecting which discovery is sought, as the judgment at law finally and conclusively settles that matter against him.

Although the demurrer is only to the amendment of the bill, it was treated in argument as being to the whole bill, and hence we have so treated it.

Decree affirmed and cause remanded.

JUDGMENTS—RELIEF FROM IN EQUITY—WHEN OBTAINABLE.—Equity has jurisdiction to set aside a former judgment for fraud only in those cases where the perjury or fraud consists of extrinsic collateral acts, not examined and determined in the former action: *Friese v. Hummel*, 26 Or. 145; 46 Am. St. Rep. 610. See monographic note to *Pico v. Cohn*, 25 Am. St. Rep. 165-171; *Colby v. Colby*, 59 Minn. 432; 50 Am. St. Rep. 420; monographic note to *Oliver v. Pray*, 19 Am. Dec. 603-612, on the power of equity to relieve against a judgment of law; and monographic note to *Little Rock etc. Ry. v. Wells*, 54 Am. St. Rep. 218-261, thoroughly discussing the question.

LORD v. BUCHANAN.

[69 VERMONT, 320.]

JUDGMENT IN TRESPASS AS BAR—GENERAL AND SPECIAL OWNER.—A special owner in possession of personalty may recover in trespass or trover its full value and damages against a stranger who has unlawfully removed and converted it. Such recovery is a bar to an action of the same nature by the general owner, as the first recovery is for his benefit to the extent of his interest.

T. R. Gordon and G. W. Wing, for the appellants.

F. J. Martin, for the appellee.

³²¹ **TYLER, J.** The plaintiffs sold a stove to a Mrs. Harroun by the following contract:

“Berlin, Vt., Sept. 27th, 1894.

“For value received I promise to pay Lord, Stone & Co., or bearer, the first day of November, February, May, and August next, thirty-two dollars with interest. The consideration of this note is one model crown portable cooking range which I have received of said Lord, Stone & Co; nevertheless, it is understood and agreed between the undersigned and said Lord, Stone & Co. that the title of the above-mentioned property does not pass to me, and until this note is paid the title to the aforesaid property

shall remain with the said Lord, Stone & Co., who shall have the right, in case of nonpayment at maturity of said note without process of law, to enter and retake, and may enter and retake immediate possession of said property wherever it may be and remove the same

“MRS. J. HARROUN.”

The defendant, as a public officer, in the foreclosure of a chattel mortgage against the vendee's husband, entered her dwelling-house, took the stove, and duly advertised and sold it, the plaintiffs and the vendee making known to the defendant their respective claims and forbidding the sale.

The vendee sued the defendant in trespass for breaking and entering the dwelling-house, converting the stove to his use and depriving her thereof. Judgment was rendered for her to recover the value of the property and special damages, and no exception was taken. This suit was brought a few days later, is in trespass and trover, and special damages are alleged for that “the plaintiffs were for a long time prevented from transacting their necessary business and were put to great trouble and expense in being deprived of the stove.”

During the trial the defendant conceded that the stove in controversy was not the one included in the mortgage, and did not seek to justify the taking.

³²² The plaintiffs claim that they held the title to the stove, and, as there was an overdue payment, that they were entitled to the possession; that the taking was an invasion of their right for which they should have at least nominal damages.

The vendee had possession of the property and an interest in it, and was entitled to recover the full value thereof and her damages: *Harker v. Dement*, 52 Am. Dec. 670, and notes; *White v. Bascom*, 28 Vt. 268. It is said in the latter case that naked possession is sufficient against all the world except him who has a superior title, and that where the suit is brought by the special owner, the law presumes it is by consent of the general owner, who alone can interfere, and that what is recovered by the special owner above his interest is held by him in trust for the general owner.

The question is, whether the plaintiffs can recover the damages which they suffered in consequence of the defendant's wrongful act. The rule is, that to entitle a plaintiff to maintain trespass or trover, he must, at the time of the taking, have either the actual possession, or the title, with the right of present possession: *Hurd v. Fleming*, 34 Vt. 169. This rule is stated in

substance in 1 Chitty on Pleading, 48, and it is there said that though the action may be brought by the general or special owner against a stranger, yet both actions cannot be supported at the same time, and that when the general owner has not the right of immediate possession, as where he has demised goods for a term, he cannot maintain trespass or trover even against a stranger; though if the injury were sufficient to affect his reversionary interest he may support a special action on the case; and a recovery in an action by the party having a possessory interest would be no bar to an action for an injury to the reversionary interest.

In this case, the plaintiffs cannot recover the special damages found by the trial court for the reason that they are not declared for. They in fact only claim nominal damages, which would be for the unlawful taking of the ³²³ property. For this they can have no recovery for the reason that the plaintiff in the other suit has had a full recovery upon this ground, and there cannot be two recoveries for the same taking.

If the plaintiffs had the right to repossess themselves of the property by reason of the vendee's failure to make payment, they waived that right and assented to the vendee's possession and suit, and cannot recover in this action.

Judgment affirmed.

TROVER—WHO MAY MAINTAIN.—Plaintiff, to recover in an action of trover, must prove general or special property in himself and a right of possession at the time of the conversion, a conversion by the defendant, and the value of the property: *Danley v. Rector*, 10 Ark. 211; 50 Am. Dec. 242, and note; *Union etc. Co. v. Mallory etc. Co.*, 157 Ill. 554; 48 Am. St. Rep. 341; extended note to *Hostler v. Skull*, 1 Am. Dec. 585-589.

TRESPASS—WHO MAY MAINTAIN.—The possessor of property may maintain trespass against a mere wrongdoer without showing the extent of his right: *Potter v. Washburn*, 13 Vt. 558; 37 Am. Dec. 615; *Barron v. Cobleigh*, 11 N. H. 557; 35 Am. Dec. 505, and note. See *Pullman Palace Car Co. v. Gavin*, 93 Tenn. 53; 42 Am. St. Rep. 902; and monographic note to *Orser v. Storms*, 18 Am. Dec. 546-560.

JUDGMENTS—WHO BOUND BY.—Judgments and decrees bind parties and privies only, and privity exists only where there is identity of interest: *Winston v. Westerfeldt*, 22 Ala. 760; 58 Am. Dec. 278. See *Emery v. Fowler*, 39 Me. 326; 63 Am. Dec. 627, and note; note to *Hill v. Bain*, 2 Am. St. Rep. 878.

STATE v. SHATTUCK.

[69 VERMONT, 403.]

MARRIAGE—RESTRICTIONS UPON—PRESUMPTION—BURDEN OF PROOF.—Restrictions upon marriage or remarriage are exceptional, and not to be presumed, and one relying upon such restriction has the burden to show its existence.

MARRIAGE FORBIDDEN AFTER DIVORCE—VALIDITY OF, IF CONTRACTED OUTSIDE OF STATE.—One divorced in one state and forbidden by the statute of that state to remarry, may remarry in another state whose laws contain no such restriction, and such remarriage must be recognized as valid in the state where the divorce was obtained, although both parties to the remarriage were residents of, and domiciled in, the latter state both before and immediately after such marriage was solemnized.

MARRIAGE PROHIBITED AFTER DIVORCE—VALIDITY IF ENTERED INTO OUTSIDE OF STATE.—If a statute, silent as to marriage outside the state, prohibits classes of persons from marrying generally, or from intermarrying, or declares void all marriages not celebrated according to prescribed forms, it has no effect upon marriages, even of domiciled inhabitants, entered into out of the state. If such marriages are valid by the international law of marriage and the local law of the place where celebrated, they are valid by the law of the state whose statute contains such restrictions.

MARRIAGE—VALIDITY OF, CONTRACTED EXTRATERRITORIALLY.—Parties who are under no disability by international law may choose their place of marriage, and, if the marriage is valid there, it is valid everywhere, though they were purposely away from home, and the same transaction in the state of their domicile would not have constituted a valid marriage.

MARRIAGE AFTER DIVORCE.—STATUTES PROHIBITING marriage after divorce are not extraterritorial in their effect, unless made so by express words or necessary implication.

W. B. C. Stickney, for the appellant.

J. G. Harvey, state's attorney, and W. W. Stickney, for the state.

405 ROWELL, J. The charge is, that the prisoner, an unmarried woman, committed adultery with Coburn, a married man. It appeared that Coburn's first wife, who is still living, obtained a divorce from him in this state in December, 1895; that on June 13, 1896, he and Grace Hoisington, both of whom were then domiciled in Windsor, in this state, went to Claremont, New Hampshire, and were there married by a clergyman authorized by the law of that state to solemnize marriages; and that immediately after the marriage they returned to Windsor, where they have lived ever since, and where they first cohabited as husband and wife, never having cohabited as such in New Hampshire.

The only evidence of the law of New Hampshire respecting marriages was chapter 174 of the Public Statutes of that state,

entitled, "Marriages." That chapter imposes no restraint upon remarriage by the guilty party to a decree of divorce.

The court charged the jury that if it found that the marriage ceremony was performed by the clergyman, and that he was authorized to perform it, as his testimony tended to show, and also found that the said Grace cohabited with Coburn under the belief that the marriage was legal, as her testimony tended to show, the marriage was valid, and Coburn was a person with whom the crime of adultery could have been committed. To this the prisoner excepted; and, also, for that the court did not charge that there was no evidence in the case to show that Coburn, being disqualified by the laws of this state to ⁴⁰⁶ contract a lawful marriage, was, notwithstanding such disqualification, competent by the laws of New Hampshire to contract a lawful marriage, and that without such testimony the fact of his marriage to said Grace was not made out.

This last exception is not sustainable. As we have said, the chapter of the New Hampshire statutes put in evidence is not restrictive in this behalf; and if it be said that some other part of the statutes may be, the answer is, that as such restrictions upon marriage are exceptional, the burden was on the prisoner to show the restriction, if any there is: *Hutchins v. Kimmell*, 31 Mich. 126, 132; 18 Am. Rep. 164. And as no such restriction exists in the common law of this state, the presumption is, that the common law of New Hampshire is like ours in this regard: *Ward v. Morrison*, 25 Vt. 593, 601.

The marriage in question must, therefore, be taken to be valid by the law of New Hampshire. But had it been celebrated in this state, it would have been void here, for our statute provides that it shall not be lawful for a divorced libelee to marry a person other than the libelant for three years from the time the divorce is granted, unless the libelant dies, and imposes a penalty on a person who violates that provision, or lives in this state under a marriage relation forbidden by it; and we have recently held that a marriage celebration in this state in violation thereof, between parties domiciled here, was void here: *Ovitt v. Smith*, 68 Vt. 35.

The prisoner claims that this marriage is void here notwithstanding it was celebrated in New Hampshire and is valid there, for that when a marriage is absolutely prohibited in a state or country as being contrary to public policy and leading to social evils, the domiciled inhabitants of that state or country cannot be permitted, by passing the frontier and entering another state

in which the marriage is not prohibited, to celebrate a marriage forbidden in their ⁴⁰⁷ own state, and immediately return to their own state, to insist on their marriage being recognized as lawful.

It is the common law of christendom that, as to form and ceremony, a marriage good where celebrated is good everywhere. But as to capacity to marry, the authorities are not agreed, some holding that, as in other contracts, it depends upon the law of domicile, and some that it depends upon the law of the place where the marriage is solemnized, as do form and ceremony, and that a marriage good where celebrated is good everywhere, unless odious by the common consent of nations, or positively prohibited by the public law of a country from motives of policy. It is undoubtedly true that states may control this matter by statute, as Massachusetts does, where it is enacted that when persons resident in that state, in order to evade its marriage laws, and with an intention of returning to reside there, go into another state or country and are married, and afterward return and reside in Massachusetts, the marriage shall be deemed void.

We have no such express provision. The language of our statute is general, and it is a fundamental rule that no statute, whether relating to marriage or otherwise, if in the ordinary general form of words, will be given effect outside of the state or country enacting it. To bind even citizens abroad, it must include them, either in express terms or by necessary implication. Hence if a statute, silent as to marriages abroad, as ours is, prohibits classes of persons from marrying generally, or from intermarrying, or declares void all marriages not celebrated according to prescribed forms, it has no effect upon marriages, even of domiciled inhabitants, entered into out of the state. Those marriages are to be judged of by the courts of such state just as though the statute did not exist. If they are valid by the international law of marriage and the local law of the place where celebrated, they are valid by the law of such state, and the statute has nothing to do with the question, ⁴⁰⁸ if such international law is a part of the law of the state, as it is here, for a written law not construed to be extraterritorial does not change the unwritten law as to extraterritorial marriages; and therefore parties who are under no disability by international law may choose their place of marriage, and, if the marriage is valid there, it will be valid everywhere, though they were purposely away from home, and the same transaction in the state of their domicile would not have made them married. There is, therefore, no foundation for an argu-

ment based simply on the idea of an evasion of the law of domicile.

This doctrine is entirely applicable to statutes prohibiting marriage after divorce. Such statutes are not extraterritorial, unless made so by express words or necessary implication, as has been frequently held in this country, though there are cases the other way, among which is the recent and well-considered case of *Pennegar v. State*, 87 Tenn. 244, 10 Am. St. Rep. 648, where the cases adopting the same view will be found. But the weight of American authority, as well as reason and analogy, sustain the proposition stated.

This whole subject is very fully and satisfactorily discussed by Mr. Bishop in chapter 39 of the first volume of his work on Marriage, Divorce, and Separation; and as we adopt his views, an extended discussion here is not necessary. The subject is also fully discussed in *Commonwealth v. Lane*, 113 Mass. 458, 18 Am. Rep. 509, and *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321. In the latter case it is said that the relation of husband and wife being based upon the contract of the parties and recognized by all christian nations, the validity of the contract, if not polygamous nor incestuous according to the general opinion of christendom, is governed, even as regards the capacity of the parties, by the law of the place of marriage; that this status, once legally created, should be recognized everywhere as fully as if created by the law of the domicile, and that therefore such a marriage, if valid by the law of the place ⁴⁰⁹ where contracted, even if contracted between persons domiciled in Massachusetts and incompetent to marry there, is valid there to all intents and effects, civil and criminal, except so far as the legislature has clearly declared that such a marriage out of the commonwealth shall be deemed invalid.

The same doctrine is held in *Van Voorhis v. Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505, where it is said that, in the absence of express words to that effect, it is not to be inferred that the legislature intended its enactments to contravene the *jus gentium* under which the question of the validity of the marriage contract is referred to the *lex loci contractus*, and which is made binding by the consent of all nations, and professedly and directly operates upon all, and that, while every country can regulate the status of its own citizens, until the will of the state finds clear and unmistakable expression to the contrary, that law must control. Judge Marshall says in *United States v. Fisher*, 2 Cranch, 386 that: "Where rights are infringed, where fundamental prin-

ciples are overthrown, where the general system of the law is departed from, the legislative intent must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects."

Brook v. Brook, 9 H. L. Cas. 193, sustains the prisoner's contention. There a man and his deceased wife's sister, both of whom were lawfully domiciled British subjects, went temporarily to Denmark and were there married, where their marriage was valid; but it was held void in England, because an English statute prohibited such marriages. The law lords delivered separate opinions, and the only ground upon which they agreed was, that as the statute made such marriages between English subjects domiciled in England void because declared by the act to be contrary to the law of God, it must be construed to include such marriages though solemnized abroad. Judge Gray says, in *Commonwealth v. Lane*, 113 Mass. 458, 18 Am. Rep. 509, that the ⁴¹⁰ judgment in that case proceeds upon the ground that an act of parliament is not merely an ordinance of man, but a conclusive declaration of the law of God; and that the result is that the law of God, as declared by act of parliament and expounded by the house of lords, varies according to time, place, length of life of parties, pecuniary interests of third persons, petitions to human tribunals, and technical rules of statutory construction and judicial procedure.

Mr. Bishop criticises the case very sharply, and says it is of the highest importance that it be sufficiently understood in this country to avoid any accident of its being followed by our courts. He discusses it very fully, admitting that it was difficult for him to write soberly about it, as the decision was announced in apparent oblivion of the course that justice had taken for ages in England, and ignored alike acts of parliament and judicial decisions. To follow it, he says, would lead us into a confusion not to be endured where marriage, good order, and christian decency are respected.

The French law is much like the English in this regard, though more exacting. By the Code Napoleon, a marriage contracted in a foreign country between French people, or between a French person and an alien, is valid if it has been celebrated in the manner followed in such country, provided it has been preceded by the publication required by the code, and provided the French person has not violated the provisions of the code concerning the qualifications and conditions required to contract marriage: *Cachard's French Civ. Code*, art. 170.

This accords with the further provision of the code, that laws relating to the status and capacity of persons apply to Frenchmen even resident in a foreign country: *Cachard's French Civ. Code*, art. 3. On this principle the civilians generally, we think, hold that as to capacity to marry, the law of the domicile governs.

But the other view, as suggested by Judge Story, is founded upon a more liberal basis of international policy that ⁴¹¹ deems it far better to support as valid marriages celebrated in another state or country when in conformity with the laws thereof, although some minor inconveniences may arise therefrom, than to shake general confidence in such marriages, to subject the innocent issue to constant doubts as to their legitimacy, and to leave the parties themselves at liberty to cut adrift from their solemn obligations whenever they happen to become dissatisfied with their lot: *Story on Conflict of Laws*, pl. 124.

Judgment that there is no error in the proceedings of the county court, and that the prisoner take nothing by her exceptions.

Validity of Marriages Contracted by Residents of a State or Country in Violation of its Laws, but Beyond its Boundaries.

Nearly all of the cases involving the question of the validity of a marriage contracted by the residents of a state or country in violation of its laws, while the contracting parties are beyond its territory, have arisen under provisions of divorce laws prohibiting the guilty party to the judgment of divorce from marrying again, either for a certain period or while the other party to the former marriage lives. It is almost universally conceded that statutes of this nature are in no sense extraterritorial, and that they are without effect outside of the territorial limits of the prohibiting state, even though the terms of the statute may be special: *Van Voorhis v. Brintnall*, 86 N. Y. 18; 40 Am. Rep. 505; *Moore v. Hegeman*, 92 N. Y. 521; 44 Am. Rep. 408; *Succession of Hernandez*, 46 La. Ann. 962-992; *Phillips v. Madrid*, 83 Me. 205; 23 Am. St. Rep. 770; *Wilson v. Holt*, 83 Ala. 528; 3 Am. St. Rep. 768-775.

Undoubtedly, a state may provide by statute that marriages between persons domiciled in a state, and who leave it for the purpose of contracting marriage elsewhere to evade its laws, but intending to return and live therein, shall be invalid; and if a state has enacted legislation declaratory of the effect of marriages extraterritorially of its citizens, who by such marriages seek to evade its positive policy and penal laws, the declaratory statute affords the rule of decision: *State v. Tutty*, 41 Fed. Rep. 753.

The rule established by the great weight of authority undoubtedly is, that a marriage good and valid by the laws of the state or country where it is entered into, is valid in every other state or country, although it appears that the parties thereto went into another state or country to contract such marriage with an

express view to evade the laws of their own country, the marriage in the foreign country or state must nevertheless be held valid in the country from which they departed for the purpose of marrying and to which they returned to live. This rule does not extend to legalize incestuous or polygamous marriages thus contracted, nor could it be extended to any marriage the parties to which were prohibited from marrying by the terms of the general and universal law of nations. This principle applies to cases arising outside of the provisions of state divorce laws, as well as to those which are within them: *Medway v. Needham*, 16 Mass. 157; 8 Am. Dec. 131; *Putnam v. Putnam*, 8 Pick. 433; *Ponsford v. Johnson*, 2 Blatchf. 51; *Plugnet v. Phelps*, 48 Barb. 566; *Dannelli v. Dannelli*, 4 Bush, 51; *Estate of Webb*, 1 Tuck. 372. In *Ross v. Ross*, 129 Mass. 243-247, 37 Am. Rep. 321, Gray, C. J., said: "The relation of husband and wife being a status based upon the contract of the parties and recognized by all christian nations, the validity of that contract if not polygamous, nor incestuous according to the general opinion of christendom, is governed, even as regards the competency of the contracting parties, by the law of the place of the contract: and this status, once legally established, should be recognized everywhere as fully as if created by the law of the domicile, and, therefore, any such marriage, valid by the law of the place where it is contracted, is, even if contracted between persons domiciled in this commonwealth and incompetent to marry here under our laws, except so far as the legislature has clearly enacted that such marriages out of the commonwealth shall be deemed void here, valid here, to all intents and effects, civil or criminal, including the settlement of the wife and children, her right of dower, and their legitimacy and capacity to inherit the father's real estate." The same principle was recognized in *Van Storch v. Griffin*, 71 Pa. St. 240-244, where the court said: "Even if the plaintiff and defendant had been residents of the state of New York, and had come into Pennsylvania and been married here, with the express purpose of evading the law of New York, and had then returned and continued to reside there, the marriage would have been recognized and treated as valid by the courts of that state."

A marriage celebrated in Tennessee between a nephew and his uncle's widow, not prohibited by the laws of that state, must be held valid in Kentucky, though void if it had been celebrated therein, and though the parties were thus married to evade the law of the latter state, to which they returned and lived subsequent to such marriage: *Stevenson v. Gray*, 17 B. Mon. 193. "The confusion and uncertainty with regard to the legitimacy of children, and the rights of property and succession, are not the only evils which would follow if the validity of a marriage were subject to be tried by the various laws to which the parties might at different times be personally subject. The fact that they have lived together as man and wife under a marriage actually and legally constituting that relation is in itself a most weighty consideration for giving effect in the case of marriage to the *lex loci contractus*, although its protection may have been sought for the single purpose of evading the law of the domicile to which the parties had been sub-

ject, and to which they intended again to subject themselves by a return to their domicile. Hence it has been decided repeatedly, both in England and America, that marriages celebrated in a neighboring country, which would have been illegal if celebrated at home, are there deemed valid, if they were legal at the place of celebration. Legislators have shown an unwillingness to require, or even to authorize, the disruption of a tie formed under such circumstances, by declaring it to be void, because, being made in fraud or evasion of the law of the domicile, it may or should be regarded as if made under that law. Much more tender should a court be in bringing to the test of the domestic law, and for the purpose of vindicating its authority, a marriage lawful where it was consummated, and the condemnation of which, while not expressly required by the domestic law, must, if it produce no more distressing consequences, degrade the parties themselves by depriving their connection of the legal sanction with which they intended and supposed it to be invested, and must shame the community itself and shock its moral sense by convicting it of having witnessed and countenanced a meretricious union and cherished in honor the guilty parties. It would confound the sense of right and wrong on a subject on which it is most important that it should be kept pure and distinct, if a marriage, lawful in Tennessee so long as the parties chose to remain there should become unlawful by their crossing the line into Kentucky, or if such a marriage, after being countenanced in this state for years, could be avoided as illegal and void from the beginning. And the result would be still more repugnant to the feeling and sense of justice of society if a marriage, not forbidden by the law of nature, clothed with the forms and solemnities required by law, followed by the birth of children, maintained in purity for years, and countenanced by the respect of society, could, after the death of one of the parties, be declared to have been from the beginning unlawful and void. Certainly, no support of a decision producing such a result can be found in the principles of the common law, and no court acting under its principles has yet made itself the instrument, without the express mandate of the statutory law, of thus desecrating the memory of the dead, and degrading the character of the living party. And we think it may be asserted that no court ever has gone, or ever will go, beyond the enactments of the legislature, either in annulling or in declaring or treating as null any marriage valid where it was celebrated, unless it be on the ground of polygamy, condemned not only by the municipal law, but by the concurrent sentiment of all christendom, or on the ground of incest, condemned by the law of nature, as indicated by the common sentiment of civilized and christian men. We should not feel authorized, therefore, to pronounce this marriage void, and incompetent to confer the rights which, under our laws, are consequent upon a valid marriage, merely because, though celebrated in Tennessee, it may have been celebrated in fraud or evasion of our law, even though it were certain that we could now so declare and treat it if it had been a domestic marriage. The case is not one in which the court is to decide whether it will enforce or prevent the execution of a contract, but to say that a marriage, lawful where it was

actually celebrated, continued or sustained in this state for years without objection, until, by the death of one of the parties to it, it is actually terminated, shall now be treated as a nullity because it was an evasion of our prohibitory law. We should not consider ourselves at liberty so to treat it": *Stevenson v. Gray*, 17 B. Mon. 212-214. In the case of *Van Voorhis v. Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505, it was held that the validity of a marriage contract is to be determined by the law of the state where it was entered into, and, if valid there, it is to be recognized as such in the courts of a sister state unless contrary to the prohibitions of natural law, or the express prohibition of a statute. In the case cited, a divorce had been granted to the wife on the ground of the husband's adultery, and it was decreed, under authority of the statute, that it should not be lawful for him to marry again until after her death. Subsequently, and during her lifetime, he took another woman, also a resident of the state of his domicile, and went to Connecticut, and, to evade the statutory prohibition contained in such decree, there married her and immediately returned and thereafter lived in New York. No such prohibition was imposed by the statute of Connecticut. The marriage was valid there, and the decision was that the marriage, being valid there, must be held valid in New York, and that a child born of such marriage was legitimate and entitled to inherit its parents' property: *Van Voorhis v. Brintnall*, 86 N. Y. 18; 40 Am. Rep. 505; followed in *Moore v. Hegeman*, 92 N. Y. 521; 44 Am. Rep. 408, where it appeared that the divorced man under such prohibition remarried in New Jersey, and then returned and resided in New York. In the case of *Thorp v. Thorp*, 90 N. Y. 602, 43 Am. Rep. 189, it appeared that a party, prohibited by a decree of divorce rendered in New York from remarrying during the other party's life, went into another state, for the purpose of evading the decree and there married a resident of New York during the life of the other divorced party, and then returned to that state, and it was held that the marriage in such other state was valid in New York notwithstanding the prohibition, and that the prohibited party might maintain an action of absolute divorce for the adultery of the other party to the second marriage. A similar doctrine was maintained in *Commonwealth v. Lane*, 113 Mass. 458, 18 Am. Rep. 509-521, where the court said: "The provisions of the General Statutes, chapter 107, section 25, forbidding the guilty party to a divorce to contract another marriage, during the life of the other party, without leave of court, on pain of being adjudged guilty of polygamy, does not create a permanent incapacity, like one arising for consanguinity or affinity. It is rather in the nature of the imposition of a penalty to which it would be difficult to give any extraterritorial operation. Upon the principles and authorities stated in the earlier part of this opinion, it certainly cannot invalidate a subsequent marriage in another state according to its laws at least without proof that the parties went into that state and were married there with intent to evade the provisions of the statutes of this commonwealth." To the same effect are *Crawford v. State*, 73 Miss. 172; *Phillips v. Madrid*, 83 Me. 205; *Ponsford v. Johnson*, 2 Blatchf. 51; *Commonwealth v. Lane*, 113 Mass. 458; 18 Am. Rep. 509-521. In a late case in Massachusetts (*Commonwealth v. Graham*, 157 Mass. 73, 34 Am. St. Rep. 255), it was decided that

a marriage contracted outside of that state, if valid where contracted, was valid there, although the parties thereto intended to evade the Massachusetts statute unless the latter expressly declared such marriage void, or it was contrary to the law of nature as generally recognized in christian countries. It would seem that a marriage made outside of Massachusetts by residents thereof for the purpose of evading her laws must be deemed void within that state in so far as parties contracting such marriage come within the expressed terms of the statute. Section 10 of chapter 145 of the Public Statutes of Massachusetts provides that: "When persons resident of this commonwealth, in order to evade any of the provisions of the first five sections of this chapter, and, with an intention of returning to reside in this commonwealth, go into another state or country and there have their marriage solemnized, and afterward return and reside here, the marriage shall be deemed void in this commonwealth." This statute may have been passed to clear away the doubt left by the case of *Commonwealth v. Lane*, 113 Mass. 458, 18 Am. Rep. 509, as to what would be the effect if it were shown that a party, prohibited by divorce from marrying again, went with another resident of the state and was there married simply to evade the law of their domicile. At any rate, the statute now provides that such a marriage shall be deemed void in the state granting the divorce and imposing the prohibition: Mass. Pub. Stats., c. 145, secs. 4, 10.

There are a few cases directly opposed to the doctrine of the cases already cited in this note. The first of them is the case of *Williams v. Oates*, 5 Ired. 535, wherein it was held that when a husband obtains a divorce from his wife under laws which prohibit her from marrying again and she, together with another resident of the state, goes into another state, and they are there married to evade the law of their residence, and then return and reside in the state where the divorce was granted, the second marriage must be deemed, in that state, null and void for all purposes, although valid in the state where it was contracted.

In *Pennegar v. State*, 87 Tenn. 244, 10 Am. St. Rep. 648, it appeared that, under the Tennessee statute, a marriage between the guilty husband or wife after a divorce for adultery and the person with whom the crime was committed, is prohibited during the life of the former consort, and it was there held that if the contracting parties in such case, being citizens and residents of Tennessee, withdraw temporarily to another state, and there married for the purpose and with the intent of avoiding the statute in question enacted in pursuance of a settled policy of the state in the interest of public morals, peace, and the good order of society, such marriage was void in Tennessee, though valid in the state where celebrated.

In *Estate of Wilbur*, 8 Wash. 35, 40 Am. St. Rep. 886, the broad principle is laid down that a marriage prohibited by statute is invalid, though contracted in a place where the statute is not in force, if the contracting parties went beyond the state of their domicile to contract their marriage for the purpose of avoiding the prohibition. This rule has been applied quite often in the southern states to marriages between white persons and negroes. Thus a negro and a white person, between whom marriage was prohibited in North

Carolina, left the state for the purpose of avoiding the law and with intent to return, and were married in another state where such marriages were lawful and it was held that such marriage was void in the former state: *State v. Kennedy*, 76 N. C. 251; 22 Am. Rep. 683. To the same effect are the cases of *State v. Ross*, 76 N. C. 242; 22 Am. Rep. 678; *State v. Tutty*, 41 Fed. Rep. 753; *Kinney v. Commonwealth*, 30 Gratt. 858; 32 Am. Rep. 690; *Dupre v. Boulad*, 10 La. Ann. 411. All of these cases cite and criticise *Medway v. Needham*, 16 Mass. 175, 8 Am. Dec. 131, and *Stevenson v. Gray*, 17 B. Mon. 193, both of which are cited with other cases in the former part of this note, and which, though based on similar facts, sustain the contrary doctrine. In the case of *Kinney v. Commonwealth*, 30 Gratt. 858, 32 Am. Rep. 690-696, the court said: "Whenever the question has arisen in the southern states, it has been held that a marriage between a white person and a negro, although the marriage be celebrated in a state where such marriage was not prohibited, is void in the state of the domicile, and when they go to another state temporarily, for the purpose of evading the law, and return to their domicile, such marriage is no bar to a criminal prosecution, and such is the law in this state. It is now so declared by statute. The statute, however, was passed after the marriage of the parties in this case. But without such statute the marriage was a nullity. It was a marriage prohibited and declared "absolutely void." It was contrary to the declared public law founded upon motives of public policy, a public policy affirmed for more than a century, and one upon which social order, public morality, and the best interests of both races depend. This unmistakable policy of the legislature, founded, I think, on wisdom and the moral development of both races, has been shown by not only declaring marriages between whites and negroes absolutely void, but by prohibiting and punishing such unnatural alliances with severe penalties. The laws enacted to further and uphold this declared policy would be futile and a dead letter, if, in fraud of these salutary enactments, both races might, by stepping across an imaginary line, bid defiance to the law, by immediately returning and insisting that the marriage celebrated in another state or country should be recognized as lawful though denounced by the public law of the domicile as unlawful and absolutely void. No state will permit its citizens to violate its laws by such evasions. But the law of the domicile will govern in such case, and, when they return, they will be subject to all its penalties, as if such marriage had been celebrated within the state whose public law they have set at defiance."

We are by no means sure that the decisions maintaining that a marriage contracted between residents of one country by going into another for the purpose of evading the laws of their domicil are sustainable either upon principle or policy. The fifty-seventh section of the Indian divorce act prohibits the marriage of either party to a divorcee within six months after the final date of the decree. One who had been divorced in India went to England and contracted a marriage within less than six months after the date of the decree, and the English courts held the marriage to be invalid, because both of the parties thereto were residents of India at the time the divorce was granted: *Warter v. Warter*, L. R. 15 P. D. 152. In this case the marriage was sought to be sustained upon the authority of *Scott v. Attorney General*, L. R. 11

P. D. 128, but it was answered that in that case the party contracting the second marriage had acquired a domicile in the country in which it was contracted, and furthermore, that the statute there relied upon imposed a penalty upon the guilty party only, whereas the Indian divorce act prohibited either party from marrying until after the expiration of the time specified therein.

Marriage Contracted on the High Seas, or at Some Other Place where No Laws Exist.—It is not unusual for persons residing at or near the sea, whose marriage is prohibited by the laws of the state of their residence, to obtain some means of being transported to some point more than a league from the shore, and consequently beyond the jurisdiction of the state, and of there entering into a contract of marriage, or to have a marriage ceremony performed, and to return to the state of their domicile under the belief that such marriage is valid, though it would have been invalid if attempted to be contracted therein. With respect to marriage upon the high seas it is probable that it can be contracted only under the same circumstances and in the same form in which the parties could contract it in the state of their domicile, and hence that the delusion that parties who for some reason cannot contract a marriage in the state of their domicile, may contract such a marriage by going upon the high seas, has nothing to sustain it in the decisions of the courts: Bishop on Marriage, Divorce, and Separation, sec. 894. The only direct judicial opinion which we have been able to discover upon this precise topic was expressed as follows: "Nor do I think that citizens of this state, as the complainant and the deceased were, can purposely go beyond its jurisdiction and within the jurisdiction of another state, as at sea, and there contract marriage contrary to its laws. Such an attempt to be joined in marriage is a fraudulent evasion of the laws to which the citizen of the state is subject and owes obedience, and ought to be held valid by them": *Holmes v. Holmes*, 1 Abb. U. S. 546; 1 Saw. 117. The same result must follow a marriage solemnized on land which is not within the jurisdiction of any particular sovereignty. In such case, as there is no local law which can be applicable to the contract of marriage, it is probable that the law of the domicile of the parties is the one which must control such marriage, and therefore it cannot be regarded as valid if not sustainable by such law: *Davis v. Davis*, 1 Abb. N. C. 140. It was very reasonably suggested in the case last cited that persons domiciled in a state or country cannot enter into a contract whose validity is not to be controlled and determined by some law, and, if for the purpose of making such contract, they go upon the high seas or to some land not under the jurisdiction of any sovereignty, and therefore not subject to any law, such persons must still be deemed subject to the law of the state or country of their domicile, and if the contract be one of marriage, its validity must be determined by such law. In England a marriage claimed to have been contracted between English subjects, though in a foreign country, must be shown to be valid either by the laws of England or of that country, and, hence, one undertaking to prove that such a marriage was valid must, if it appears not to have been valid according to the laws of England, show the existence of laws in the country in which it was celebrated, and that the marriage was valid according to those laws: *Catherwood v. Caslon*, 13 Mees. & W. 261; *The Queen v. Mellis*, 10 Clark & F. 537.

MACK v. CAMPEAU.

[69 VERMONT, 553.]

CONTRACTS—VALIDITY—SUPPRESSION OF CRIMINAL PROSECUTION.—A contract, the object and part of the consideration of which is the suppression of a threatened criminal prosecution against one of the parties thereto is void as against public policy.

CONTRACTS—VALIDITY—SUPPRESSION OF CRIMINAL PROSECUTION.—A contract, the object of which is to prevent a third person from commencing threatened proceedings, both civil and criminal, against one of the parties to the contract, is void as against public policy, and cannot be enforced.

CONTRACTS—VALIDITY—SUPPRESSION OF CRIMINAL PROSECUTION.—Parties to a contract made for the purpose of suppressing a threatened criminal prosecution against one of them cannot deny the fact of guilt, and the court must treat them as they have treated themselves.

F. W. McGettrick and F. L. Fish, for the appellant.

Roberts & Roberts, for the appellees.

⁵⁵⁹ ROSS, C. J. 1. The orator contends that the demurrer should have been overruled because the bill does not in terms allege that the defendant, Campeau, had been guilty of criminal intimacy with the wife of Egan, and for that ⁵⁶⁰ reason no crime is shown by the bill to have existed which could have been the subject of the negotiation between the orator and Campeau. The bill alleges that Egan had accused Campeau with having been criminally intimate with Egan's wife, and that he had alienated her affections; that "Egan was threatening legal proceedings" against him "to recover damages," and "to subject" him "to criminal prosecution"; "that Campeau, realizing his liability to such proceedings, and desiring to avoid the damage and expense of the same, and to save the exposure, punishment, and scandal that would be incident thereto, besought the orator for his services in that behalf." The bill further alleges that the orator entered upon the employment and did "intercede with, influence, persuade, and induce Egan to forego and refrain from prosecuting or instituting legal proceedings against Campeau," on account of the alleged criminal relations.

Under the decisions of this state, these allegations are a sufficient setting forth that Campeau had been guilty of the alleged criminal intimacy. By his employment of the orator to dissuade Egan from prosecuting or instituting legal proceedings against him on account of his alleged criminal relations with Egan's wife, he admitted that he was guilty of the crime charged: *Dixon v. Olmstead*, 9 Vt. 310; 31 Am. Dec. 629; *Bowen v. Buck*, 23 Vt.

308. *Dixon v. Olmstead*, 9 Vt. 310, 31 Am. Dec. 629, is trover to recover for the conversion of a horse. To sustain the action these facts in substance were shown. The defendant, residing in New Hampshire, sent his agent into this state, who, after procuring a warrant for the plaintiff's arrest and surrender to the authorities of New Hampshire to be tried on an alleged charge of forgery committed in that state, induced the plaintiff, who denied the charge and declared himself innocent of it, to settle by giving the defendant the horse, among other things. No other evidence that a forgery had been committed by the plaintiff in New Hampshire was given. The defendant contended that the ⁵⁶¹ alleged crime must be established, and that the horse had been given in settlement of the crime, to entitle the plaintiff to recover. But the court said: "For the purposes of this trial, it must be considered, first, that the plaintiff was guilty of the offense. For if, when he was threatened only with legal process and the ordinary proceedings in such cases, he saw fit to come forward and compromise the matter, it is not in his mouth to deny his guilt." *Bowen v. Buck*, 28 Vt. 308, follows the doctrine announced in *Dixon v. Olmstead*, 9 Vt. 310, 31 Am. Dec. 629, and holds that the parties to such transactions are to be held and treated as they treat themselves; that if they enter upon negotiations and settlements in which they treat themselves as guilty of the alleged crime they will be so treated when those negotiations and settlements are brought under legal investigation. Hence the bill alleges sufficient facts to have the court treat the transactions between the orator and Campeau as they treated them, as of and concerning criminal relations existing between Campeau and the wife of Egan.

2. The orator also contends that if Campeau had been guilty of having criminal relations with Egan's wife, Egan would have a valid claim against him growing out of those relations and that Campeau could lawfully employ the orator to settle or adjust the claim of Egan growing out of the same. The contention is sustainable, if the allegations of the bill do not fairly include in the orator's employment the prevention of a criminal prosecution to be set on foot by Egan. To support his contention the orator relies upon this allegation, "and in consideration that the orator should intercede and use his influence with Egan, to dissuade him from instituting legal proceedings against Campeau, based upon the aforementioned criminal relations," etc. He contends that the only legal proceedings Egan could institute against Campeau growing out of such relations were those to recover private

damages. This construction possibly might be given to this allegation if it stood alone. ⁵⁶² Yet it must be remembered that Egan might, by complaint to the proper officer, be instrumental in commencing a criminal prosecution against Campeau. It was his duty as a citizen to make such complaint, if he had knowledge of the commission of the crime. But when this allegation is read in connection with that which immediately precedes, that Egan had threatened to subject Campeau to criminal prosecution, that Campeau, desiring to save the exposure, punishment, and scandal that would be incident thereto, sought the orator's services in that behalf; and in connection with what follows, that the orator did induce Egan to refrain from prosecuting and instituting legal proceedings, it fairly imports that the orator was employed not only to prevent Egan from instituting a civil suit, but also to prevent him from causing to be commenced a criminal prosecution. The meaning of words and phrases in pleadings very frequently depends upon the context: *Royce v. Maloney*, 58 Vt. 445. The language relied upon by the orator, "instituting legal proceedings," when read in connection with the context, fairly imports criminal, as well as civil, proceedings. It is not contended that if part of the consideration for the agreement, which the orator asks to have enforced, was the suppression of criminal prosecution, equity will aid the orator in enforcing it.

The decree of the court of chancery, sustaining the demurrer and adjudging the bill insufficient, is affirmed and cause remanded.

CONTRACTS—VALIDITY OF—SUPPRESSION OF CRIMINAL PROSECUTION.—A contract is wholly void if any part of the consideration thereof is the suppressing of a criminal prosecution: *Woodruff v. Hinman*, 11 Vt. 592; 34 Am. Dec. 712; monographic note to *Hinesburgh v. Sumner*, 31 Am. Dec. 600-604. No one can recover upon such a contract, because, to establish his claim, he must trace his right through an illegal transaction: *Extended note to Hill v. Freeman*, 49 Am. Rep. 49.

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ACTIONS.

1. **ACTIONS—CAUSES ARE NOT MISJOINED, WHEN.**—In an action against two defendants to rescind an exchange of lands made by the plaintiff, the complaint does not misjoin causes of action but states only one cause where it alleges that one of the defendants fraudulently induced the plaintiff to exchange Wisconsin land for Tennessee land, by false representations as to the title and quality of the latter, and by taking advantage of the plaintiff's mental incapacity; that said defendant, by a land contract, sold the Wisconsin land received by him in such exchange to the other defendant, who took it with knowledge of the facts; and that both defendants threaten to sell or encumber the land so as to prevent the plaintiff from collecting any judgment he may obtain. (*Menz v. Beebe*, 120.)

2. **ACTIONS—WEAK AND FEEBLE-MINDED PERSON—CAPACITY TO SUE.**—At common law, and in the absence of a statute to the contrary, a weak and feeble-minded person of full age may bring an action in his own name, and appear by attorney. (*Menz v. Beebe*, 120.)

3. **ACTIONS—WEAK AND FEEBLE-MINDED PERSON—CAPACITY TO SUE.**—Unless prohibited by statute, a weak and feeble-minded person may sue in his own name, without a guardian ad litem, to set aside an exchange of property fraudulently procured from him by the defendant; and there is no such prohibition in the statutes of Wisconsin. The statement in his complaint that he is "of a weak and feeble mind, and not of sufficient mental capacity to attend to ordinary business transactions, or to protect and preserve his property rights," is no impediment to the action. (*Menz v. Beebe*, 120.)

4. **ACTIONS—PERSONAL INJURIES—SURVIVAL—ASSIGNMENT.**—Under the statutes of Wisconsin, a cause of action for a personal injury survives and is, therefore, assignable before judgment. (*Lehmann v. Farwell*, 111.)

5. **ACTIONS—INJURY TO LAND IN ANOTHER STATE—CONSTRUCTION OF STATUTE.**—A statute requiring actions for injuries to real property to be brought in the county where the subject of the action is situated settles the rule and indicates the policy of the state as to actions for injuries to real property within the state, but does not affect such causes of action arising out of the state. (*Little v. Chicago etc. Ry. Co.*, 421.)

6. **ACTIONS FOR INJURY TO LAND ARE TRANSITORY.**—An action for damages for injuries to real property is on principle just as transitory in its nature as one on contract or for a tort committed on the person or personal property. It is a personal action and may, therefore, be maintained in this state for injury to land lying in another state. (*Little v. Chicago etc. Ry. Co.*, 421.)

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ADVERSE POSSESSION.

ADVERSE POSSESSION—TITLE BY PRESCRIPTION.—A wrongful entry upon land, with continued possession, without any pretense of paper title, but under a claim of right inconsistent with the title of the true owner, and the exercise of acts of possession hostile to his rights in the land, may ripen into title by prescription, and this doctrine applies to an easement in real property. (Swan v. Munch, 491.)

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3. **APPELLATE PRACTICE—OBJECTION FIRST MADE ON APPEAL.**—Objection to a charge of a court in a criminal case may be first made and considered on appeal, if such charge is calculated to injure the rights of the accused, but, unless so calculated, is not ground for reversal of the judgment. (Gonzales v. State, 51.)

4. **APPELLATE PRACTICE—EVIDENCE—RECORD.**—Unless it affirmatively appears that the long-hand manuscript of the evidence was filed with the clerk before it was incorporated in the bill of exceptions, the evidence cannot be considered as being in the record. (Bedford Belt Ry. Co. v. McDonald, 172.)

5. **APPELLATE PRACTICE—THE ADMISSION OF INADMISSIBLE EVIDENCE,** if harmless, is not ground for reversal of the judgment. (Stewart v. State, 35.)

6. **JUDGMENTS BY DEFAULT—PRESUMPTION ON APPEAL.** If a judgment is taken by default, it cannot be presumed on appeal that anything was proved beyond what was alleged in the complaint. (Albany etc. Co. v. Merchants' Nat. Bank, 178.)

7. **APPELLATE PRACTICE—JUDGMENT BY DEFAULT.**—An assignment of error that the complaint does not state facts sufficient to constitute a cause of action cannot be made available for the first time on appeal for the reversal of a judgment upon default, unless some fact essential to the existence of the cause of action has been wholly omitted from the complaint. (Albany etc. Co. v. Merchants' Nat. Bank, 178.)

8. **APPEAL—SETTING ASIDE VERDICT AS EXCESSIVE—REDUCING AMOUNT.**—If a verdict, in an action to recover damages for personal injuries, is supported by some evidence, a court, on appeal, is not justified in saying that it is manifestly wrong and must be set aside as excessive, but it may reduce the amount. (Sawyer v. Rumford Falls etc. Co., 260.)

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2. ARREST, WITHOUT WARRANT—BREACH OF THE PEACE.—A city council has power to pass an ordinance authorizing police officers to make arrests of persons engaged in a breach of the peace, in their presence, without warrant; and, as a disturbance or violation of public order is a breach of the peace, a police officer who, from the outside of a house, hears a disturbance, or is made aware of disorderly conduct, within it, may, acting in good faith, under the authority of such an ordinance, enter the house and lawfully arrest the person guilty of such conduct as being an inmate of a disorderly house, for the offense may be fairly said to have been committed in his presence. (Hawkins v. Lutton, 131.)

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ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

1. ASSIGNMENT FOR BENEFIT OF CREDITORS TAKES EFFECT WHEN—POSTPONEMENT.—An assignment for the benefit of creditors takes effect, under the statute of Ohio, from the time of its delivery to the probate judge of the proper county, who must indorse thereon the exact time of such delivery. He cannot postpone the time of its taking effect, or displace or interfere with rights accruing upon the delivery of the assignment, by his delay in making the indorsement required by statute as to the time of delivery, or by his indorsement of a date later than that of the delivery to him. (H. B. Clafin Co. v. Evans, 686.)

2. PARTIES.—TO A SUIT TO SET ASIDE AN ASSIGNMENT for the benefit of creditors as fraudulent the assignor is a necessary party, and, in the event of his death, his executor or administrator. (First Nat. Bk. v. Shuler, 601.)

3. ASSIGNMENT FOR THE BENEFIT OF CREDITORS—EVIDENCE OF FILING.—An indorsement, on an assignment for the benefit of creditors, of the exact time of its delivery to the probate judge is but prima facie evidence of the time of filing; and the true date of the delivery of the instrument to him may be shown by parties whose interests are affected. (H. B. Clafin Co. v. Evans, 686.)

4. ASSIGNMENT FOR BENEFIT OF CREDITORS—EFFECT OF DELAY IN FILING.—Under a statute requiring the probate judge to indorse, on an assignment for the benefit of creditors, the exact time of its delivery to him, he cannot, where the assignment is delivered to him before executions are levied, give the execution creditors a prior lien over other creditors, by holding the assignment and not indorsing it filed until after the levies are made, though this is done in obedience to the assignor's instructions. (H. B. Clafin Co. v. Evans, 686.)

5. ASSIGNMENT FOR BENEFIT OF CREDITORS BY MANAGING PARTNER.—When a partner resides out of the state where

the partnership business is carried on, the managing partner in charge of the business may make a valid assignment of the firm effects for the benefit of its creditors, without the consent of the absent partner, as his assent will be presumed. (*H. B. Claflin Co. v. Evans*, 686.)

6. ASSIGNMENT FOR BENEFIT OF CREDITORS—INSOLVENT PARTNERSHIP—DISPUTED RIGHT TO HOMESTEAD EXEMPTION—DUTY OF ASSIGNEE.—When members of an insolvent firm assign for the benefit of creditors, and their right to claim an allowance out of firm property, in lieu of homestead, is disputed, the assignee's duty is to await an order of court to determine their right before turning over the allowance. He acts at his peril without such order, and the advice of counsel will not shield him from the consequences of a mistaken course. (*Aultman, Miller & Co. v. Wilson*, 677.)

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See Sales, 2.

ATTORNEY AND CLIENT.

1. ATTORNEY AND CLIENT—FEES.—The relation of attorney and client is created by contract, and litigants who have not thus assumed liability for attorney's fees cannot be held liable therefor, although they have been benefited, directly or indirectly, by the attorney's services. (*Rives v. Patty*, 510.)

2. ATTORNEY AND CLIENT—FEES.—An attorney employed by a part of the creditors of an insolvent estate, who in his professional capacity realizes a fund for distribution among all of them, cannot charge the fund with his fees. He can recover compensation only from those who employed him. (*Rives v. Patty*, 510.)

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1. BOARDS OF HEALTH—POWERS—DELEGATION OF LEGISLATIVE POWER.—A state board of health is a creation of the statute, and has only such power as the statute confers. It has no legislative power and none can be delegated to it. It is purely an administrative body. (*State v. Burdge*, 123.)

2. BOARDS OF HEALTH—UNAUTHORIZED DELEGATION OF POWER.—A statute authorizing a state board of health to make such regulations as may, in its judgment, be necessary for the protection of the people from dangerous, contagious diseases, and giving it power to designate what diseases are "contagious," or "dangerous" to the public health, is a delegation of legislative power not authorized by the constitution. (*State v. Burdge*, 123.)

3. BOARDS OF HEALTH—POLICE POWER—UNREASONABLENESS OF RULE AS TO VACCINATION.—Conceding that a state board of health has power to make a rule excluding from

the public schools children who do not present certificates of vaccination, such a rule is not a valid exercise of the police power of that board, but void, on account of its unreasonableness and extraordinary character, where, at the time of its adoption, there is no apparent or immediate necessity for its existence; and no such necessity for the enforcement of a rule of that kind, in a particular locality, is shown by the existence of a few cases of smallpox scattered throughout the state, and of but one in the locality, which has been properly quarantined, if there is no epidemic of smallpox existing in the state. (State v. Burdge, 123.)

4. BOARDS OF HEALTH—COMPULSORY VACCINATION—PUBLIC SCHOOLS.—In the absence of a statute authorizing compulsory vaccination, or of one requiring vaccination as one of the conditions of the right or privilege of children to attend the public schools, a rule adopted by a state board of health, excluding from public and other schools all school children who do not present certificates of vaccination, is not a valid exercise of the rightful powers of the board. (State v. Burdge, 123.)

BOARD OF SUPERVISORS.

See Counties, 1.

BONA FIDE PURCHASER.

See Lis Pendens, 4; Mortgage, 4; Negotiable Instruments, 8, 16.

BONDS.

BONDS—ATTORNEY'S FEES, WHEN IN ADDITION TO PENALTY.—A bond in the sum of five hundred dollars and ten per cent attorney's fees is a promise to pay two different things, to wit, the sum of five hundred dollars and an attorney's fee of ten per cent, and a recovery of both may be had on a breach of the conditions of the bond. (Singer Mfg. Co. v. Reynolds, 417.)

BREACH OF PEACE.

See Arrest, 2.

BROKERS.

BROKERS AND COMMISSION MERCHANTS, RIGHT TO FOLLOW MONEYS IN THE HANDS OF.—Where goods are consigned to a broker or commission merchant for sale, the title does not vest in him, but remains in the consignor, and the money arising from the sale is his, and not the money of the agent. Wherever that money can be traced, it may be claimed by its owner. If the broker makes an assignment for the benefit of his creditors, his assignee is not entitled to such money, but must pay it over to the consignor from the sale of whose property it resulted. (Drovers' etc. Nat. Bk. v. Roller, 344.)

BURDEN OF PROOF.

See Insurance, 3; Marriage and Divorce, 1; Master and Servant, 14.

BURGLARY.

See Conspiracy, 2; Indictment, 3.

CARRIERS.

1. CARRIERS OF PASSENGERS—REFUSAL TO CARRY BLIND PERSON.—A common carrier of passengers cannot refuse to carry a person, otherwise qualified, upon the sole ground that he is blind. (Zachery v. Mobile & Ohio R. R. Co., 529.)

2. CARRIERS—NEGLIGENCE—LIMITATION OF LIABILITY.

A common carrier cannot, by special agreement, relieve himself from the consequences of his own negligence, nor limit his liability for losses resulting therefrom. (*Pittsburgh etc. Ry. Co. v. Sheppard*, 732.)

3. CONTRACTS—PLACE OF PERFORMANCE—PAYMENT OF FREIGHT.—If a contract of carriage is silent as to the time and place of payment of the freight, it is payable at the time of the delivery of the property to the consignee, and necessarily at the place of delivery. Hence the place of delivery is the place of performance of such contract. (*Pittsburgh etc. Ry. Co. v. Sheppard*, 732.)

4. CONTRACTS—CONFLICT OF LAWS—PLACE OF PERFORMANCE.—If a carrier makes a contract and receives livestock in one state to be transported to a designated place in another, and the stock are injured during transportation in the latter state, through the negligence of the carrier, the rights of the parties, in an action to recover for the injury, are governed by the laws of the latter state. (*Pittsburgh etc. Ry. Co. v. Sheppard*, 732.)

CHARITIES.

1. GIFT FOR A FOREIGN CHARITABLE USE.—The fact that a charity would be administered in a foreign country does not of itself render the gift void. (*Teele v. Bishop of Derry*, 401.)

2. GIFT FOR CHARITABLE USE, WHAT IS.—A bequest to trustees of moneys to purchase a lot and build a chapel to forever be used for purposes of public worship under the auspices of the Roman Catholic Church is a gift for a public charitable use. (*Teele v. Bishop of Derry*, 401.)

3. PUBLIC CHARITY, DUTY OF COURT TO FORM A SCHEME TO CARRY OUT.—The fact that a bequest is in the nature of a public charity does not itself require that the court should form a scheme to carry it out as near as may be to the scheme of the testator, if for any reason that has become impossible of performance in the manner which he had provided. (*Teele v. Bishop of Derry*, 401.)

4. CY PRES. RULE OF—WHEN INAPPLICABLE.—If a charitable purpose is limited to a particular object, which it becomes impossible to carry out, or to an institution which has ceased to exist before the gift takes effect, the doctrine of cy pres does not apply, and, in the absence of any limitation over or other provision, the legacy lapses. Hence, if there is a bequest in a will to trustees for the purpose of purchasing a lot and building a chapel in Carndrine, to be forever used for the purpose of public worship under the auspices of the Roman Catholic Church, and it is found to be impracticable to carry out this scheme, the court will not adopt some other scheme, but the legacy will lapse. (*Teele v. Bishop of Derry*, 401.)

CHATTEL MORTGAGE.

CHATTEL MORTGAGES—POWER OF SALE—FRAUD ON CREDITORS.—A mortgage executed by a manufacturing corporation on its products, reserving to the mortgagor the right to keep, use, and sell such property in the usual course of business, is fraudulent as to its creditors, and is not rendered valid by a provision that if the mortgagor shall sell the property, or any interest therein, otherwise than at retail, the mortgagee shall take immediate possession of, and sell the property to satisfy the mortgage debt. (*First Nat. Bk. v. Caperton*, 540.)

See Warehousemen.

CHECKS.

1. CHECKS—ASSIGNMENT OF FUND—RECOVERY OF PROCEEDS OUT OF DRAWER'S ESTATE.—A check is an assignment

of so much of the drawer's funds as amount to the sum designated in the check, and, if those funds are wrongfully covered into the estate of the drawer of the check by his executors, both law and equity require that they should be restored to the true owner. (*Whitehouse v. Whitehouse*, 278.)

2. CHECKS—DELIVERY AFTER MAKER'S DEATH—WHAT CONSTITUTES AND ITS EFFECT.—If a check is delivered by the maker, in his lifetime, to a third person, with directions to deliver it to the payee after the maker's death, and such after-delivery is made, the payee's right to the check takes effect at the date of the first delivery, and after the first delivery the payee's demand for the check and a refusal by the custodian thereof to deliver it are, in effect, equivalent to a second delivery. (*Whitehouse v. Whitehouse*, 278.)

See Gift, 3; Trusts, 2.

COMMISSION MERCHANTS.

See Brokers.

COMMON LAW.

See Actions, 2; Disorderly House, 1; Lis Pendens, 2.

CONDITIONS.

See Estates, 3; Wills, 6.

CONFLICT OF LAWS.

See Carriers, 4; Contracts, 8-12.

CONSPIRACY.

1. CONSPIRACY.—ACTS AND DECLARATIONS of a co-conspirator after the consummation of the conspiracy are admissible only against the party doing the act, or making the declaration. (*Conde v. State*, 22.)

2. BURGLARY—CONSPIRACY TO COMMIT.—If a person enters in a conspiracy by positive agreement to commit a burglary, he may be convicted of the conspiracy, although he subsequently withdraws and takes no part in the commission of the burglary. (*Dill v. State*, 37.)

See Indictment, 3.

CONSTITUTIONAL LAW.

CONSTITUTIONAL LAW.—DUE PROCESS OF LAW extends to all adversary rights of persons in property, and requires that, before there shall be a judicial determination affecting such rights, process to obtain jurisdiction of the person claiming them shall be issued and served, except in cases where the statute has provided for a substituted or constructive service. (*State v. Guilbert*, 756.)

CONTAGIOUS DISEASES.

See Boards of Health, 24.

CONTEMPT.

1. CONTEMPT—COURTS—LEGISLATURE.—A court created by the constitution has inherent power to punish contempts summarily. This power is necessary to the exercise of judicial functions, and it is not competent for the legislature to abridge it. (*Hale v. State*, 691.)

2. CONTEMPT—REMOVING WITNESS BEYOND JURISDICTION.—It is a contempt of court to remove a witness from the county of his residence, where he is under subpoena to attend upon

the trial of a cause pending, for the purpose and effect of preventing his appearance upon the day of trial, as it is a wrongful act obstructing the administration of justice. (*Hale v. State*, 691.)

CONTRACTS.

1. **CONTRACTS, CONSTRUCTION OF.**—The proper construction of a contract is not dependent upon any name given it by the parties, nor upon any one provision, but upon the entire body of the contract and its legal effect as a whole. (*Arbuckle v. Kirkpatrick*, 854.)

2. **CONTRACTS—CONFLICTING CLAUSES—CONSTRUCTION.** If two clauses of a contract are in conflict, the first governs rather than the last. (*Wisconsin Marine etc. Bank v. Wilkin*, 86.)

3. **CONTRACT, WHEN ENTIRE.**—A contract for the services of a band of musicians for two months at the rate of twenty-four dollars for a week of seven days for each man employed, and double pay for the leader, is an entire contract, under which no recovery can be had if any part of it is unlawful. (*Stewart v. Thayer*, 407.)

4. **CONTRACTS—STATUTE OF FRAUDS—CONSIDERATION—"REASONABLE CLEARNESS."**—The "reasonable clearness" with which the consideration for an agreement, promise, or undertaking, in writing, must appear, in order to satisfy a statute of frauds requiring the consideration, when not expressly stated, to appear with reasonable clearness, cannot be made to depend upon what may be conjectured from that which has been written (*Siemers v. Siemers*, 430.)

5. **CONTRACTS—STATUTE OF FRAUDS—INSUFFICIENT APPEARANCE OF CONSIDERATION.**—An agreement as follows: "I, the undersigned, herewith promise to pay to the widow Margarethe Gruenenfelder, on the wedding day when she shall become my wife, the sum of one thousand dollars," does not satisfy a statute of frauds requiring the consideration, when not expressly stated, to appear with "reasonable clearness." (*Siemers v. Siemers*, 430.)

6. **STATUTE OF FRAUDS—EVIDENCE—MEASURE OF PROOF.**—The statute of frauds prescribes a rule of procedure to be observed by the court in which the enforcement of the contract is sought; and the mode and measure of proof required by such statute must be produced in order to establish the contract, no matter in what state or country it may have been made. (*Heaton v. Eldridge*, 737.)

7. **STATUTE OF FRAUDS—CONFLICT OF LAWS.**—Under the Ohio statute of frauds, an agreement which by its terms is not to be performed within one year from the time that it is made cannot be enforced in that state, unless the agreement, or some memorandum thereof, is in writing signed by the party to be charged or by some one authorized by him to sign it, although such agreement is made in another state where it might be proved by parol evidence. (*Heaton v. Eldridge*, 737.)

8. **CONTRACTS—CONFLICT OF LAWS.**—The law of the state where a contract is executed and is to be performed, enters into, and becomes a part of, the contract, in the sense that its validity and obligatory effect are to be determined and controlled by that law; and when valid there the contract will be sustained everywhere, and accorded the interpretation required by the law of the place where made, when that law is properly brought to the attention of the court, unless the contract is against good morals, or contravenes a settled policy of the state in whose tribunals its enforcement is sought. (*Heaton v. Eldridge*, 737.)

9. **CONTRACTS—CONFLICT OF LAWS.—PRINCIPLES OF COMITY**, as applied to contracts, do not extend so far as to require that the remedial system and methods of procedure by one state shall yield to those of another, nor that either shall recognize or enforce those of the other. (*Heaton v. Eldridge*, 737.)

10. **CONTRACTS—CONFLICT OF LAWS—PLACE OF PERFORMANCE**.—A contract made in one state, to be performed in another, is governed by the laws of the latter. They determine its validity, obligation, and effect. (*Pittsburgh etc. Ry. Co. v. Sheppard*, 732.)

11. **CONTRACTS—CONFLICT OF LAWS**.—If a contract is made in one state to be performed in part in another, and an action is brought for a breach of that part of the contract, the rights of the parties must be determined according to the law of the latter state. (*Pittsburgh etc. Ry. Co. v. Sheppard*, 732.)

12. **CONTRACTS—CONFLICT OF LAWS—INTERPRETATION AND REMEDY**.—Contracts receive their sanction and interpretation from the law of the place where they are made and to be performed; but the remedy upon them must be pursued according to the law of the place where they are sought to be enforced. (*Heaton v. Eldridge*, 737.)

13. **CONTRACTS—ILLEGALITY—RIGHT TO RETAIN PROFITS**.—One in possession of the gains and profits of an executed transaction cannot retain them as against another party thereto on the ground that the business which produced the fund was illegal. (*Andrews v. New Orleans Brewing Assn.*, 509.)

14. **CONTRACTS—ILLEGALITY—AGREEMENT TO PREVENT INDICTMENT**.—A contract by an attorney at law to render his services in preventing the finding of an indictment against one accused or suspected of crime is against public policy, illegal, and void as matter of law, regardless of the belief of the attorney as to the guilt or innocence of the accused, and cannot be recovered upon. (*Weber v. Shay*, 743.)

15. **CONTRACTS—VALIDITY—SUPPRESSION OF CRIMINAL PROSECUTION**.—A contract, the object and part of the consideration of which is the suppression of a threatened criminal prosecution against one of the parties thereto is void as against public policy. (*Mack v. Campeau*, 948.)

16. **CONTRACTS—VALIDITY—SUPPRESSION OF CRIMINAL PROSECUTION**.—Parties to a contract made for the purpose of suppressing a threatened criminal prosecution against one of them cannot deny the fact of guilt, and the court must treat them as they have treated themselves. (*Mack v. Campeau*, 948.)

17. **CONTRACTS—VALIDITY—SUPPRESSION OF CRIMINAL PROSECUTION**.—A contract, the object of which is to prevent a third person from commencing threatened proceedings, both civil and criminal, against one of the parties to the contract, is void as against public policy, and cannot be enforced. (*Mack v. Campeau*, 948.)

18. **CONTRACTS—UNLAWFUL COMBINATION TO CONTROL BUSINESS**.—If persons, associated in a city as masons and building contractors, have two sets of by-laws, one for general distribution and the other, under which the association carries on its operations, private, and each member is required by such private by-laws to submit all bids, proposed to be made by him, to such association, and, if found to be the lowest bidder and entitled to the contract, to add to such bid, before submitting it to the owner or architect of the proposed building, six per cent of the contract price, which he is to pay to the association, and thus exact from owners six per cent in excess of a fair price, the arrangement is an unlawful combination, contrary to public policy, and void, especially where the membership

of the association embraces more than four-fifths of the masons and builders in the city, as its manifest purpose is to suppress fair and free competition in bidding for building contracts. Hence, a note given to such association, by a member of it, for the amount of such percentage, is void, because it is founded upon an unlawful consideration, and is not enforceable. (*Milwaukee M. & B. Assn. v. Niezerowski*, 97.)

19. **SUNDAY LAWS.—A CONTRACT IN VIOLATION OF** the statutes for the observance of the Lord's Day cannot support an action for services performed under it on secular days as well as on the Sabbath. (*Stewart v. Thayer*, 407.)

20. **SUNDAY LAWS—CONTRACTS TO BE PERFORMED PARTLY ON SUNDAYS.**—If a contract is made for the services of a band of musicians to play for seven days each week, including the afternoons and evenings of each Sunday, it is in violation of the laws for the observance of the Sabbath, and, though fully performed, will not support an action for the services thus rendered. (*Stewart v. Thayer*, 407.)

21. **CONTRACTS — ILLEGALITY — PLEADING.**—If plaintiff, to make out his case, is required to show that the contract sued on is, for any reason, illegal, the court should not enforce it, whether such illegality is pleaded as a defense or not, but, if such illegality does not appear from the face of the contract, or from the evidence necessary to prove it, and depends upon extraneous facts, the defense is new matter, and must be pleaded to be available. (*School District v. Sheldley*, 576.)

22. **OFFER, ACCEPTANCE BY TELEGRAMS, WHEN TERMINATES POWER TO WITHDRAW OFFER.**—If an offer made by one telegram is accepted by another, it cannot afterward be withdrawn by a third telegram forwarded before the second was actually received, but which did not reach its addressee until after the second telegram had come to the hands of the person making, and afterward seeking to withdraw, from the offer. (*Brauer v. Shaw*, 387.)

23. **CONTRACT.—BREACH OF INDUCED BY THIRD PARTY.** Merely to induce or procure a free contracting party to break his contract, whether done maliciously or not, to the damage of the other contracting party, does not give a right of action against the party holding out the inducement. The only remedy is an action upon the contract for its breach. (*Glencoe L. & G. Co. v. Hudson Bros. etc. Co.*, 560.)

24. **CONTRACTS—REMEDY FOR BREACH INDUCED BY THIRD PARTY—MASTER AND SERVANT.**—An action cannot be maintained against a third person for inducing a party to break his contract with the complainant, when the relation of master and servant does not exist between the contracting parties, and a railroad company is not the servant of the shipper. The remedy is an action on the contract to recover for its breach. (*Glencoe L. & G. Co. v. Hudson Bros. etc. Co.*, 560.)

25. **TORTS—PROCURING CONTRACT TO BE BROKEN.—AN ACTION** lies against a third person for wrongfully procuring a party to break his contract with the plaintiff, to the latter's injury, and the employment of unlawful or improper means to induce him to do so is unlawful. This principle applies where the employer breaks his contract, as well as where it is broken by the employé, and is not, in fact, confined to contracts of employment. (*Perkins v. Pendleton*, 252.)

26. **A RESCISSION OF A CONTRACT IS NOT NECESSARY** to support an action for damages for false representations whereby plaintiff was induced to make it. (*Andrews v. Jackson*, 390.)

27. **CONTRACTS—WANT OF CONSIDERATION—PLEADING.** If defendant pleads want of consideration for a contract, the court

must consider its legality, and its illegality is sufficiently raised by an objection in the nature of a demurrer to the evidence to require its consideration on appeal. (*School District v. Sheidley*, 576.)

28. **CONTRACTS—EVIDENCE.**—The evidence by which a contract shall be proved is no part of the contract itself, but its admission or rejection becomes a part of the proceeding on the trial, where its competency and sufficiency must be determined; and, when the required evidence is lacking, the court must refuse the enforcement of the contract. (*Heaton v. Eldridge*, 737.)

See Carriers, 3, 4; Corporations, 3; Jurisdiction, 2, 3; Sales, 4; Trusts, 1, 2.

CORPORATIONS.

1. **CORPORATIONS — ORGANIZATION — “MANUFACTURING OR MECHANICAL BUSINESS.”**—A corporation organized, not only for the purposes of mining, but also for the business of “buying and selling and dealing in mineral lands,” is not within the terms of a constitutional provision respecting corporations organized for “manufacturing or mechanical business.” (*Holland v. Duluth Iron etc. Co.*, 480.)

2. **CORPORATIONS—“MECHANICAL BUSINESS”—MINING OF IRON ORE—EXEMPTION OF STOCKHOLDERS FROM “DOUBLE LIABILITY.”**—A “mechanical business,” within the meaning of a constitutional provision that “each stockholder in any corporation, excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of his stock,” is closely allied with, or incidental to, some kind of manufacturing business. The mining of iron ore is such a “mechanical business,” and stockholders of a corporation organized for that purpose are, therefore, exempt from the stockholders’ “double liability.” (*Cowling v. Zenith Iron Co.*, 471.)

3. **CORPORATIONS—CONTRACTS—ULTRA VIRES.**—If a private corporation has entered into a contract not immoral in itself, and not forbidden by statute, and it has been in good faith fully performed by the other party, the corporation cannot sustain a plea of ultra vires. (*Bedford Belt Ry. Co. v. McDonald*, 172.)

4. **WILLS—CORPORATIONS, POWER TO TAKE BY, WHO MAY QUESTION.**—The capacity of a corporation to take property by devise or bequest in excess of the amount prescribed by law cannot be questioned by the heirs or next of kin of the testator, but only by a direct proceeding instituted for that purpose. (*In re Stickney’s Will*, 308.)

5. **CORPORATIONS — STATUTE — ORGANIZATION — TAKING OF STOCK IN OTHER CORPORATIONS—CONSTITUTIONAL EXEMPTION OF STOCKHOLDERS FROM LIABILITY.**—The fact that a corporation has been organized under a statute which allows it to “take, acquire, and hold stock in any other corporation, if a majority in amount of the stockholders shall so elect,” does not prevent it from being a corporation whose stockholders are exempt under the constitution, where the corporation has never taken the benefit of such statute, with respect to the taking and holding of such other stock. (*Cowling v. Zenith Iron Co.*, 471.)

6. **CORPORATIONS, SUBSCRIBER TO CAPITAL STOCK OF.** It is not essential to constitute one a subscriber to the capital stock of a corporation that he should have subscribed to the stock-books after articles of incorporation have been perfected and filed. If there is a preliminary subscription, and the corporation is thereafter formed as contemplated, within a reasonable time, the subscribers become shareholders without any further act. Persons who

signed such preliminary subscription and also consented to the holding of the first meeting and participated therein must, therefore, be deemed subscribers. (*Nickum v. Burekhardt*, 822.)

7. CORPORATIONS, CHANGE IN PURPOSE OF SUBSCRIPTION.—Though the purposes designated in the articles of incorporation do not correspond with those set forth in the preliminary subscription, the subscribers remain bound, if they have participated in the organization of the corporation after knowing of such change. (*Nickum v. Burekhardt*, 822.)

8. CORPORATIONS.—THE FAILURE TO NOTIFY SUBSCRIBERS OF THE FIRST MEETING of a corporation cannot be urged by other subscribers who were notified and were present at such meeting. Such meeting is valid if a sufficient number of subscribers were present, though others entitled to be present and to participate therein were absent because not notified. (*Nickum v. Burekhardt*, 822.)

9. CORPORATIONS—WHEN PERSONS BECOME STOCKHOLDERS.—If persons buy and pay for stock in a corporation, but the certificates are not issued or delivered for reasons personal to themselves, they are, nevertheless, stockholders, even when no formal action has been taken whereby they become stockholders. (*Holland v. Duluth Iron etc. Co.*, 480.)

10. CORPORATIONS — STOCKHOLDERS — NECESSITY OF CERTIFICATE.—In order to constitute one a stockholder in a corporation, it is not necessary that a certificate of stock be issued. The certificate is merely evidence of his title to shares of stock. (*Holland v. Duluth Iron etc. Co.*, 480.)

11. CORPORATIONS—EVIDENCE THAT ONE IS A STOCKHOLDER.—The entry of a person's name in the stock-book of a corporation as a stockholder, supplemented by identifying testimony, will, in the absence of rebutting testimony, support a finding that he is a stockholder. (*Holland v. Duluth Iron etc. Co.*, 480.)

12. CORPORATIONS—EVIDENCE—ADMISSIBILITY OF ENTRIES IN STOCK-BOOK.—To make entries in the stock-book of a corporation admissible in evidence for the purpose of showing who are stockholders it is not necessary that the stock-book should have been kept in any particular manner or that it contain the entries prescribed by statute. It is enough that it is the stock-book of the corporation. (*Holland v. Duluth Iron etc. Co.*, 480.)

13. CORPORATIONS—EVIDENCE AS TO OWNERSHIP OF STOCK.—If the name of a person appears on the stock-book of a corporation as a stockholder, this is *prima facie* evidence that he is the owner of stock. (*Holland v. Duluth Iron etc. Co.*, 480.)

14. CORPORATIONS—CONCLUSIVENESS OF JUDGMENT AS AGAINST STOCKHOLDERS—CORPORATE INDEBTEDNESS.—A judgment, in an action by a judgment creditor of a corporation to enforce the constitutional or statutory liability of its stockholders, is conclusive against them on the question of corporate indebtedness and liability, although such judgment was taken by default. (*Holland v. Duluth Iron etc. Co.*, 480.)

15. CORPORATIONS—CONCLUSIVENESS OF JUDGMENT AS AGAINST STOCKHOLDERS.—A judgment against a corporation is conclusive against the stockholders in any action or proceeding to enforce their individual liability and there is no legitimate distinction between cases in which actions are brought against stockholders on account of unpaid subscriptions and those wherein the object is to enforce the statutory or constitutional liability. (*Holland v. Duluth Iron etc. Co.*, 480.)

16. RES JUDICATA—JUDGMENT AGAINST CORPORATION IN FAVOR OF A STOCKHOLDER, WHEN NOT CONCLUSIVE IN CONTROVERSIES WITH OTHER STOCKHOLDERS.—A corporation, in prosecuting an action against a stockholder to recover a subscription, does not represent him and the other stockholders, and a judgment against it in favor of such stockholder is not conclusive against it in a subsequent action between it and the other stockholders involving the same issues. (*Nickum v. Burekhardt*, 822.)

17. RES JUDICATA — CORPORATIONS, JUDGMENTS AGAINST, WHEN BINDING UPON STOCKHOLDERS.—A corporation represents and binds its stockholders in all matters within the limits of its corporate powers so long as it acts in good faith and without fraud upon their rights; and, in the bringing and defending of suits affecting the rights and obligations of the corporation, it binds the stockholders as fully as in the making of contracts. This is true only in those cases in which the corporation is charged as representing the individual stockholders. (*Nickum v. Burekhardt*, 822.)

18. CORPORATIONS.—THE AUTHORITY OF THE PRESIDENT of a corporation to execute a release of a mortgage made to him is sufficiently established by evidence that he did most of its business at a place where the mortgage was given and recorded, and had made many deeds in its behalf, each of which, as well as the release in question, had attached thereto a certificate of the secretary of the corporation of what purported to be a vote of the directors authorizing it (*Swasey v. Emerson*, 368.)

See Devise; Eminent Domain, 1; Estoppel, 1, 2.

CORPUS DELICTI.

See Homicide, 1, 2; Larceny, 1.

COSTS.

COSTS—WHEN LOST BY FAILURE TO PERFECT JUDGMENT.—Under a statute requiring the successful party in an action to perfect judgment within sixty days after entry of verdict, or within thirty days after the expiration of a stay of proceedings, he loses his right to costs, if he fails to perfect his judgment within sixty days after entry of verdict, where no stay of proceedings has been ordered, but the clerk must then enter the proper judgment without costs. (*Milwaukee M. & B. Assn. v. Niezerowski*, 97.)

COTENANCY.

COTENANCY.—IMPROVEMENTS, not in the nature of repairs, cannot be made by one cotenant upon the common property, and the expense or any part thereof charged to his cotenant. (*Brown v. Cooper*, 190.)

COUNTIES.

1. COUNTIES.—ONE BOARD OF SUPERVISORS IS NOT BOUND by the acts of its predecessors not within the scope of their authority. (*Jefferson Co. v. Grafton*, 516.)

2. COUNTIES—POWER TO SELL LAND.—A county is not a municipal corporation proper, but only a quasi corporation; and as such has no power to sell land not applied to a public use, unless such power has been expressly conferred upon it by statute. (*Jefferson Co. v. Grafton*, 516.)

3. COUNTIES — PURCHASERS FROM — RIGHT TO QUESTION POWER OF.—A purchaser claiming title to land under a conveyance from a county cannot in an action by it to cancel the deed,

defend by denying that the county had power to acquire and dispose of the land. That is a matter of which the state alone can complain. (*Jefferson Co. v. Grafton*, 516.)

4. COUNTIES—JUDGMENT AS CLAIM AGAINST.—A judgment against a county, after a certified copy of it is filed, has the force and effect of an audited claim, which must be enforced in the same manner as other audited claims that are provided for by an application of unappropriated funds, or the levy of a tax, etc. It cannot be otherwise enforced, for execution does not run against the county. (*Emery County v. Burresen*, 898.)

See Execution, 1, 2; Police Power, 2.

COURTS.

1. COURTS—INHERENT POWERS.—Powers necessary to the orderly and efficient exercise of jurisdiction are inherent. They do not depend upon express constitutional grant, nor in any sense upon the legislative will. (*Hale v. State*, 691.)

2. COURTS—INHERENT POWER—LEGISLATURE.—A power which the legislature does not give, it cannot take away. If power, distinguished from jurisdiction, exists independently of legislation, it will continue to exist notwithstanding legislation. (*Hale v. State*, 691.)

See Contempt, 1, 2; Legislature.

COURTS OF PROBATE.

See Assignment for Benefit of Creditors, 1; Executors and Administrators, 7.

COVENANTS.

1. COVENANT AGAINST ENCUMBRANCES RUNNING WITH LAND—ACTION BY ASSIGNEE OF COVENANTEE.—A covenant against encumbrances which are a money charge on land runs with the land until they are discharged, and an action on such covenant can be maintained by an assignee of the covenantee. (*Security Bk. of Minn. v. Holmes*, 495.)

2. COVENANT IN MORTGAGE, AGAINST ENCUMBRANCES RUNNING WITH LAND—ACTION BY ASSIGNEE OF MORTGAGE.—A covenant against encumbrances, although contained in a mortgage, which are a money charge on the land, runs with the land; and an action may be maintained for its breach by an assignee of the mortgagee who has acquired title to the land by purchase at a foreclosure sale and who has paid the encumbrances. (*Security Bk. of Minn. v. Holmes*, 495.)

CREDITOR'S BILL.

See Creditor's Suit.

CREDITORS' SUIT.

1. CREDITORS' BILL, LIEN OF, EFFECT OF DEATH UPON. The lien acquired by the filing of a creditors' bill is not defeated by the death of the debtor before judgment. (*First Nat. Bk. v. Shuler*, 601.)

2. CREDITORS' BILL, LIEN OF.—As respects chattels subject to be taken on execution unless the action is brought in aid of an execution, the creditors' bill does not create any lien as against other creditors, or, if any lien exists, it is so imperfect and incomplete that it may be defeated by the subsequent levy of a writ in favor of another creditor, made before a receiver is appointed. (*First Nat. Bk. v. Shuler*, 601.)

3. CREDITORS' BILL, LIEN OF.—The plaintiff in a creditors' action acquires by its commencement a lien upon the choses in action and equitable assets of the debtor, entitling such plaintiff, in the successful event of the action, to priority of payment thereunder in preference to other creditors, regardless of the priority of the respective judgments. (*First Nat. Bk. v. Shuler*, 601.)

CRIMINAL LAW.

1. CRIMINAL LAW.—INSANITY AS A DEFENSE TO CRIME is an affirmative one. Hence the burden of proof rests on the accused to establish his insanity. (*Kelch v. State*, 680.)

2. CRIMINAL LAW.—THE PLEA OF GUILTY ADMITS ONLY the acts charged, and does not preclude the defendants from claiming that they do not constitute a crime. (*Grossman v. Oakland*, 832.)

CRIMINAL PROSECUTION.

See *Contracts*, 15-17.

CY PRES, RULE OF.

See *Charities*, 4.

DAMAGES.

1. DAMAGES FOR FRIGHT OR MENTAL DISTURBANCE.—In an action to recover damages for an injury sustained through the negligence of another, there can be no recovery for a bodily injury caused by mere fright or mental disturbance. Persons who are merely negligent are not bound to anticipate and guard against fright and the consequences thereof. The rule is probably otherwise where there is an intention to cause mental disturbance, or where acts are done with gross carelessness or recklessness, showing an utter indifference to consequences. (*Spade v. Lynn and Boston R. R. Co.*, 393.)

2. DAMAGES — MEASURE OF, FOR PROCURING DISCHARGE OF EMPLOYE.—If a person, by means of fraud or intimidation, procures either the breach of a contract, or the discharge of a plaintiff from an employment, which but for such wrongful interference would have continued, he is liable in damages for such injuries as naturally result therefrom. The rule is the same whether, by these wrongful means, a contract of employment definite as to time is broken, or an employer is induced, solely by reason of such procurement, to discharge an employe whom he would otherwise have retained. (*Perkins v. Pendleton*, 252.)

3. DAMAGES—FRAUD IN EXCHANGE OF REAL ESTATE.—In an action for fraud and deceit in the sale or exchange of real estate, the measure of damages is the difference between the actual value of the land as it would have been if as represented and as it actually was. (*Hecht v. Metzler*, 906.)

4. DAMAGES TO LIVESTOCK—EVIDENCE OF VALUE.—In an action to recover for injury to a horse, evidence of his pedigree and that some of his blood relations were celebrated trotters, is competent and admissible as affecting his value. (*Pittsburgh etc. Ry. Co. v. Sheppard*, 732.)

5. DAMAGES—VERDICT, WHEN NOT EXCESSIVE.—A verdict for four thousand five hundred dollars for personal injury received through negligence is not excessive, nor does it indicate that it is the result of passion or prejudice, when the evidence shows that the plaintiff, prior to the accident which rendered him a permanent invalid, was a healthy man thirty-seven years of age, earning seventy-five dollars per month, and that he has expended seven

hundred and fifty dollars for medical aid and attendance without permanent relief. (*Geary v. Kansas City etc. Ry. Co.*, 555.)

See Master and Servant, 18; Railroad Corporations, 17, 18; Vendor and Purchaser.

DEBTOR AND CREDITOR.

See Husband and Wife, 6, 9.

DEDICATION.

DEDICATION FOR ONE PURPOSE DOES NOT JUSTIFY USE FOR ANOTHER.—Land dedicated by one for a street or other way cannot be appropriated without his consent to the use of a railway, and one to whom the owner of a lot fronting upon a public street grants such lot acquires only the right to use the street for the ordinary purposes of a highway, and cannot justify its appropriation to a different purpose. (*Bowen v. Delaware etc. R. R. Co.*, 667.)

DEEDS.

See Notice.

DEFINITIONS.

"Chaste character." (*People v. Nelson*, 592.)

"Partnership." (*Carter v. McClure*, 842.)

"Trial by jury." (*Lommen v. Minneapolis Gaslight Co.*, 450.)

DELIVERY.

See Checks, 2; Insurance, 4; Negotiable Instruments, 2; Sales, 2, 3.

DEVISE.

PERPETUITY, WHEN NOT CREATED BY A CONDITION IMPOSED ON THE GRANTEE.—If property is devised to a corporation by a will, in which the testator declares that he expressly requires as a condition of the vesting of the devise that the corporation shall release certain claims against various churches therein specified this condition does not create a perpetuity, though it is possible that the releases might not be executed within lives in being and twenty-one years. The condition is not a condition precedent, and does not prevent the immediate vesting of the estate. Furthermore, the acceptance of the provisions of the will in itself operates as an equitable release of the claims specified therein, and the execution of a formal release would be decreed by a court of equity upon the application of any person interested. (*In re Stickney's Will*, 308.)

DISORDERLY HOUSES.

1. DISORDERLY HOUSES—DEFINITION.—At common law, a disorderly house is one in which the inmates behave so badly as to become a nuisance to the neighborhood, or one kept in such a way as to disturb or scandalize the public generally, or the inhabitants of a particular neighborhood, or the passers-by. (*Hawkins v. Lutton*, 131.)

2. DISORDERLY HOUSES—MEANING OF TERM IN ORDINANCE.—The term "disorderly house," in a city ordinance providing for the punishment of any person found in a "disorderly house, or a house of ill-fame, or a place resorted to for the purpose of prostitution," is not restricted to a house resorted to for the purpose of prostitution, assignation, fornication, gambling, etc., but includes a house in which quarrels, fighting, boisterous, profane, and obscene language, and other things occur, disturbing the repose of the neighborhood and violating public order and tranquility. (*Hawkins v. Lutton*, 131.)

See Arrest, 2.

DRUNKENNESS.

See Police Power.

DUE PROCESS OF LAW.

See Constitutional Law; Indictment, 7; Police Power, 4; Surveys.

DURESS.

1. **DURESS—WHAT CONSTITUTES—THREAT OF PROSECUTION.**—It is not the threat of criminal prosecution in any case that constitutes duress, but the condition of mind produced thereby. The threat must be of such a nature, and made under such circumstances, as to constitute a reasonably adequate cause to control the will of the threatened person, and must have that effect, and the act sought to be avoided must be performed by the person while in such condition. (*Wolff v. Bluhm*, 115.)

2. **DURESS—WHAT IS NOT—THREAT OF PROSECUTION.**—If a married man unlawfully causes a girl fifteen years of age to become pregnant, a mere threat by the girl's father to prosecute him criminally, unless he gives a note and mortgage to provide for the care of the girl and her child, followed by the execution of the papers several days afterward, and after the seducer's consultation with friends, who advised him to settle, does not constitute duress which will avoid the instruments. (*Wolff v. Bluhm*, 115.)

EASEMENTS.

1. **EASEMENTS—WHAT CONTINUOUS USE BECOMES ADVERSE.**—If the claimant of an easement in real property needs its use from time to time, and so uses it, there is a sufficiently continuous use to be adverse, although it is not constant. (*Swan v. Munch*, 491.)

2. **EASEMENTS — PRESCRIPTION — FLOWING LAND — FLOATING LOGS.**—If a person, for the purpose of sluicing logs, builds a dam across a river, whereby the water is obstructed and overflows another's land during the months of April, May, and June of each year, the continued adverse use of the dam during those months of each year for a period of fifteen years, is sufficient to create an easement by prescription in the landowner's premises during said three months of each year. (*Swan v. Munch*, 491.)

See Injunction, 7; Adverse Possession.

ELECTIONS.

ELECTIONS—BALLOTS.—A STATUTE prohibiting the name of a candidate for office from appearing more than once upon the official ballot is a valid law. (*State v. Bode*, 696.)

EMINENT DOMAIN.

1. **EMINENT DOMAIN—WHAT IS A PUBLIC USE IS A JUDICIAL QUESTION.**—Whether a proposed use is in fact public so as to justify the taking of property without the consent of the owner is a question for the courts to determine, and, in doing so, they are not confined to the description of the objects and purposes of the corporation as set forth in its articles of incorporation, but may resort to extrinsic evidence showing the actual business to be conducted by it. (*Bridal Veil etc. Co. v. Johnson*, 818.)

2. **EMINENT DOMAIN—RAILWAYS, WHEN A PUBLIC USE.** If a railway is constructed for the benefit and use of the general public in carrying freight and passengers, it must be regarded as a public use, though there is no town or settlement at either of its termini nor along its line, and its route is through a rough, mountainous, and sparsely settled country, and it has never charged persons

for riding as passengers, and has no passenger or freight cars or depots, and its use has been in transporting logs from the lands of the corporation to its sawmills. (*Bridal Veil etc. Co. v. Johnson*, 818.)

EQUITY.

See Executors and Administrators, 5; Injunction, 8; Judgment, 4-6, 13, 14; Maxims; Trademark, 2; Trusts, 1.

ESTATES.

1. **ESTATES—LIFE TENANT—TAXES—REPAIRS.**—A tenant for life of real estate is compelled to pay taxes and expense of repairs out of the rents and profits, whether such life estate comes by will, conveyance, or operation of law, unless he voluntarily pays them out of other funds. (*St. Paul Trust Co. v. Mintzer*, 444.)

2. **ESTATES—FAILURE OF LIFE TENANT TO PAY TAXES AND EXPENSES OF REPAIRS—REMEDY OF ADMINISTRATOR—EQUITY.**—If the life tenant in a homestead estate fails, for many years, to pay the taxes and to make repairs in order to save the estate for the reversioners, the administrator, with the will annexed, being authorized by the express terms of the will to collect the rents and to pay the taxes, is entitled to maintain a bill in equity to have a receiver appointed to take charge of the premises, to collect the rents sufficient in amount to discharge the liabilities of the life tenant's estate for which he is answerable, to reimburse the administrator for taxes and expenses paid by him, and to pay unpaid taxes, and expenses for repairs, necessarily incurred to preserve the property. (*St. Paul Trust Co. v. Mintzer*, 444.)

3. **CONDITIONS PRECEDENT AND SUBSEQUENT, TESTS OF.**—If the thing to be done does not necessarily precede the vesting of an estate in the grantee, but may accompany or follow it, and might as well be done after as before the vesting of the estate, the condition is subsequent. (*In re Stickney's Will*, 308.)

ESTATES OF DECEDENTS.

See Executors and Administrators, 9.

ESTOPPEL.

1. **ESTOPPEL, NECESSITY FOR PLEADING.**—One who has an opportunity to plead an estoppel, but does not, thereby waives it. Therefore, a corporation wishing to prevent defendants from controverting its corporate existence on the ground that they have dealt with it as a corporation, and are therefore estopped to deny that it is such, must plead such estoppel. (*Nickum v. Burckhardt*, 822.)

2. **ESTOPPEL—HOLDERS OF CERTIFICATES OF STOCK** are not estopped from reclaiming them by the fact that their guardian indorsed them in blank and left them in the possession of one who sold them to a bona fide purchaser. The guardian could not have anticipated that anyone would purchase the certificates without inquiring if their transfer by the guardian was authorized. (*O'Herron v. Gray*, 411.)

See Judgment, 17.

EVIDENCE.

1. **EVIDENCE—COURT RECORDS.**—The best evidence of the contents of a court record is a certified copy thereof, under the hand and seal of the clerk of the court, and it is error to admit parol evidence thereof. (*Stewart v. State*, 35.)

2. **EVIDENCE—RECORD OF SPEED.**—The annual reports of the "American Trotting Association" are themselves admissible in evidence as records of speed made by horses; but information ob-

tained by a witness from such published reports is not admissible in evidence. (*Pittsburgh etc. Ry. Co. v. Sheppard*, 732.)

3. EVIDENCE—STATUTORY REGULATION prescribing the mode or measure of proof necessary to maintain an action or defense pertains to the remedy, and constitutes a part of the procedure of the forum in administering the remedy. (*Heaton v. Eldridge*, 737.)

4. CRIMINAL LAW—EVIDENCE—PRELIMINARY EXAMINATION.—If an accused voluntarily testifies for himself at his preliminary examination, his statements then made are admissible against him on a subsequent trial, whether he was or was not under arrest and cautioned; and the examining court is not required to inform the accused that he can testify if he wishes, but that he does not have to testify; and the failure of the court to so inform him is no objection to the admission of his voluntary testimony on a subsequent trial. (*Dill v. State*, 37.)

See Contracts, 28; Corporations, 12, 13; Damages, 4; Fraud, 6; Homicide, 9; Larceny, 1; Master and Servant, 19; Mechanic's Lien, 8; Negotiable Instruments, 6, 13; Perjury, 1, 2; Rape, 4, 6, 7; Schools, 2, 3; Suretyship, 3; Wills, 4, 7.

EXCESSIVE VERDICT.

See Appeal, 8; Damages, 5.

EXECUTION.

1. EXECUTION DOES NOT RUN AGAINST A COUNTY.—No execution can issue upon a judgment against a county, unless expressly authorized by statute. It does not possess property liable to execution in the same sense that an individual possesses it. (*Emery County v. Burresen*, 898.)

2. EXECUTION—COUNTIES—CONSTRUCTION OF STATUTE.—A statute giving a judgment creditor a right to execution and a statute exempting certain classes of property from execution against a county do not confer the right to levy an execution against the property of a county, if there is no statute granting such right in express terms. (*Emery County v. Burresen*, 898.)

3. EXEMPTION—WAIVER OF, BY SALE.—To claim property as exempt is a personal privilege of the debtor, but he may waive such privilege, and does waive it, when he conveys the property to another, especially when with fraudulent intent. (*Wyman v. Gay*, 238.)

4. EXEMPT PROPERTY, SALE OF IN FRAUD OF CREDITORS—RECOVERY BY INSOLVENT'S ASSIGNEE.—Although certain chattels and policies of life insurance where the annual premium on each is less than one hundred and fifty dollars, are exempt from attachment while in the hands of an insolvent debtor, yet, if he conveys such property to a particular creditor, so as to give him a fraudulent preference over other creditors, it is placed without the protection of the statute of exemptions, and the debtor's assignee in insolvency may recover the property, or its value, including the value of the policies, for the benefit of all the creditors. (*Wyman v. Gay*, 238.)

EXECUTORS AND ADMINISTRATORS.

1. EXECUTORS AND ADMINISTRATORS.—AN ADMINISTRATOR DE BONIS NON SUCCEEDS only to the unadministered property of the intestate, that is, the goods, effects, and credits which were of the intestate at the time of his decease and which remained in specie, unaltered or unconverted by any act of the administrator, or the proceeds thereof which have not been commingled with the administrator's own money. (*Hodge v. Hodge*, 285.)

2. EXECUTORS AND ADMINISTRATORS—MONEY, WHEN "IN SPECIE," AND WHEN "ADMINISTERED."—Money received by a former executor or administrator in his character as such, and kept by itself, will be regarded as remaining in specie, but, if mixed with the administrator's own money, it is considered as converted, or, technically speaking, administered. (Hodge v. Hodge, 285.)

3. EXECUTORS AND ADMINISTRATORS—ACTIONS.—AN ADMINISTRATOR DE BONIS NON cannot sustain an action at law against his predecessor for anything save unadministered effects existing in specie. (Hodge v. Hodge, 285.)

4. EXECUTORS AND ADMINISTRATORS—ACTIONS.—AN ADMINISTRATOR DE BONIS NON cannot maintain an action against the estate of his predecessor for money wrongfully received by him, prior to his appointment as administrator, in the absence of allegation and proof that such money is distinguishable as a part of the intestate's property. (Hodge v. Hodge, 285.)

5. EXECUTORS AND ADMINISTRATORS—SUIT BY ADMINISTRATOR DE BONIS NON FOR MONEY WRONGFULLY RECEIVED BY HIS PREDECESSOR PRIOR TO THE LATTER'S APPOINTMENT.—If a wife owns a deposit in a savings bank, standing in the name of a trustee for her sole benefit, and the husband, after her death, procures from the trustee a transfer of the deposit to himself, without consideration, and withdraws a part of it, but is subsequently appointed administrator of his wife's estate, and dies without having included this sum in his inventory, or in any way accounting for it, an administrator de bonis non of the wife's estate cannot maintain an action at law, or a proceeding in equity, against the personal representative of the husband to charge his estate with the money so withdrawn. A bill in equity cannot be sustained upon the ground that the money was received by the defendant's testator charged with a trust in favor of the wife's estate, because, if this was so, the identity of the trust fund has been lost, and the identity of the trust fund, if such it was, having been lost, the cestui que trust can stand in no better position than other creditors. (Hodge v. Hodge, 285.)

6. EXECUTORS AND ADMINISTRATORS—REVIVAL OF DEBT DUE FROM—ACTION BY ADMINISTRATOR DE BONIS NON.—An indebtedness from an administrator to the estate, having been converted into assets by his appointment, is not revived by the death or removal of the administrator so that it can be sued by an administrator de bonis non. (Hodge v. Hodge, 285.)

7. EXECUTORS AND ADMINISTRATORS—DEBTS DUE FROM, AS ASSETS—JURISDICTION.—A debt due from a person to a testator or intestate becomes, by the debtor's appointment as executor or administrator, assets in his hands. The administrator's own debt being assets, it becomes, therefore, an item in his administration account, and the question whether it is due, and the amount of it, is one of probate jurisdiction, to be decided first, both as to law and fact, by the judge of probate, but subject to appeal. (Hodge v. Hodge, 285.)

8. PARTIES—DEATH OF THE DEFENDANT, NECESSITY OF MAKING HIS EXECUTRIX A PARTY AS SUCH.—If, after a suit is commenced against a grantor and his wife and another who were his grantees in certain transfers, which are assailed as fraudulent, to set aside such transfers, the grantor dies, and his wife is appointed his executrix, she must be made a party as such. This is not accomplished by filing a supplemental complaint averring such death and appointment, and that she is his sole devisee and legatee. Unless she is made a party as executrix, the rights of the general creditors of the estate cannot be put in issue nor litigated on the trial. (First Nat. Bk. v. Shuler, 601.)

9. EXECUTORS AND ADMINISTRATORS—CONSTRUCTION OF STATUTE PERMITTING SUPREME COURT TO GIVE JUDGMENT FOR CLAIM AGAINST ESTATE.—The only object of a statute permitting the supreme judicial court to give judgment for the amount of a claim against the estate of a deceased person, which has not been presented within the time limited by statute, if justice and equity require it to be allowed, and the creditor is not chargeable with culpable neglect in not prosecuting his claim, is to relieve a creditor, under certain circumstances, from the limitation of the statute in regard to the prosecution of claims against the estates of deceased persons. It does not create a cause of action in equity, after the bar of the statute, when there was none at law before. (*Hodge v. Hodge*, 285.)

See Estates, 2.

EXEMPTION.

See Execution, 3, 4; Homestead, 2, 4, 5, 7, 8.

FEEBLE-MINDED PERSONS.

See Actions, 2, 3.

FILING OF PAPERS.

1. FILING IMPORTS THAT THE PAPER shall remain with the clerk as a record, subject to be inspected by those who have an interest in it, like any other paper properly lodged in his office. (*Meridian Nat. Bk. v. Hoyt*, 504.)

2. FILING A PAPER CONSISTS in placing it in the proper official custody by the party charged with the duty of filing it, and the receiving of it by the officer, to be kept on file. (*Meridian Nat. Bk. v. Hoyt*, 504.)

3. FILING.—MARKING A PAPER “FILED” IS NOT FILING IT, and it can only be filed by delivering it to the proper officer, to be by him received and dealt with in the manner usual with that class of papers. (*Meridian Nat. Bk. v. Hoyt*, 504.)

4. FILING.—BILLS IN CHANCERY, TO BE “FILED,” must be delivered to the clerk, to be by him received, indorsed, and dealt with in the manner usual with such bills. They must be delivered and recorded with the purpose of having process issue in due course of time in order to be legally “filed.” (*Meridian Nat. Bk. v. Hoyt*, 504.)

5. FILING—WHAT DOES NOT CONSTITUTE.—Mere marking upon a bill in chancery the word “filed” and making a docket entry thereof, together with placing momentarily the bill in a court file without more, in a cover, when it is at once handed back and taken away, with direction not to issue process thereon, and kept away until another similar bill on behalf of another complainant has been filed, is not a legal filing so as to give the first bill priority over the second. (*Meridian Nat. Bk. v. Hoyt*, 504.)

See Assignment for Benefit of Creditors, 3, 4; *Lis Pendens*, 4.

FORGERY.

1. FORGERY—PROCURING SIGNATURE OF THIRD PERSON.—One who procures another to sign an appeal bond with intent, subsequently consummated, to pass such a signature as the signature of a third person of the same name as the signer, is guilty of forgery. (*Peel v. State*, 49.)

2. FORGERY—PROCURING SIGNATURE OF THIRD PERSON.—One who procures another, in his presence, to sign to an appeal bond the name of a third person, who resides in another county,

but whose name is identical with that of the signer, and also procures such signer to add to the bond the name of such other county, and then utters the bond as having been signed by such third person is guilty of forgery. (*Peel v. State*, 49.)

3. **FORGERY—RAILROAD TICKET—VARIANCE.**—If, on a trial for uttering a forged railroad ticket, it appears from the face thereof that it must be indorsed with a certain stamp on the back before it is complete and binding upon the railroad company, it must also appear that such stamped indorsement has been set out in the indictment as part of the forged instrument before evidence of such indorsement is admissible. (*Robinson v. State*, 20.)

4. **FORGERY OF RAILROAD TICKET—CHARGE AS TO ACCOMPLICE.**—If, on a trial for passing a forged railroad ticket, it appears by the principal witness for the prosecution, who sold the ticket to the defendant, that the witness knew it was of no value unless filled out and indorsed with a certain stamp, it is essential to a conviction that the jury be charged as to accomplice testimony and the necessity for its corroboration, in relation to such witness. (*Robinson v. State*, 20.)

5. **FORGERY—INDICTMENT—SUFFICIENCY.**—It is essential to the validity of an indictment for passing a forged railroad ticket that the character of the instrument, and in what the forgery consists be fully set out, both as to the face of the ticket and as to an indorsement on the back thereof, which alone renders the ticket binding and valuable. (*Robinson v. State*, 20.)

FORMER JEOPARDY.

See Incest, 1; Homicide, 3, 4.

FRANCHISE.

See Railroad Companies, 2-5.

FRAUD.

1. **FRAUD—EXPRESSION OF OPINION—VALUE.**—The mere expression of opinion, estimate, or judgment of the value of property, even if false, does not, as a rule, constitute actionable fraud. (*Hecht v. Metzler*, 906.)

2. **FRAUD OR MISREPRESENTATION—WHEN ACTIONABLE.**—A false statement concerning a fact material to a contract, and which is influential in producing it, constitutes actionable fraud or misrepresentation. (*Hecht v. Metzler*, 906.)

3. **FRAUD—MISREPRESENTATION AS TO RENTALS.**—A willful misrepresentation by one who exchanges land, that the rental from the property given in exchange is greater than it really is, is when relied upon by the other party, an actionable fraud. (*Hecht v. Metzler*, 906.)

4. **FRAUD—MISREPRESENTATION AS TO LOCATION OF LAND.**—A willful misrepresentation by one who exchanges land, that the property given in exchange is high and dry, and located in a particular place, and which operates to the injury of the other party, is, when relied upon by the latter, without an inspection of the premises, an actionable fraud. (*Hecht v. Metzler*, 906.)

5. **FALSE REPRESENTATIONS, WHEN ACTIONABLE.**—One who, to induce a sale of notes, represents them to be good as gold, and who intends, and is understood to intend, not an expression of an opinion, but a statement of a fact of his own knowledge, is, if such representations were known by him to be false, answerable to the person to whom they were made and who has been damaged by acting thereon. (*Andrews v. Jackson*, 390.)

6. FALSE REPRESENTATIONS, EVIDENCE TO SUPPORT FINDING OF.—Evidence showing that a person seeking to sell promissory notes professed to know all about the solvency of the maker, that she to whom they were offered knew nothing of the maker, but lived in another town and was obliged to accept the seller's representations or decline to deal with him, and that he said he had loaned money to the maker, and asked, "Do you suppose I would lend my money to him when he was not good," is sufficient to support a finding that such seller was understood, and intended to be understood, as making a representation of facts within his own knowledge. (*Andrews v. Jackson*, 390.)

See Judgment, 6, 8; Mortgage, 3; Negotiable Instrument, 7, 8; Vendor and Purchaser.

FRAUDULENT CONVEYANCES.

FRAUDULENT CONVEYANCES. — MORTGAGES made with intent to defraud creditors are valid as between the parties thereto, although void as to creditors, and voidable as to all other parties. (*Barwick v. Moyse*, 512.)

See Execution, 4; Insolvency, 1.

GAME LAWS.

GAME LAWS, WHEN INAPPLICABLE TO GAME KILLED IN ANOTHER STATE.—A statute declaring that no person shall shoot or in any manner catch, kill, or have in possession any rabbit between certain dates specified does not prohibit the having in possession between those dates rabbits killed in another state where the killing was lawful. (*Dickhaut v. State*, 332.)

GARNISHMENT.

See Attachment.

GIFTS.

1. GIFTS ARE NOT COMPLETE until the money is paid or the property is delivered. A note or other promise to pay in future is not a gift. (*School District v. Sheidley*, 576.)

2. GIFTS.—NOTES of a donor payable in future to a donee are not the subject of a gift. (*School District v. Sheidley*, 576.)

3. GIFTS — DONATIO CAUSA MORTIS — DONOR'S OWN CHECK—CONTRACT.—The doctrine that the donor's own check may not be the subject of a donatio causa mortis does not apply when such check is given for a valuable consideration received by the donor in his lifetime, for the transaction is not a gift of any kind, but a contract. (*Whitehouse v. Whitehouse*, 278.)

See Charities, 1, 2.

GRAND JURY.

See Indictment, 7, 8.

GUARANTY.

GUARANTY—CONFLICTING CLAUSES—CONSTRUCTION. Certain persons, all but two of whom were stockholders in a certain manufacturing company, signed an instrument which expressed a consideration and recited that the company mentioned was indebted to a bank named in a certain sum and might thereafter become indebted in additional amounts. Following this were four clauses; the first was a joint and several agreement to pay the whole indebtedness of the manufacturing company to the bank; the second was a waiver of notice; the third declared the contract to be a continuing

guaranty; and the fourth read as follows: "It is understood that we are to pay any sums which may accrue hereunder in the proportion which the amount of stock now held by each of us in said company bears to the whole amount of capital paid in by said company." The court, in construing such guaranty, in an action thereon, held that the first clause expressed the agreement between the parties, and that the last one could have only the effect of fixing a rule of contribution between the members of the manufacturing company. (*Wisconsin Marine etc. Bank v. Wilkin*, 86.)

GUARDIAN AND WARD.

1. A GUARDIAN HAS NO RIGHT TO PLEDGE a certificate of stock standing in the name of his ward. (*O'Herron v. Gray*, 411.)

2. GUARDIAN'S SALE.—IT IS THE DUTY OF ONE PURCHASING PROPERTY held by a guardian to ascertain whether the sale is authorized. (*O'Herron v. Gray*, 411.)

3. GUARDIAN'S SALE—WHEN VOID.—A petition for the sale of personal property presented in the name of a guardian by E. S. F., but without the guardian's knowledge or authority, does not give the court jurisdiction. An order of sale and a transfer based thereon are void. (*O'Herron v. Gray*, 411.)

See *Estoppel*, 2.

HABEAS CORPUS.

HABEAS CORPUS—VOID INDICTMENT.—A person who has been convicted and sentenced under an indictment found and returned by a grand jury composed of more men than is required to constitute a legal grand jury is entitled to be released from custody upon a writ of habeas corpus, for the reason that he is restrained of his liberty by an indictment and sentence which are absolutely void. (*Ex Parte Reynolds*, 54.)

HIGHWAYS.

HIGHWAYS—TITLE OF ABUTTING OWNER.—The owner of land abutting upon a public street or highway has the legal title to the center of such street or highway, subject only to the public easement. (*Chicago etc. Ry. Co. v. Milwaukee etc. Ry. Co.*, 136.)

See *Railroad Companies*, 6, 7.

HILARY RULES.

See *Pleading*, 1.

HOMESTEAD.

1. HOMESTEAD INTERESTS ARE FAVORED by the constitution and statute, and the law applicable thereto should receive a liberal construction. (*Kiewert v. Anderson*, 487.)

2. HOMESTEADS—EXEMPTION OF PROCEEDS—INTENTION.—If a homestead has been sold with the intention of purchasing another homestead with the proceeds, the latter are exempt for a reasonable time, although the homesteader has shown some slight intention of investing them in another state. (*Schuttloffel v. Collins*, 216.)

3. HOMESTEAD—EXTENSION OF CITY LIMITS.—A homestead, once acquired, is a valuable right, and an act of the legislature extending the limits of a city so as to include the homestead, while it retains all its characteristics as such, does not operate to reduce or diminish the right of the owner of the homestead, unless it becomes, in fact, urban property. (*Kiewert v. Anderson*, 487.)

4. HOMESTEADS—SALE ON TIME—EXEMPTION OF PROCEEDS.—If a homestead is sold on time, with intention to invest

the proceeds, when realized in a new homestead, such proceeds are exempt. (*Schuttloffel v. Collins*, 216.)

5. HOMESTEADS—SALE ON TIME—EXEMPTION OF PROCEEDS.—If a husband sells his homestead on time, intending to invest the proceeds, when realized, in a new homestead, and dies in the mean time, such proceeds are exempt in the hands of his widow, for the purpose of purchasing a home for herself and her children. (*Schuttloffel v. Collins*, 216.)

6. HOMESTEAD—LANDS, URBAN, RURAL, AND PLATTED.—The fact that a homestead, situated within an incorporated city and used for agricultural purposes, is wholly or partly surrounded by laid-out and platted lands rural in character does not affect its homestead character so long as the homestead land itself is not laid out and platted, and is not urban, in its character. (*Kiewert v. Anderson*, 487.)

7. PARTNERSHIP—INSOLVENCY—HOMESTEAD EXEMPTION.—The members of an insolvent firm are not entitled to a homestead exemption out of partnership property in the hands of an assignee for the benefit of creditors until the firm debts are paid. (*Aultman, Miller & Co. v. Wilson*, 677.)

8. PARTNERSHIP—INSOLVENCY—HOMESTEAD EXEMPTION—HUSBAND AND WIFE.—The members of an insolvent co-partnership, composed of a husband and his wife, are not entitled, either jointly or severally, to an allowance in lieu of homestead, out of firm assets in the hands of an assignee for the benefit of creditors, until the firm debts are paid. (*Aultman, Miller & Co. v. Wilson*, 677.)

See Assignment for Benefit of Creditors, 6.

HOMICIDE.

1. HOMICIDE—CORPUS DELICTI.—It is essential to a conviction for any degree of culpable homicide, not only that it be shown that the deceased has been killed, but also that the killing was caused by some criminal means or agency, and, unless the corpus delicti in both these respects is proved, a confession by the accused is not of itself sufficient to sustain a conviction. (*Conde v. State*, 22.)

2. HOMICIDE—CORPUS DELICTI.—On a trial for murder, evidence that a witness saw the corpse of the person alleged to have been killed, and assisted in burying it, but did not see the face, which was covered with a bloody cloth, nor did he see any wounds on the person of the deceased, nor any marks of violence, is not sufficient to establish that he came to his death by some criminal means or agency. Such evidence does not establish the corpus delicti. (*Conde v. State*, 22.)

3. HOMICIDE—FORMER JEOPARDY—DEGREES OF CRIME.—If an accused has been put on trial for a homicide or other offense which embraces different degrees, and has been acquitted of the higher degree, he cannot again be put on trial for that degree and it is the duty of the court to so inform the jury. (*Conde v. State*, 22.)

4. HOMICIDE—FORMER JEOPARDY—ERRONEOUS CHARGE.—If, after an accused has been acquitted of murder in the first degree, he is placed on trial for murder in the second degree, it is error to charge the jury that "when an indictment charges murder upon implied malice alone, and the evidence establishes, or tends to establish, express malice as a fact, it is not to be understood that such proof would, on the one hand, be incompetent, nor, on the other, that it would create a variance from the allegations in the indictment, but such evidence, notwithstanding it shows express malice, would,

in such case, be sufficient to warrant a conviction for murder in the second degree, since express malice comprises and embraces implied malice, just as murder of the first degree comprises and embraces murder of the second degree." Such charge makes the accused liable to conviction for the crime for which he has been acquitted. (*Conde v. State*, 22.)

5. HOMICIDE—SELF-DEFENSE.—The fact that one person with a grievance arms himself, and seeks an interview with the man who wrongs him, is not necessarily a provocation, nor does it place the injured party necessarily in the wrong; and to deprive him of the right of self-defense, he must willingly and knowingly use language or commit acts clearly and reasonably calculated and intended to lead to an affray or deadly conflict. (*Shannon v. State*, 17.)

6. HOMICIDE—SELF-DEFENSE—PROVOKING QUARREL.—One person may speak to another about derogatory charges or statements made or circulated by such other against him without intending to provoke a difficulty; and, knowing that such other person is armed, he may also arm himself, not to provoke a difficulty or to produce an occasion for injuring such other, but to act, if necessary, in self-defense; and if, in an attempt to adjust the trouble or reach an understanding without any provocation on his part, the insult or charge complained of is not only persisted in, but publicly repeated, and the complainant, roused to passion thereby, replies in terms equally insulting, and is immediately attacked, and finally kills his adversary in defense of his life, he is not guilty of any crime. (*Shannon v. State*, 17.)

7. CRIMINAL LAW—MURDER—PROOF OF INSANITY—INSTRUCTION.—To instruct a jury, in a murder case, that the evidence introduced to establish insanity is insufficient if it merely shows it to have been probable; that the proof must be such as to overcome the legal presumption of sanity; and that it must "satisfy" them that the defendant is insane, is erroneous and prejudicial, because it requires more than a preponderance of the evidence to maintain the defense. (*Kelch v. State*, 680.)

8. CRIMINAL LAW—INSANITY—DEFENSE—DEGREE OF PROOF.—One charged with murder, and who sets up his insanity as a defense, is bound to establish it, but he may do so by a bare preponderance of the evidence, and is not required to make any higher degree of proof. (*Kelch v. State*, 680.)

9. HOMICIDE—GOODS OF DECEASED IN POSSESSION OF ACCOMPLICE—CHARGE LIMITING EVIDENCE.—If, on a trial for murder, evidence is admitted showing that property of the deceased, after his death, was found in the possession of one of the defendants jointly on trial, and at a time when the other defendant was not present, and it is not shown that the latter ever had possession of the property, the evidence should be limited to the defendant in whose possession the property was found. (*Conde v. State*, 22.)

HUSBAND AND WIFE.

1. HUSBAND AND WIFE, HIS RIGHT TO HER SERVICES.—Though a woman is serving a man in the capacity of clerk upon an agreement to pay her an annual compensation of five hundred dollars, such employment to continue as long as he practices law, and such payment not to be made until he retires from business, he, upon their subsequent marriage, becomes entitled to her services without payment. She need not continue serving him as a clerk, but, if she does so, she cannot enforce any promise to pay therefor, however solemnly made. (*Matter of Callister*, 620.)

2. HUSBAND AND WIFE, LEGISLATION AS AFFECTING HIS RIGHT TO HER SERVICES.—The legislation of the state of

New York upon the subject of the rights of married women has only resulted in abrogating their common-law status to the extent set forth in the various statutes. They have not, by express provision nor by implication, deprived him of his common-law right to avail himself of a profit or benefit from her services. A pre-existing contract between them stipulating for payment by him for such services is necessarily terminated by their marriage. (*Matter of Callister*, 620.)

3. HUSBAND AND WIFE.—FOR HIS LOSS OF CONSORTIUM with his wife a husband may maintain an action, notwithstanding the enactment of statutes enlarging the rights of married women. While these abridge his right to compel her to work for him, he still has a right to her society and assistance which is different in character and degree from that which other people have or which she is at liberty to give them. Hence, if a wife suffers personal injuries from the negligence of another, her husband may recover compensation for his consequential injuries therefrom, including his loss of consortium. (*Kelly v. New York etc. R. R. Co.*, 397.)

4. TENANCY BY ENTIRETIES—MORTGAGE EXECUTED BY HUSBAND.—If a husband executes a mortgage on real property which he and his wife hold as tenants by the entirety, she cannot be dispossessed under such mortgage, or any foreclosure thereof to which she was not a party. The constitution of Maryland, by declaring that the property of the wife shall be protected from the debts of the husband, renders it impossible that any deed or mortgage made by him alone or any judgment rendered against him shall be enforced so as to deprive her of her right to the possession of the whole of the property of which he and she are tenants by the entirety. (*McCubbin v. Stanford*, 329.)

5. HUSBAND AND WIFE.—A constitutional provision declaring that the property of the wife shall be protected from the debts of the husband, while it does not impair the marital rights of the husband in his wife's property, places it beyond the reach of his creditors. Such interest as he has, therefore, is not subject to his liabilities. (*McCubbin v. Stanford*, 329.)

6. HUSBAND AND WIFE—ABSORPTION OF DEBTOR HUSBAND'S PROPERTY FOR FAMILY SUPPORT.—A wife will not be allowed to absorb her debtor husband's property under the cover of family support. Hence, a court will closely scrutinize, even with suspicion, the transfer, by a husband to his wife, of the former's means and earnings, however innocent any such transaction may appear on its surface, if the effect of the transfer is not for the support of the family, but to store the property away from the reach of creditors. (*Trefethen v. Lynam*, 271.)

7. HUSBAND AND WIFE—INVESTMENT OF HIS INCOME IN HER BUSINESS—BURDEN OF PROOF AS TO FAMILY EXPENSES.—If a wife receives money of her husband, it being a part of his income, invests it in her separate business, and then pays family expenses out of the proceeds of that business, the burden is upon her, as against his prior creditors, to show affirmatively the amount actually consumed in such expenses, and that no wrong was worked to her husband's creditors. (*Trefethen v. Lynam*, 271.)

8. HUSBAND AND WIFE—HUSBAND'S LIABILITY FOR RENT OF WIFE'S PROPERTY OCCUPIED BY FAMILY.—A wife may, at her will, manage and dispose of her own property, including the homestead upon which the family live, but while it is so occupied she cannot, at least in the absence of any agreement, require the husband to pay her rent therefor; and it follows that she cannot insist upon it as against his creditors. (*Trefethen v. Lynam*, 271.)

9. HUSBAND AND WIFE—HUSBAND'S EXPENDITURES ON WIFE'S PROPERTY—RIGHTS OF HIS CREDITORS.—If a husband, at the expense of his existing creditors, expends his own money with his wife's consent in making a permanent, visible, and appreciable addition to his wife's estate, and to its value, as by building a stable on her homestead, she should not be allowed to retain any such benefit or increment in value, but such prior creditors may, by equitable trustee process, compel her to account for the money or estate thus absorbed, although there was no actual intent to defraud them. (*Trefethen v. Lynam*, 271.)

10. A MARRIED WOMAN IS NOT GIVEN THE POWER TO PROSECUTE IN HER OWN NAME AN ACTION FOR ENTICING AWAY HER HUSBAND OR ALIENATING his affections by a statute providing that, where a husband has deserted his family, his wife may prosecute or defend in his name any action which he might have prosecuted or defended, and she may sue or be sued in her own name for any cause of action accruing subsequently to such desertion. (*Smith v. Smith*, 838.)

11. MARRIED WOMAN, ACTION FOR ALIENATING HUSBAND'S AFFECTIONS.—A married woman had, at the common law, a cause of action against one who wrongfully enticed away or alienated the affections of her husband, but, because of her disability, her right of action remained in abeyance, and could not be prosecuted by her in her own name. If he died or there was an absolute divorce, her right of action remained her property, and she could then prosecute a suit therefor as a feme sole. (*Smith v. Smith*, 838.)

12. ASSIGNMENT—CAUSE OF ACTION FOR PERSONAL INJURIES.—A husband, who is indebted to his wife, and who obtains a verdict in an action for personal injuries, may lawfully assign his cause of action to her, after verdict but before judgment, to the extent of his actual indebtedness to her. (*Lehmann v. Farwell*, 111.)

73. HUSBAND AND WIFE.—A PROMISSORY NOTE GIVEN BY A HUSBAND to his wife in consideration of moneys which she had accumulated for the purpose of purchasing oil paintings and household decorations, and which had been given her by him, is enforceable against his estate. (*Matter of Callister*, 620.)

See Executors and Administrators, 5; Suretyship, 14; Witnesses, 1.

INCEST.

1. INCEST—FORMER JEOPARDY.—An acquittal for rape does not bar a prosecution for incest with the same party growing out of the same transaction. The offenses are distinct, each requiring a different character of proof. (*Stewart v. State*, 35.)

2. INCEST—ACCOMPLICE.—If, on a trial for incest, the evidence tends to show that the prosecuting witness consented to the commission of the offense charged, she should be treated as an accomplice; and the jury should be instructed that before they can convict her testimony must be corroborated. (*Stewart v. State*, 35.)

INDICTMENT.

1. AN INDICTMENT FOR AN OFFENSE CREATED BY STATUTE is generally sufficient, if it describes the offense in the words of the statute. (*Dickhaut v. State*, 332.)

2. INDICTMENT—SUFFICIENCY—ASSAULT.—An information charging an aggravated assault committed by an adult upon a child, with switches, is sufficient, and the only effect of the allegation as to the means used, is to confine the prosecution to proof of such means. (*Kinnard v. State*, 47.)

3. INDICTMENT—JOINDER OF OFFENSES.—Burglary and conspiracy to commit burglary may be joined in separate counts in

the same indictment; and, if the evidence shows that only one criminal transaction is involved, the court need not restrict the prosecution to any particular count. (*Dill v. State*, 37.)

4. **INDICTMENT—COUNTS—"SAME OFFENSE."**—Under the Texas statute, an indictment may contain as many counts charging the same offense as it may be deemed necessary to insert. The words "same offense" mean the same criminal transaction. (*Dill v. State*, 37.)

5. **INDICTMENT—JOINDER OF COUNTS.**—Counts may be joined in the same indictment to meet the various aspects in which the evidence may present itself; and, if it appears from the evidence that only one criminal transaction is involved, the court need not restrict the prosecution to a particular count. (*Dill v. State*, 37.)

6. **INDICTMENT—ROBBERY—DESCRIPTION OF FOREIGN MONEY.**—An indictment for robbery describing the property taken as "one dollar in Mexican money of the value of fifty cents" is insufficient, for the reason that the court can take no judicial cognizance of foreign money, and that, in describing it in the indictment, it must be treated as property merely, and not money, and described by name, kind, quantity, and ownership, as directed by statute. (*Wade v. State*, 31.)

7. **INDICTMENT AND SENTENCE—ILLEGAL GRAND JURY—DUE PROCESS OF LAW.**—An indictment found and returned by a grand jury composed of more men than is required to constitute a legal grand jury, as well as a conviction and sentence under such indictment, is without due process of law and absolutely void. (*Ex parte Reynolds*, 54.)

8. **GRAND JURY—PRESENCE OF A STENOGRAPHER BEFORE.**—The presence of a stenographer before a grand jury while witnesses are being examined, who attends, by express order of the court, to assist the prosecuting attorney in taking down the testimony of witnesses, and who does take stenographic notes of the testimony, but who retires before the jury commence their deliberations, invalidates an indictment found upon the testimony of witnesses given under these circumstances; and the respondent in the indictment may take advantage of such invalidity. (*State v. Bowman*, 266.)

See Contracts, 14; Forgery, 5; Habeas Corpus.

INJUNCTION.

1. **JUDGMENTS, VOID—INJUNCTION AGAINST.**—An injunction does not lie against an execution issued upon a void judgment rendered by a justice of the peace. The defendant has an ample and adequate remedy at law. (*St. Louis etc. Ry. Co. v. Lowder*, 565.)

2. **INJUNCTION—IRREPARABLE INJURY—COMPLAINT.**—A complaint for an injunction upon the ground of irreparable injury must show affirmatively why the injury is irreparable, or allege facts which will justify that reasonable conclusion; otherwise the injunction will be refused. (*McGregor v. Silver King Mining Co.*, 883.)

3. **INJUNCTION—IRREPARABLE INJURY—ADEQUATE REMEDY AT LAW.**—It must depend upon the circumstances of each particular case as to when injuries shall be regarded as irreparable at law; and no injunction will issue unless there is cause to fear substantial and serious damage, for which courts of law could furnish no adequate remedy. (*McGregor v. Silver King Mining Co.*, 883.)

4. **INJUNCTION—IRREPARABLE INJURY—WHAT IS NOT.**—The digging of a trench, and the laying of a pipe line therein, across plaintiff's land, which is rocky, barren, vacant, and comparatively

valueless, is not such an irreparable injury as to justify the issuance of an injunction, where it appears that the damages, if any, are merely nominal; that the defendant is solvent and able to respond in damages; and that proceedings have been taken, under the statute, for condemnation. (*McGregor v. Silver King Mining Company*, 883.)

5. INJUNCTION—SETTLED RIGHT OF COMPLAINANT—ADEQUATE REMEDY AT LAW.—An injunction will not, ordinarily, be granted when the right of the complainant is doubtful, and has not been settled at law; and, even when it has been so settled, an injunction will not be granted when the remedy at law is adequate. (*McGregor v. Silver King Mining Co.*, 883.)

6. INJUNCTION TO RESTRAIN TRESPASS.—It is not usual to issue an injunction to restrain a trespass merely because it is such, without showing that the property trespassed upon has some peculiar value that could not admit of due recompense, or that it would be destroyed by repeated or continuous acts of trespass. (*McGregor v. Silver King Mining Co.*, 883.)

7. INJUNCTION—TRESPASS—ACQUISITION OF EASEMENT OR SERVITUDE.—In a complaint to restrain the construction of a ditch across barren, rocky, uncultivated, and comparatively valueless land, and the laying of pipes therein, an allegation that the trespass will ripen into an easement unless enjoined, forms no basis for injunctive relief pending the final hearing, as no such easement or servitude can be acquired, except by the consent or acquiescence of the plaintiff. (*McGregor v. Silver King Mining Co.*, 883.)

8. INJUNCTION—TRESPASSES—FOUNDATION OF EQUITY JURISDICTION.—The foundation of the jurisdiction of a court of equity to issue injunctions to restrain trespasses is the probability of irreparable injury, the inadequacy of pecuniary compensation, and the prevention of a multiplicity of suits, where the rights of numerous persons are involved. (*McGregor v. Silver King Mining Co.*, 883.)

9. AN INJUNCTION AGAINST RESORTING TO THE COURTS OF ANOTHER STATE may be granted when both parties are residents of this state, and the object of the prosecution of the action in the other state is to evade the laws of this and to subject the defendant to some penalty or remedy of an oppressive character to which he is not subject in the state of his residence and wherein the alleged cause of action accrued. (*Miller v. Gittings*, 352.)

10. INJUNCTION TO PREVENT ARREST IN AN ACTION IN ANOTHER STATE.—If a cause of action accrues, or is alleged to have accrued, in favor of one party and against another in a state of which both are residents and upon which cause of action no arrest or imprisonment is lawful in the state wherein it arose, an injunction will issue to prevent the prosecution of an action thereon in another state where the remedy of arrest and imprisonment is sought, and may be, or has been, awarded. (*Miller v. Gittings*, 352.)

11. AN INJUNCTION MAY ISSUE TO PREVENT THE PROSECUTION OF AN ACTION IN ANOTHER STATE, though one of the defendants is a resident thereof, if the alleged cause of action arose in this state, of which the plaintiffs in the action were residents, and they went to such other state for the purpose of evading the laws of this and of having the defendants arrested suddenly, and thereby coerced into paying plaintiff's claim, when, had the action been begun in the state wherein the cause accrued, no arrest could have been made under its laws. (*Miller v. Gittings*, 352.)

12. AN INJUNCTION MAY ISSUE AGAINST THE PROSECUTING IN ANOTHER STATE by citizens of this state of any action, when the substantial ends of justice require that the action should

not be prosecuted elsewhere than in this state. (*Miller v. Glittings*, 352.)

13. INJUNCTION—LOSSES—SETTING ASIDE RESTRAINING ORDER.—If the continuance of a temporary restraining order until the hearing of an application for an injunction is likely to work great injury to the defendant, without corresponding benefits to the plaintiff, and the latter has his remedy in damages, such order should be set aside. (*McGregor v. Silver King Mining Co.*, 883.)

14. INJUNCTION—LOSSES TO BE CONSIDERED.—If the granting of an injunction would necessarily cause great loss to the defendant, a loss disproportionate to the injuries sustained by the plaintiff, that fact should be considered in determining whether the application should be granted, and, in some cases, it would justly have great weight. (*McGregor v. Silver King Mining Co.*, 883.)

See Trademark, 1, 3.

INSANE PERSONS.

CRIMINAL LAW—MURDER—PROOF OF INSANITY PREPONDERATES, WHEN.—Whenever the existence of insanity is made probable after considering all of the evidence for and against it, there is a preponderance of evidence in favor of insanity. (*Kelch v. State*, 680.)

INSANITY.

See Criminal Law, 1; Homicide, 7, 8; Insane Persons; Negotiable Instruments, 3.

INSOLVENCY.

1. INSOLVENCY PROCEEDINGS—FRAUDULENT TRANSFER, WHEN RESORT MUST BE HAD TO INDEPENDENT SUITS TO VACATE.—When a debtor has been adjudged insolvent on his own petition or upon a petition of his creditors, but not upon a ground upon which it is subsequently sought to attack a transfer made by him, it is necessary for his trustee or assignee in insolvency to resort to an independent suit for that purpose. If, on the other hand, the proceeding is involuntary and upon some ground which, if it exists, renders the transfer void as against such assignee or trustee, the adjudication of insolvency upon that ground establishes it for all purposes, and relieves the assignee of the necessity of resorting to a suit in equity to avoid the transfer. (*Vogler v. Rosenthal*, 298.)

2. INSOLVENCY PROCEEDINGS—TRANSFEREES, WITHDRAWAL OF ANSWER OF WITHOUT PREJUDICE—EFFECT OF SUBSEQUENT ADJUDICATION.—If, in involuntary proceedings in insolvency, it is alleged as a ground thereof that the debtor has made a transfer while insolvent, or in contemplation of insolvency, for the purpose of hindering, delaying, or defrauding his creditors, or of preferring some of them, the persons to whom transfers have been made deny that they were made for the purpose alleged, and afterward such persons are permitted by order of court to withdraw their answer without prejudice, and the debtor is then adjudged an insolvent upon the grounds alleged in the petition, such adjudication is conclusive against such persons of the grounds upon which it was based. Their withdrawal of their answers had no other effect than to place them in the same position that they would have been in had they not appeared or answered at all. (*Vogler v. Rosenthal*, 298.)

See Judgment, 24; Trusts, 3.

INSTRUCTIONS.

See Forgery, 4; Homicide, 4, 9; Incest, 2; Rape, 5.

INSURANCE.

1. INSURANCE—SPECIAL AND GENERAL PROVISIONS.—

A special provision in a policy of insurance will be held to override a general provision only where the two cannot stand together. If reasonable effect can be given to both, then both are to be retained. (*German Fire Ins. Co. v. Roost*, 711.)

2. INSURANCE—CONSTRUCTION OF CONTRACT.—The meaning of a contract of insurance is to be gathered from a consideration of all its parts; and no provision is to be wholly disregarded because it is inconsistent with other provisions, unless no other reasonable construction is possible. (*German Fire Ins. Co. v. Roost*, 711.)

3. INSURANCE—CONDITIONS—BURDEN OF PROOF.—A clause in an insurance policy providing that taking additional insurance makes it void, unless written consent thereto is indorsed upon the policy, and that no condition of the policy can be waived except in writing signed by the secretary of the company, is, in the absence of statutory regulation, binding upon the assured, who has the burden of proof to show facts exempting from its operation (*Taylor v. State Ins. Co.*, 210.)

4. INSURANCE—PROOF OF LOSS—DELIVERY.—If a complaint in an action on a policy of insurance alleges notice and proof of loss to the insurer, accompanied by the affidavits required, copies of which are attached as exhibits, and the answer admits that such documents were received, their delivery is shown without formally putting them in evidence. (*Taylor v. State Ins. Co.*, 210.)

5. INSURANCE—ACCIDENT—DEATH WHILE ENGAGED IN AN UNLAWFUL ACT.—Under a policy of accident insurance exempting the insurer from liability for the death of the insured while engaged in an unlawful or vicious act, an answer setting up as a defense a violation by the insured of a statute prohibiting seining in streams at a point above tide water is insufficient on demurrer if it fails to allege that such seining was done in a stream above tide water (*Conboy v. Railway Officials etc. Assn.*, 154.)

6. INSURANCE—ACCIDENT—DEATH WHILE VIOLATING STATUTE.—Under a policy of accident insurance exempting the insurer from liability for the death of the insured while engaged in an unlawful act, the fact that the latter meets his death while violating a statute does not relieve the insurer from liability, unless the act done is one which increases the risk and is one between which and the death there is a causative connection. (*Conboy v. Railway Officials etc. Assn.*, 154.)

7. INSURANCE, LIFE—VOLUNTARY EXPOSURE TO UNNECESSARY DANGER, WHAT IS NOT.—Though the assured approaches another, applying vulgar and abusive language to him, and the latter retreats, warning the assured not to approach, but he nevertheless continues his threatening demonstrations, and is thereupon shot and killed, he does not commit a breach of the condition of a policy exempting the insurer from liability for death caused by voluntary exposure to unnecessary danger, unless the assured knew, or had reason to apprehend, that his adversary was armed with a deadly weapon and would use it for the purpose of taking his life or inflicting serious bodily injury. (*Union Casualty Co. v. Harroll*, 873.)

8. INSURANCE—ACCIDENT—VOLUNTARY EXPOSURE TO DANGER.—Under an accident insurance policy exempting the insurer from liability for the death of the insured resulting from "voluntary exposure to unnecessary danger or perilous venture," the insurer, to absolve himself from liability, must not only allege and prove that the insured exposed himself to unnecessary danger, but

also that he knew of such danger and voluntarily exposed himself thereto. (*Conboy v. Railway Officials etc. Assn.*, 154.)

9. INSURANCE, ACCIDENT, LOSS OF LIFE BY, WHAT IS.—The death of the assured is regarded as due to an accident, though he was intentionally killed by one upon whom he was moving aggressively, if he did not know, and had no reason to believe, that his adversary was armed with a deadly weapon, with intent upon such advance to slay, and the assured was unarmed. Under such circumstances, he had a right to presume that, if a fight occurred, it would be carried on without the use of deadly weapons. (*Union Casualty Co. v. Harroll*, 873.)

10. INSURANCE, ACCIDENT.—DROWNING is a death from external violence.—(*Wehle v. U. S. Mut. Acc. Assn.*, 598.)

11. INSURANCE, ACCIDENT—RIGHT TO EXAMINE CORPSE. WITHIN WHAT TIME MUST BE EXERCISED.—Where a policy of insurance against accident stipulates that the insurer, by its medical adviser, shall have the right to examine the person or body of the assured in respect to any alleged injury or cause of death, such right must be exercised immediately upon receiving notice of the death, and, if not exercised until after interment, is waived. Especially is this true when it does not appear that after such interment any facts came to the knowledge of the insurer warranting the belief that death had occurred from any cause excepted from the contract of insurance. (*Wehle v. U. S. Mut. Acc. Assn.*, 598.)

12. INSURANCE—LIGHTNING AND EXPLOSION CLAUSES.—CONSTRUCTION.—If a policy of insurance on a house and furniture contains a lightning clause, followed by a provision distinctly excluding liability for loss by explosion, it is plain that a loss by explosion is not contemplated by the parties as being embraced within the protection of the policy. Hence, if lightning strikes a powderhouse, in which neither the company nor the insured has any interest, on the other side of a street from the insured property, seventy-one feet distant, and which stroke is followed by an explosion that destroys the house and furniture, the company is not liable. (*German Fire Ins. Co. v. Roost*, 711.)

13. INSURANCE—POWER OF AGENT TO CORRECT POLICY—An agent authorized to make contracts of insurance may, at any time during the continuance of his agency, though subsequent to a loss, correct a policy issued by him, by inserting therein property included in the original contract, but omitted from the policy by mistake. (*Taylor v. State Ins. Co.*, 210.)

14. INSURANCE—POWER OF AGENT—ADDITIONAL INSURANCE—NOTICE.—An insurance agent, whose powers are limited to making contracts and issuing policies, has no power, after issuing a policy, to violate a condition therein by agreeing verbally with the insured, without the knowledge of the insurer to additional insurance in another company. Notice to such agent of additional insurance is not notice to his principal, and it is not bound thereby nor by such verbal agreement of the agent. (*Taylor v. State Ins. Co.*, 210.)

15. INSURANCE—POWER OF AGENT TO WAIVE CONDITIONS IN POLICY.—An insurance agent, whose powers are limited to making contracts of insurance and delivering policies, has no authority, after he has issued a policy, to waive a clause therein expressly providing that additional insurance shall avoid the policy unless written consent thereto should be indorsed thereon, and that no condition therein can be waived except in writing signed by the secretary. Additional insurance taken upon the authority of such attempted waiver by such agent avoids the policy. (*Taylor v. State Ins. Co.*, 210.)

16. INSURANCE IN FAVOR OF MORTGAGEE.—A policy of insurance made payable to a designated mortgagee, as his interest may appear, covers only such interest as he has at the issuing of the policy, and cannot entitle him to indemnity for loss suffered because of further loans made by him and secured by mortgages on the insured property. (*Attleborough Sav. Bk. v. Security Ins. Co.*, 373.)

17. INSURANCE, FORFEITURE OF MORTGAGEE'S RIGHTS If an insurer has lost his right to indemnity because of a breach of a policy of insurance made payable to a mortgagee as his interest may appear, and the latter cannot or will not assign his mortgage to the insurer so that he can be subrogated to his rights, such mortgagee cannot recover anything on the policy, if it stipulates that the insurer, if he elects to pay the amount secured by the mortgage, shall be entitled to an assignment thereof, if no liability exists as to the mortgagor. (*Attleborough Sav. Bk. v. Security Ins. Co.*, 373.)

18. INSURANCE—PROXIMATE CAUSE OF LOSS.—In determining the liability of an insurance company for a loss, the proximate and not the remote cause of the loss is to be regarded. Hence, if a powderhouse, in which neither the company nor the insured has any interest, is struck by lightning, which results in an explosion that destroys an insured house and furniture on the other side of the street, seventy-one feet distant, the loss of the house and furniture is caused by explosion, and not by lightning. (*German Fire Ins. Co. v. Roost*, 711.)

INTERLOCUTORY DECREE.

See Judgment, 15.

INTERSTATE COMMERCE.

1. INTERSTATE COMMERCE—CONSTITUTIONAL LAW.—A statute regulating the sale of convict made goods manufactured in other states by imposing a license tax on those who sell such goods within the state is void as being in conflict with section 8 of article 1 of the constitution of the United States providing that Congress shall have power to regulate commerce among the several states. (*Arnold v. Yanders*, 753.)

2. INTERSTATE COMMERCE—TAX ON CONVICT MADE GOODS.—A tax or duty imposed by statute upon convict made goods when imported from another state is clearly a regulation of commerce among the states, and an attempt to exercise a power which belongs to Congress alone. Such statute is therefore unconstitutional and void. (*Arnold v. Yanders*, 753.)

IRREPARABLE INJURY.

See Injunction, 2-4.

JOINDER OF COUNTS.

See Indictment, 3-5.

JOINT STOCK COMPANIES.

JOINT STOCK COMPANIES, unless incorporated, are partnerships. (*Carter v. McClure*, 842.)

JUDGMENT.

1. JUDGMENTS—ENTRY NUNC PRO TUNC.—Proof, to authorize the entry of a judgment or sentence nunc pro tunc, may as well be made by parol as by record evidence. (*Gonzales v. State*, 51.)

2. JUDGMENTS—ENTRY NUNC PRO TUNC.—The trial court may enter sentence nunc pro tunc when it has the indictment, ver-

dicit, and judgment before it, and has personal knowledge that sentence has been pronounced, without requiring or having any record evidence of the latter fact. (*Gonzales v. State*, 51.)

3. JUDGMENTS—NUNC PRO TUNC ENTRIES—EVIDENCE.—The power of a court to make entries nunc pro tunc is restricted to placing upon the record evidence of judicial action which has been actually taken. In determining the question whether such action has been taken, the court may resort to all sources of information that are competent under general rules of evidence, including the oral testimony of witnesses. (*Jacks v. Adamson*, 749.)

4. JUDGMENTS—RELIEF IN EQUITY.—A court of equity will not set aside a judgment at law because it was founded on a fraudulent instrument or perjured testimony, nor for any matter that was actually presented and considered in the judgment assailed. (*Camp v. Ward*, 929.)

5. JUDGMENTS—RELIEF IN EQUITY—BILL OF DISCOVERY.—A bill in equity seeking to set aside a judgment at law between the same parties, on the ground that it was based upon perjured testimony, cannot be sustained as a bill of discovery, for the reason that the judgment is conclusive that the complainant has no interest in the matter concerning which discovery is sought. (*Camp v. Ward*, 929.)

6. JUDGMENTS—RELIEF IN EQUITY.—The acts for which a court of equity may, on account of fraud, set aside or annul a judgment at law between the same parties have relation only to fraud, extrinsic or collateral to the matter tried by the first court, and not to fraud in the matter on which the judgment was rendered. (*Camp v. Ward*, 929.)

7. JUDGMENT VACATING AS TO AN INNOCENT PARTY.—A judgment may be vacated for fraud and deceit practiced by one of the parties thereto, though thereby another party not implicated in the fraud or deceit loses the benefit of the judgment as *res judicata*. (*Furman v. Furman*, 629.)

8. JUDGMENTS, VACATING FOR FRAUD.—The court has power to set aside a judgment for fraud and deceit practiced by a party thereto, and may do so after the lapse of the period of time designated in sections 724, 1282, and 1290 of the Code of Civil Procedure of New York. (*Furman v. Furman*, 629.)

9. RES JUDICATA, GENERAL RULE OF.—If a question has once been tried and determined on its merits, without fraud or collusion, by a court having jurisdiction of the parties and subject matter, it cannot be again litigated between the same parties in the same or any other judicial tribunal so long as the adjudication remains unreversed and in full effect. (*Martin v. Evans*, 292.)

10. RES JUDICATA—PARTIES.—A judgment against one sued as an individual does not bind him as a trustee or executor, nor does a judgment against one as a trustee or executor bind him as an individual in a subsequent action, although the identical issue is involved, and the decision in the first action was upon the merits. (*First Nat. Bk. v. Shuler*, 601.)

11. RES JUDICATA.—TO CONSTITUTE A DECISION in one cause an estoppel in another, the case adjudicated must have been between the same parties in the same right or capacity. (*Nickum v. Burckhardt*, 822.)

12. RES JUDICATA, CHANGE IN FORM OF ACTION.—Where remedy was sought in a suit in equity to which complainant's ownership of certain bonds was essential, and a decree of bill dismissed was entered, such decree is conclusive in a subsequent action of trover by the same plaintiff against the same defendants seeking to

recover for the conversion of the same property. (*Martin v. Evans*, 292.)

13. RES JUDICATA.—WHENEVER A DECREE DISMISSING A BILL in equity fails to restrict its own scope, the presumption is, that the issues raised by the pleadings have been disposed of on the merits, and such decree constitutes a bar to further litigation of the same matters between the same parties. The force of this presumption is not avoided by the opinion of the chancellor showing that the bill could have been dismissed because complainant had an adequate remedy at law, as well as on the merits. (*Martin v. Evans*, 292.)

14. RES JUDICATA—BILL DISMISSED ON TWO GROUNDS.—Where, in a suit in equity, the complainant claims that she was the owner of certain bonds which she sold, and that she lent the proceeds, taking a note and mortgage, to one R., to be held in trust for her, and that, he dying subsequently, his administrators sold the note and mortgage before proceedings could be brought against them to have the trust declared in complainant's favor; and the chancellor in his opinion declares that complainant was not the owner of such bonds, nor of the moneys resulting therefrom, and that no trust existed in her favor, and further that, were his conclusion otherwise, still the suit could not be maintained, because the remedy of the complainant was ample at law, the decree subsequently entered of bill dismissed is conclusive against complainant. Its effect is not limited by the declaration of the chancellor that if the allegations of the bill had been established, still the remedy was at law. (*Martin v. Evans*, 292.)

15. RES JUDICATA.—AN INTERLOCUTORY DECREE, although consented to, establishing and confirming the respective interests of the parties in and to certain property, and appointing referees to make partition thereof, is not conclusive on appeal from a final decree confirming the report of the referees, of the right to have the property divided in kind rather than by sale. (*Brown v. Cooper*, 190.)

16. JUDGMENT—CONCLUSIVENESS OF, THOUGH LAW IS MISAPPLIED.—If a court has jurisdiction to render judgment in an action, which it does, and the judgment is not reversed or modified, it is binding on the parties and their privies, and conclusive of the questions litigated, even though erroneously decided; and, even where the court misapplies the law as to any question, the judgment must, nevertheless, stand until corrected in some appropriate way. (*Hodson v. Union Pac. Ry. Co.*, 902.)

17. JUDGMENT—RES ADJUDICATA—ASSIGNED CLAIM—PRIVITY—ESTOPPEL AS TO ASSIGNOR.—If a person, having a cause of action against a railway company for the negligent killing of his horse, assigns his claim to another, who has a like cause of action against the same company, and who sues, setting up both causes of action, one for the value of his own horse, and the other to recover as assignee, and a general verdict is rendered for the plaintiff on both causes of action, upon which judgment is rendered for one entire sum, but, upon a motion for a new trial, the plaintiff remits a sum equal in value to that claimed for the assignor's horse, and the defendant pays the judgment, the assignor must be regarded as in privity with the assignee, and is estopped, in another action, brought by himself, from litigating the claim for his own horse against the same defendant, where the assignment was made an issue in the former action, was declared valid, and there was no appeal or reversal of judgment in that action. The assignor cannot be heard to say that he was not a party to the first action, because, having been represented therein by his assignee, the judgment is just as binding on him as if he had been a party of record. (*Hodson v. Union Pac. Ry. Co.*, 902.)

18. JUDGMENTS—COLLATERAL ATTACK.—A judgment merely voidable or erroneous cannot be collaterally attacked. Such judgment can be corrected only by appeal or some other direct proceeding. (*Edmondson v. Independent School Dist.*, 224.)

19. JUDGMENTS—COLLATERAL ATTACK—FRAUD AND COLLUSION.—A judgment against a municipality, fairly obtained, cannot be collaterally attacked in a mandamus proceeding to compel the levy of a tax to pay it on the ground that its affirmance on appeal was obtained by collusion, especially when such attack is made long after the alleged collusion was discovered. (*Edmondson v. Independent School Dist.*, 224.)

20. JUDGMENTS—COLLATERAL ATTACK—MUNICIPAL INDEBTEDNESS.—A judgment against a municipality cannot be collaterally attacked on the ground that it was rendered on a debt in excess of a constitutional limitation. Such excess was a matter of defense in the action in which the judgment is rendered. (*Edmondson v. Independent School Dist.*, 224.)

21. JUDGMENT IN TRESPASS AS BAR—GENERAL AND SPECIAL OWNER.—A special owner in possession of personalty may recover in trespass or trover its full value and damages against a stranger who has unlawfully removed and converted it. Such recovery is a bar to an action of the same nature by the general owner, as the first recovery is for his benefit to the extent of his interest. (*Lord v. Buchanan*, 933.)

22. JUDGMENT—PART REMISSION—EFFECT UPON ASSIGNOR OF CLAIM.—If a party obtains a judgment for damages, and voluntarily, without specifying any purpose, remits a part thereof, he abandons his claim to the sum so remitted, and cannot afterward bring an action to recover such sum. This principle applies to one who has, in fact, assigned a claim for the purposes of an action, as well as to one who is a party of record. Such remission is, in effect, and to the amount thereof, a credit on the judgment. (*Hodson v. Union Pac. Ry. Co.*, 902.)

23. PARTIES DEFENDANT HAVING BOTH AN INDIVIDUAL AND A REPRESENTATIVE CAPACITY.—If a defendant in an action is also the executor of a decedent who, in his lifetime, was a necessary party thereto, and the cause proceeds to judgment, such defendant cannot be deemed to be before the court in his representative capacity, where no order is entered making him a party in that capacity. The judgment cannot bind the interest which he represents, and must, therefore, be reversed for a defect of parties. (*First Nat. Bk. v. Shuler*, 601.)

24. JUDGMENTS IN REM—INSOLVENCY ADJUDICATIONS—EFFECT OF AS AGAINST THIRD PERSONS.—An adjudication of insolvency upon the ground that a debtor has made a transfer to hinder, delay, and defraud his creditors, or to give some of them an unlawful preference, is a judgment in rem, and conclusively establishes as against the transferee that such transfer was made for the purposes found by the adjudication in insolvency. It is necessary, if the transferee wishes to protect his transfer, for him to appear in the insolvency court and resist the adjudication so far as it rests upon any ground which may affect him. (*Vogler v. Rosenthal*, 298.)

25. A JUDGMENT NOTE IS NOT RENDERED FRAUDULENT by the fact that it was obtained for the very purpose of entering judgment at once and levying execution on the debtor's property. (*Geilfuss v. Corrigan*, 143.)

See Appeal, 6, 7; Corporations, 14-17; Counties, 4; Injunction, 1; Judicial Sales; Municipal Corporations, 6; Negotiable Instrument, 17.

JUDGMENT NOTE.

See Judgment, 25.

JUDICIAL SALES.

JUDGMENTS VOID—SALES UNDER—REMEDY.—If a judgment and execution are void, no title passes to the purchaser thereunder, and the defendant therein may replevin the property from such purchaser. (St. Louis etc. Ry. Co. v. Lowder, 565.)

JURISDICTION.

1. JURISDICTION OF THE SUBJECT MATTER is the power, lawfully conferred, to deal with the general subject involved in the action. (St. Louis etc. Ry. Co. v. Lowder, 565.)

2. CONTRACTS OUSTING COURTS OF JURISDICTION.—Parties cannot by contract take away the jurisdiction of courts to determine their rights and liabilities; and an attempt to do so is void. (Baltimore & Ohio R. R. Co. v. Stankard, 745.)

3. CONTRACTS OUSTING COURTS OF JURISDICTION—RELIEF RULES OF RAILWAY.—A rule of the relief department of a railway company providing that all claims of beneficiaries shall be submitted for determination to the superintendent of the company, whose determination shall be final and conclusive unless appealed from to the advisory committee, and, if appealed from, the decision of such committee shall be final and conclusive upon all parties without appeal, is void in so far as it attempts to oust the courts of jurisdiction to determine the liabilities of the parties; and a beneficiary whose valid claim has been rejected by such advisory committee may maintain an action to recover thereon. (Baltimore & Ohio R. R. Co. v. Stankard, 745.)

See Partition, 2; Treaties.

JURY TRIAL.

See Trial.

LACHES.

LACHES, WHAT ARE.—Mere lapse of time alone cannot constitute laches, unless accompanied by the failure to do some act which there was a legal duty to do, and that failure caused prejudice to the adverse party. The failure to place of record the transfer of a mortgage does not constitute laches, where it is operative without any record and is accomplished by an instrument not entitled to record, and the law has not imposed the duty of making any record upon the subject. (Demuth v. Old Town Bank, 322.)

LARCENY.

1. LARCENY BY FINDER—CORPUS DELICTI—EVIDENCE.—On a trial for larceny by the finder of property so marked as to be capable of identification, proof of the possession and of the immediate subsequent conversion of such property by the finder is admissible to establish the corpus delicti. (State v. Hayes, 219.)

2. LARCENY BY FINDER HAVING KNOWLEDGE OF OWNER.—Under a statute providing that if any person come, by finding, into the possession of personal property of which he knows the owner, and unlawfully appropriates such property, he is guilty of larceny; one may be convicted of the larceny of a pocketbook and contents if, at the time he found it, he knew, or by an examination of its contents might have known, to whom it belonged. (State v. Hayes, 219.)

3. LARCENY BY FINDER—INTENT.—To constitute larceny of the contents of a pocketbook, the intent to appropriate such contents need not exist at the time of finding, if at that time its contents are unknown to the finder. It is sufficient if such intent is formed at the time that the contents are discovered. (State v. Hayes, 219.)

4. LARCENY—KNOWLEDGE OF OWNER BY FINDER.—If the contents of a pocketbook found by a person are such as to furnish reasonable means of identifying the owner, this is equivalent to actual knowledge of such owner on the part of the finder. (State v. Hayes, 219.)

LEGISLATURE.

LEGISLATURE—POLICY OF LAW.—COURTS do not deal with the policy of a law. That is a question for the legislature. (Lommen v. Minneapolis Gaslight Co., 450.)

See Contracts, 1, 2; Courts, 2; Police Power, 3, 4.

LIENS.

LIENS FOR SERVICES.—One who takes, keeps, and trains a horse under contract with the owner, has a common-law lien for the labor, expense, and skill bestowed. (Scott v. Mercer, 188.)

LIFE TENANT.

See Estates, 1, 2.

LIMITATIONS OF ACTIONS.

1. LIMITATION OF ACTIONS—ABSENCE FROM STATE—TEMPORARY VISITS.—A debtor who has removed from the state and who occasionally returns and visits it as a traveling salesman, stopping only a day or two at each place, cannot include the time consumed by such visits in the time covered by his plea of the statute of limitations, although, in making each of such visits, he remains within the state continuously for several months. (Weille v. Levy, 500.)

2. LIMITATION OF ACTIONS—ABSENCE FROM STATE.—An action to foreclose a mechanic's lien, not barred by the statute of limitations against the principal debtor by reason of removal from the state before the statute has fully run, and constant nonresidence thereafter, is not barred as to others holding liens upon the premises who have been residents of the state during the entire period. (Leeds Lumber Co. v. Haworth, 199.)

3. LIMITATION OF ACTIONS—ABSENCE FROM STATE—TEMPORARY VISITS.—One who removes from the state and afterward visits it as a traveling salesman, stopping only a day or two in each place, is not within the state within the meaning of the statute of limitations although on each of such visits he remains within the state continuously for several months. (Weille v. Levy, 500.)

4. BANKRUPTCY, STATUTE OF LIMITATION IN ACTION BY ASSIGNEE.—A statute providing that no suit shall be maintained between an assignee in bankruptcy and a person claiming an adverse interest touching any property or rights of property transferable to, or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee, does not apply where no adverse claim existed prior to the adjudication in bankruptcy. Therefore, if the adverse claim or entry was not made until after such adjudication, the assignee's right of action is not barred by such statute, but only by the statute of limitations applicable to like actions brought by other persons. (Bowen v. Delaware etc. R. R. Co., 667.)

5. LIMITATIONS IN SUITS TO FORECLOSE MORTGAGES.—Though the note to secure which a mortgage was given is barred by the Maryland statute of limitations, the mortgage itself may still be foreclosed. (*Demuth v. Old Town Bank*, 322.)

LIS PENDENS.

1. LIS PENDENS.—THE OBJECT of lis pendens is not, primarily, notice, but to hold the subject of the suit, the res, within the power of the court, so as to enable it to pronounce judgment upon it. (*Brown v. Cohn*, 83.)

2. LIS PENDENS—COMMON LAW AND STATUTORY.—The common law of lis pendens governs in all cases not covered by a statute upon that subject, which statute is clearly intended to be supplemental to the common law and not to repeal it. (*Brown v. Cohn*, 83.)

3. LIS PENDENS.—THE PURCHASER OF A TAX CERTIFICATE, pending a suit to annul it, to which the vendor is a party, is bound by the judgment therein, although no notice of lis pendens was filed. (*Brown v. Cohn*, 83.)

4. LIS PENDENS—FILING OF, WHEN UNNECESSARY—TAX CERTIFICATE OR TITLE—BONA FIDE PURCHASER.—The filing of a notice of lis pendens is not necessary where the subsequent purchaser has actual notice, or where he is not a bona fide purchaser; and the purchaser of a tax certificate or a tax title is not a bona fide purchaser, but takes the title subject to its infirmities, especially where he takes it without legal assignment. (*Brown v. Cohn*, 83.)

5. NOTICE.—LIS PENDENS is notice to one who buys timber standing on land from a party to a suit of the rights and interest of the complainant therein. (*Alliance Trust Co. v. Nettleton Hardware Co.*, 531.)

LOTTERIES.

1. CONSTITUTIONAL LAW—LOTTERIES.—Laws for the suppression of lotteries are in the interest of the morals and welfare of the people of the state, and therefore are legitimate exercises of its police powers. (*Ford v. State*, 337.)

2. CONSTITUTIONAL LAW—LOTTERY TICKETS, STATUTES PROHIBITING POSSESSION OF.—A statute making it criminal for a person to have in his possession any ticket, slip, list, or record of prizes drawn in a lottery, or any record of any lottery ticket, or anything in the nature thereof, unless for the purpose of procuring and furnishing evidence of violations of the law, is constitutional, and the accused cannot escape conviction by proving that he did not know the nature and use of the prohibited articles found in his possession, and that they were given to him by another man, to be delivered to a third, and that he to whom they were so given had no knowledge that they were in any way connected with the lottery business. The absence of guilty knowledge is, under this statute, but a matter for the consideration of the court in imposing sentence for its violation. (*Ford v. State*, 337.)

MANDAMUS.

See Judgment, 19.

MANUFACTURING OR MECHANICAL BUSINESS.

See Corporations, 1, 2.

MARRIAGE AND DIVORCE.

1. MARRIAGE—RESTRICTIONS UPON—PRESUMPTION—BURDEN OF PROOF.—Restrictions upon marriage or remarriage are

exceptional, and not to be presumed, and one relying upon such restriction has the burden to show its existence. (*State v. Shattuck*, 936.)

2. MARRIAGE FORBIDDEN AFTER DIVORCE—VALIDITY OF, IF CONTRACTED OUTSIDE OF STATE.—One divorced in one state and forbidden by the statute of that state to remarry, may remarry in another state whose laws contain no such restriction, and such remarriage must be recognized as valid in the state where the divorce was obtained, although both parties to the remarriage were residents of, and domiciled in, the latter state both before and immediately after such marriage was solemnized. (*State v. Shattuck*, 936.)

3. MARRIAGE PROHIBITED AFTER DIVORCE—VALIDITY IF ENTERED INTO OUTSIDE OF STATE.—If a statute, silent as to marriage outside the state, prohibits classes of persons from marrying generally, or from intermarrying, or declares void all marriages not celebrated according to prescribed forms, it has no effect upon marriages, even of domiciled inhabitants, entered into out of the state. If such marriages are valid by the international law of marriage and the local law of the place where celebrated, they are valid by the law of the state whose statute contains such restrictions. (*State v. Shattuck*, 936.)

4. MARRIAGE—VALIDITY OF, CONTRACTED EXTRATERRITORIALY.—Parties who are under no disability by international law may choose their place of marriage, and, if the marriage is valid there, it is valid everywhere, though they were purposely away from home, and the same transaction in the state of their domicile would not have constituted a valid marriage. (*State v. Shattuck*, 936.)

5. MARRIAGE AFTER DIVORCE.—STATUTES PROHIBITING marriage after divorce are not extraterritorial in their effect, unless made so by express words or necessary implication. (*State v. Shattuck*, 936.)

See Officers, 5; Perjury, 1, 2; Wills, 1.

MARRIED WOMEN STATUTES.

See Husband and Wife, 2.

MASTER AND SERVANT.

1. MASTER AND SERVANT—SPECIAL DANGER AND PROMISE TO REMOVE IT—CONTRIBUTORY NEGLIGENCE.—It is a general rule that a protest by an employé against continuing in the employment of the master because of some special risk attending it, a promise by the employer to remove the danger within a reasonable time, and a continuance of the employment in consideration of such promise, will relieve the employé from the charge of contributory negligence, if he is injured because of the danger within such time. This rule does not apply where the risk is so obvious, immediate, and constant that serious bodily injury is likely to occur from a continuance of the work, for it is then negligence to rely upon such promise. (*Erdman v. Illinois Steel Co.*, 66.)

2. MASTER AND SERVANT—NEGLIGENCE—DANGEROUS PLACE TO WORK.—A master is bound to furnish the servant a reasonably safe place in which to work, considering the nature of the work. He is not to set a man at work among latent and extraordinary dangers, of which the employé knows nothing, and which he cannot ascertain by experience or observation. (*McMahon v. Ida Mining Co.*, 117.)

3. MASTER AND SERVANT—NEGLIGENCE—DANGEROUS PLACE TO WORK.—If a "shift boss" in a mine, whose duty it is

to direct miners where to work, knows of a concealed danger in the mine, such as an unexploded blast of dynamite, but puts a miner, ignorant of such danger, at work in the place where such danger is concealed, without notifying him of it, and the miner is unable, with ordinary care, to ascertain such dangers, the master is liable for an injury to the miner caused by an explosion of the blast while he is at work in such place, although his own act caused it to go off, as the shift boss plainly and palpably acted in the capacity of master in directing the miner to work there. (*McMahon v. Ida Mining Co.*, 117.)

4. MASTER AND SERVANT—PERSONAL INJURY TO SERVANT IN PAPER MILL—PROXIMATE CAUSE—NEGLIGENCE—LIGHT.—If an old and much worn dynamo belt breaks, thus suddenly extinguishing the electric lights of a papermill, and leaving it in complete darkness, with no temporary lights provided for such an emergency, though of frequent occurrence and known to the company, and a person employed as a "third hand" in the machine room is directed by the machine tender to pull broken paper off one of the presses, while such room is in darkness, but, in doing so, finds that the paper is choked between the roll and the "doctor," and, in his exertions to draw out the choked paper, it breaks, and he attempts to save himself from falling from the step on which he is standing by seizing a rod or lever near by, but falls to grasp it, by reason of the absence of light, and is injured, the omission of the papermill company to exercise reasonable care and diligence in keeping the room lighted in the night-time, and not the unexpected breaking of the paper, must be regarded as the real, efficient, and proximate cause of the injury, and the company is, therefore, answerable for it. (*Sawyer v. Rumford Falls etc. Co.*, 260.)

5. MASTER AND SERVANT—DEFECTIVE MACHINERY—NEGLIGENCE OF EMPLOYE IN CONTINUING AT WORK AFTER PROMISE TO REPAIR.—A man with fourteen years of experience about machinery, and who is employed to assist in sawing and shearing heated bars and plates of iron in a mill where such work is done, is guilty of negligence, to the point of recklessness, in working with a saw, four feet in diameter, having a crack in it from the rim two or three inches in length, and running at a speed of seventeen hundred revolutions a minute, where he, having knowledge of the defect and notwithstanding the master's promise to remedy it, lets the saw down upon large bars or plates of iron with sufficient force to cut them in two; for the danger of the saw flying to pieces is so obvious, immediate, and constant that the employé is negligent in relying upon such promise. Therefore, the unsupported testimony of such an employé that he did not know of the existence of the danger is not sufficient to support a finding of the jury that he neither knew nor ought to have known of it. (*Erdman v. Illinois Steel Co.*, 66.)

6. MASTER AND SERVANT—DEFECTIVE MACHINERY—ASSUMPTION OF RISK.—If a man employed to assist in sawing and shearing heated bars and plates of iron in a mill where such work is done, and which bars and plates are cut by a circular saw about four feet in diameter, has had large experience with machinery, has worked fourteen years in the mill, and four years in operating the machine, where an accident occurs to him, and notices, before going to work on the day of the accident, that the saw is cracked for two or three inches from the outside, and asks the acting foreman if he is going to change it, who promises to do so after one heat is run off, he must be presumed to have assumed the risk of going to work with the saw in that condition, notwithstanding

his own testimony that he went to work because the foreman said it was not dangerous, especially where it is plain that the employé was the most experienced man in the crew, and knew more about the danger than the foreman, and where the clear inference from all the evidence is that he did not rely upon the judgment of anybody that it was safe to proceed with the work. (*Erdman v. Illinois Steel Co.*, 66.)

7. MASTER AND SERVANT—FELLOW-SERVANTS.—One who is engaged with another in the same employment is not divested of the character of a fellow-servant by the mere fact that he has authority to direct the other in his work. (*Hayes v. Colchester Mills*, 915.)

8. MASTER AND SERVANT—FELLOW-SERVANTS—NEGLIGENCE TOWARD MINOR EMPLOYEES.—A servant engaging in a dangerous employment assumes all the risks ordinarily incident thereto, including those which arise from the negligence of a fellow-servant. A minor, though a child of tender years, is within the application of this rule, but, in his case, it is modified by the duty of the master to warn him of the perils of the work and instruct him how to avoid them. (*Hayes v. Colchester Mills*, 915.)

9. MASTER AND SERVANT—NEGLIGENCE OF FELLOW-SERVANT.—If an employé, although a fellow-servant of an injured employé, is charged with the master's duty to such employé, his failure in that duty is the negligence of the master, and the doctrine of fellow-servants does not apply. (*Hayes v. Colchester Mills*, 915.)

10. MASTER AND SERVANT—MINOR EMPLOYEES—NEGLIGENCE OF FELLOW-SERVANT.—If a servant, acting within the scope of his employment, requires his minor fellow-servant to perform a service requiring warning and instruction, the negligence of such servant in failing to give such instruction and warning is the negligence of the master, who is liable therefor. (*Hayes v. Colchester Mills*, 915.)

11. MASTER AND SERVANT—MINOR EMPLOYEES—NEGLIGENCE OF FELLOW-SERVANT.—If a fellow-servant, acting within the sphere of his own duty, requires of a minor employé a service outside of his employment, and which a prudent master would not have imposed upon a person of his years, strength, and judgment, the master is liable for the consequence of the improper order. (*Hayes v. Colchester Mills*, 915.)

12. MASTER AND SERVANT—MINOR EMPLOYEES—CAPACITY.—If a minor employé is engaged to do such work as is suited to his capacity, it is for the jury to determine whether the work required of him was within or beyond his capacity; and if the service was beyond his capacity, and so outside the scope of his employment, he did not assume the risks attendant upon it. (*Hayes v. Colchester Mills*, 915.)

13. MASTER AND SERVANT—MINOR EMPLOYEES.—It is the duty of one who employs an immature and inexperienced person for a dangerous service to explain to him the perils of the work, and instruct him how to avoid them; but the giving of proper instructions will not relieve an employer from liability to a child, if the work required of him was not within the scope of his employment and not such as ought to have been required of a person of his capacity. (*Hayes v. Colchester Mills*, 915.)

14. MASTER AND SERVANT—MINOR EMPLOYEES—BURDEN OF PROOF.—In an action by a minor employé to recover for injury received through the negligence of his master in failing to properly instruct him, the burden of proof is upon the employé to show that the

master failed to give him such instructions. Although the trial court fails to enforce this rule, objection to its action cannot be made available for the first time on appeal. (*Hayes v. Colchester Mills*, 915.)

15. MASTER AND SERVANT—VOLUNTEER ASSISTING SERVANTS, LIABILITY OF MASTER TO.—One who voluntarily assists the servants of another with or without their request, and is injured by their negligence, cannot recover of their employer therefor. He and they are to be treated as fellow-servants. (*Railroad v. Ward*, 848.)

16. MASTER AND SERVANT, THIRD PERSONS ASSISTING SERVANT, WHEN NOT DEEMED MERE VOLUNTEERS.—If one is interested in the work being done by the employes of another, and, at their request, or with their consent, undertakes to assist them, he does not do so at his own risk, and, if injured by their carelessness, their employer is answerable. (*Railroad v. Ward*, 848.)

17. TORTS—INDUCING DISCHARGE OF EMPLOYEE—ACTIONABLE WRONG.—Merely to induce another to leave an employment or to discharge an employé, by persuasion or argument, however whimsical, unreasonable, or absurd, is not in and of itself unlawful; but to intimidate an employer, by threats of such a character as to produce this result, and thereby cause him to discharge an employé, whom he desires to retain, and would retain except for such unlawful threats, is an actionable wrong. (*Perkins v. Pendleton*, 252.)

18. DAMAGES—ACTION FOR PROCURING DISCHARGE OF EMPLOYEE.—A person is liable in damages for inducing, by threats or other unlawful means, an employer to discharge his employé even when the terms of the contract of service are such that the employer may do this at his pleasure, without violating any legal right of the employé. (*Perkins v. Pendleton*, 252.)

19. MASTER AND SERVANT—HAZARDOUS EMPLOYMENT—EVIDENCE.—If the mere description of a service shows it to be hazardous, other evidence of its character is not necessary. (*Hayes v. Colchester Mills*, 915.)

See Contracts, 24.

MAXIMS.

1. MAXIMS.—A party cannot take advantage of his own wrong. (*Holland v. Duluth Iron etc. Co.*, 480.)

2. MAXIMS.—IN EQUITY, that will be considered done which ought to be done. (*Holland v. Duluth Iron etc. Co.*, 480.)

MECHANIC'S LIEN.

1. MECHANIC'S LIEN, ARCHITECT, WHEN ENTITLED TO. An architect is entitled to a lien for his services upon a building for supervising the work of construction, but not for preparing plans and specifications. (*Mitchell v. Packard*, 404.)

2. MECHANIC'S LIEN, WHO NOT ENTITLED TO.—One employed by the month to do such work as his employer may require, and who, in pursuance of such employment, does work some of which is of a character for which a lien might be asserted and the balance of a different character, is not entitled to any lien. Where lienable and nonlienable items are included in one contract for a specified sum, or are made the basis of a lumping charge, so that it cannot be seen from the contract or account what properly is charged to each, the benefit of the mechanics' lien law is lost. (*Getty v. Ames*, 835.)

3. MECHANICS' LIENS — ACCOUNT — ONE CHARGE FOR GROUP OF ITEMS.—An account filed to obtain a mechanic's lien

is not open to the objection that it contains a "lumping charge," although it contains but one charge for a group of items, provided such group consists of items which are proper subjects for a lien and the contract under which they were furnished named one price for the whole of such group. (*Mitchell Planing Mill Co. v. Allison, 544.*)

4. **MECHANICS' LIENS—DATE OF ITEMS.**—A mechanic's lien account is good and valid, although no date is set opposite each item therein, if it appears therefrom that all of the items were furnished within the time required by law and between named dates. (*Mitchell Planing Mill Co. v. Allison, 544.*)

5. **MECHANICS' LIENS—PRICE OF MATERIALS.**—The price agreed upon for materials furnished between a subcontractor and the contractor for a building is, *prima facie*, the reasonable value thereof. (*Mitchell Planing Mill Co. v. Allison, 544.*)

6. **MECHANICS' LIENS—ACCOUNT.**—A just and true account of a mechanic's lien demand is required whether filed by an original or a subcontractor, but it need not have the definiteness of a pleading to be valid. (*Mitchell Planing Mill Co. v. Allison, 544.*)

7. **MECHANIC'S LIEN.—A NOTICE OR CLAIM OF A MECHANIC'S LIEN MUST STATE**, either directly or by necessary inference, the name of the person to whom the claimants furnished material or for whom they performed the labor, otherwise no lien can be enforced. (*Getty v. Ames, 835.*)

8. **MECHANICS' LIENS—"ACCOUNT"—WHAT MUST CONTAIN—EVIDENCE.**—The account which the Missouri mechanic's lien law requires to be filed to obtain a lien is such a statement of the claim as fairly apprises the landowner and the public of the nature and amount of the demand asserted as a lien; and it may consist of one or more items. It may be all on one side or mutual, but it must disclose on its face that the demand is within the terms of the lien law and the affidavit required to verify the account may be considered to ascertain the sufficiency of the latter. (*Mitchell Planing Mill Co. v. Allison, 544.*)

9. **MECHANICS' LIENS.—PLEADINGS** in mechanics' lien cases are governed by the general code of practice, except in those particulars covered by such lien law, and the landowner may require such definiteness of statement in such actions as the code demands in other actions to collect accounts. (*Mitchell Planing Mill Co. v. Allison, 544.*)

MEDICAL AID FOR EMPLOYEES.

See *Railroad Companies, 19-22.*

MINES AND MINING.

See *Corporations, 2.*

MINORS.

See *Officers, 6, 7.*

MORTGAGE.

1. **AN ASSIGNMENT OF A MORTGAGE IS A CONVEYANCE** within the meaning of the statutes of Massachusetts, and must, therefore, be recorded, to charge subsequent purchasers with notice thereof. (*Swasey v. Emerson, 368.*)

2. **MORTGAGE. ASSIGNMENT OF.—BY AN INDORSEMENT OF A PROMISSORY NOTE** to a bona fide purchaser he acquires the benefit of the lien of a mortgage to the same extent as though he had been named therein as mortgagee, though the public records

afford no evidence of the transfer of the note. (*Demuth v. Old Town Bank*, 322.)

3. **MORTGAGES—FORECLOSURE—FRAUD AS DEFENSE.**—If, in an action for foreclosure, the mortgagee can show a prima facie right to recover on the face of the instrument without revealing fraud in the transaction, the mortgagor is not permitted to plead or show as a defense his own and the mortgagee's fraudulent intention, and that the mortgage was made without consideration and to defraud creditors. (*Barwick v. Moyse*, 512.)

4. **MORTGAGE.—A RELEASE BY A MORTGAGEE AFTER ASSIGNING THE NOTE** to secure which the mortgage was given is valid as in favor of one who had no notice of such assignment, though both the note and the mortgage were in the hands of the assignee. He, by failing to place his title on record, made it possible for the mortgagee to execute a release which apparently freed the property from the mortgage, and an innocent purchaser relying upon the release must be protected. (*Swasey v. Emerson*, 368.)

5. **MORTGAGE, RELEASE OF AFTER THE TRANSFER OF NOTE BY THE MORTGAGEE.**—If a mortgagee has indorsed the note secured by the mortgage to a bona fide purchaser, such mortgagee is not authorized to afterward release the mortgage, and though he has a conveyance from the mortgagor and produces a note which he represents to be the one secured by the mortgage, and states that it has been fully paid, and is thereby enabled to sell the property subject thereto to an innocent purchaser, the latter acquires title subject to the prior assignment of the mortgage by the indorsement of the note, though such assignment is not of record. The assignee is not prejudiced by the subsequent fraudulent acts of the mortgagee in which he does not participate. This is especially true where a comparison of the note produced with the note described in the mortgage must show that there is substantial difference in their terms, and therefore that the note in the possession of the mortgagee cannot be the one secured by the mortgage. (*Demuth v. Old Town Bank*, 322.)

See *Covenants*, 2; *Fraudulent Conveyances*; *Husband and Wife*, 4; *Insurance*, 16, 17; *Laches*; *Limitations of Actions*, 5; *Suretyship*, 4.

MUNICIPAL CORPORATIONS.

1. **MUNICIPAL CORPORATIONS, POWER OF TO DECLARE WHAT ARE NUISANCES.**—A municipal corporation has no power to declare a particular use of property a nuisance, unless such use comes within the common law or the statutory idea of a nuisance, though its charter purports to confer upon it power to prevent and restrain nuisances and to declare what shall constitute a nuisance. (*Grossman v. Oakland*, 832.)

2. **A MUNICIPAL ORDINANCE PROHIBITING THE BUILDING OF ANY FENCE** along the side of any railroad within that part of the municipality which was laid out in lots and blocks, and that any fence so built is a nuisance, is void. (*Grossman v. Oakland*, 832.)

3. **TAXATION—LICENSES—ORDINANCES.**—An ordinance imposing a reasonable license tax upon each car operated by a street railway company, and also imposing a fine upon such company for operating its cars without having paid such license tax, is valid. (*Springfield v. Smith*, 569.)

4. **TAXATION—MUNICIPAL EXEMPTION—CONSTRUCTION OF ORDINANCES—STREET RAILWAYS.**—Municipal exemption of a street railway from taxation cannot be extended by construction beyond the plain terms of the grant, and ordinances containing

such exemption are to be strictly construed against the company and in favor of the public. (*Springfield v. Smith*, 569.)

5. TAXATION—LICENSE TAX—RIGHT OF MUNICIPALITY TO EXACT—CONSTRUCTION OF ORDINANCE.—In construing an ordinance of a city conferring upon a company authority to construct and operate a street railroad, the right to exact license fees will not be denied simply because it has not been expressly reserved, and if the contract between the city and the company does not in terms dispense with the payment of a license, the rights of the latter are not impaired by a subsequent ordinance requiring such payment. (*Springfield v. Smith*, 569.)

6. JUDGMENTS—COLLATERAL ATTACK—MUNICIPAL INDEBTEDNESS.—Obtaining a judgment against a municipality is not the creation of a debt against it within the meaning of a constitutional provision fixing a limit to the indebtedness which the municipality may incur. Such judgment is merely conclusive evidence of a pre-existing debt at the time of its rendition, and, if such debt was in excess of such constitutional limit, that was matter of defense to be interposed in the suit in which the judgment was rendered; and, if not so interposed, it is waived and cannot be made the basis of a collateral attack on the judgment. (*Edmundson v. Independent School Dist.*, 224.)

See Arrest, 2; Judgment, 20; Taxation, 4.

NEGLIGENCE.

1. NEGLIGENCE, ACTION IN A SUDDEN EMERGENCY.—If one who is confronted with a sudden emergency uses his judgment, his employer is not liable, though, from error in such judgment, injury is inflicted on another. (*Bittner v. Crosstown Street Ry. Co.*, 588.)

2. NEGLIGENCE—ERROR OF JUDGMENT IN SUDDEN EMERGENCY.—If a boy runs suddenly in front of an electric street railway car and is struck by it, the railway corporation is not liable for the subsequent error of judgment on the part of the motorman in charge of the car in reversing its movement, whereby the boy is again run over. (*Bittner v. Crosstown Street Ry. Co.*, 588.)

See Master and Servant; Railroad Companies. 1, 11; Shipping, 1-3.

NEGOTIABLE INSTRUMENTS.

1. NEGOTIABLE INSTRUMENTS, WHAT ARE NOT.—Certificates of stock, even when indorsed in blank for the purpose of authorizing the making of an instrument of transfer over the signature, are not negotiable securities. (*O'Herron v. Gray*, 411.)

2. NEGOTIABLE INSTRUMENTS—DELIVERY.—If notes are delivered to a third person, by consent of the maker and payee, with directions by the maker to deliver them to the payee whenever called for, this is a good and sufficient delivery. (*School District v. Sheldley*, 576.)

3. NEGOTIABLE INSTRUMENTS—CONSIDERATION.—A note promising to pay a school district a certain sum of money for the establishment of a library is not without sufficient consideration merely because the maker receives no benefit or value moving from the beneficiary to himself. The consideration for the note is sufficient if the beneficiary expends money or incurs liability in reliance thereon and in furtherance of the establishment of a library, nor does the insanity of the maker of the note subsequent to its execution, and after its liabilities are incurred, affect or destroy the consideration. (*School District v. Sheldley*, 576.)

4. NEGOTIABLE INSTRUMENTS—CONSIDERATION—PUBLIC POLICY.—The fact that a board of education, in the exercise of its official discretion, regulates its action in establishing a library to some extent with reference to the amount, value, and character of voluntary contributions, whether made or promised, does not render its action void as against public policy, and the fact that its action is regulated to some extent by the voluntary contribution of a note, does not render the latter void as tending to unduly influence such action. (*School District v. Sheidley*, 576.)

5. NEGOTIABLE INSTRUMENTS—CONSIDERATION—PROMISE TO MAKE GIFT.—A note executed by a private individual to an incorporated college as an endowment, and to aid it in the accomplishment of the defined purposes for which it is incorporated is based upon a sufficient consideration. (*Irwin v. Lombard Univ.*, 727.)

6. NEGOTIABLE INSTRUMENTS—CONSIDERATION.—EVIDENCE that the maker of a note was a man of great wealth is inadmissible upon the sole issue of want of consideration, but if one defense is that such maker was insane at the time of making the note, large in amount, evidence of his moderate means is admissible in rebuttal as bearing upon his legal capacity. (*School District v. Sheidley*, 576.)

7. NEGOTIABLE INSTRUMENTS VOID FOR FRAUD.—One who is ignorant of the contents of a note from inability to read, and who signs it without intending to, is not bound unless chargeable with negligence in not ascertaining its character. (*Green v. Wilkie*, 184.)

8. NEGOTIABLE INSTRUMENTS — WHEN VOID FOR FRAUD—INNOCENT PURCHASER.—An illiterate person, who is fraudulently induced to sign a note and mortgage for a large sum, supposing that he is signing a lease and note for a much smaller sum to a different payee is not liable on the mortgage note in the hands of an innocent purchaser, unless he is guilty of negligence in signing it. In such case, the note has never had an existence, in the sense of the minds of the parties meeting, to give it validity, and such maker cannot be deemed to have been a party to it. (*Green v. Wilkie*, 184.)

9. NEGOTIABLE INSTRUMENTS—DEFENSE—COMAKER AS PRINCIPAL—PAROL PROOF OF SURETYSHIP.—If a person signs a note as maker, but is, in fact, a surety, and there is nothing on the face of the note to show his true relation, he will be treated and considered as a principal, with respect to all who have no notice of the suretyship; but, whenever it is material in his defense to an action against him on the note, he may aver, and prove by parol evidence, that he made the note merely as surety, without consideration, and that such fact was known to the plaintiff before the equities, through which such evidence became admissible, arose. (*Gillett v. Taylor*, 890.)

10. NEGOTIABLE INSTRUMENTS — DEFENSE—PROOF BY PAROL, THAT COMAKER WAS ONLY A SURETY.—In a suit on a promissory note, it is competent for one of two makers to aver affirmatively in his answer, and to prove by parol, that he signed the note as surety, and that he was discharged by an extension of time, granted, without his knowledge or consent, to the principal debtor by the payee, who had knowledge that one maker was merely surety for the other. It is, therefore, error to exclude such evidence, as it does not vary the terms of a written contract or change its legal effect. The rights of a surety arise out of the circumstances of the case, and do not depend upon the written instrument. (*Gillett v. Taylor*, 890.)

11. NEGOTIABLE INSTRUMENTS—MAKER'S INDORSEMENT OF NOTE PAYABLE TO HIS OWN ORDER.—A note payable to the order of the maker is incomplete in its execution until it is indorsed by him and delivered to another for value. It is then, in legal effect, payable to the bearer, and the maker is liable only as maker, without demand and notice. He is not liable as an indorser. (*Ewan v. Brooks-Waterfield Co.*, 719.)

12. NEGOTIABLE INSTRUMENTS—EFFECT OF INDORSEMENTS WHERE PAPER IS FOR MAKER'S ACCOMMODATION. Neither the order in which names appear on the back of commercial paper, nor the order in point of time in which they were placed there, is conclusive of the relation of the parties to the paper, or to each other, or of the liability incurred, where the paper is for the accommodation of the maker. (*Ewan v. Brooks-Waterfield Co.*, 719.)

13. NEGOTIABLE INSTRUMENTS—IRREGULAR INDORSEMENTS—PAROL EVIDENCE.—A third person's indorsement on the back of a note payable to the maker's order belongs to that class known as irregular or anomalous indorsements, whose obligation depends upon the agreement of the parties, and, being ambiguous in that respect, parol evidence is admissible to show the terms of the agreement as actually made by the parties, or other facts showing their intention at the time. (*Ewan v. Brooks-Waterfield Co.*, 719.)

14. NEGOTIABLE INSTRUMENTS—IRREGULAR INDORSEMENTS—EFFECT.—Neither the indorsement of the maker's name on the back of a note payable to his own order to complete its execution, nor that of a third person in blank before or at the time of its execution and delivery, constitutes a regular indorsement of commercial paper. Neither does it create the contract arising from a regular indorsement in blank, the terms of which are distinctly defined by law, and which cannot, therefore, be varied by parol. (*Ewan v. Brooks-Waterfield Co.*, 719.)

15. NEGOTIABLE INSTRUMENTS—THIRD PERSON'S INDORSEMENT OF NOTE PAYABLE TO MAKER'S ORDER.—When the name of a third person appears in blank on the back of a negotiable promissory note, at the time it takes effect, his undertaking rests upon the consideration which supports the note. It is, therefore, presumed that he intended to be liable as surety for its payment, and he is answerable accordingly, unless he can show that there was a different agreement or understanding between the parties, which it is competent for him to do. (*Ewan v. Brooks-Waterfield Co.*, 719.)

16. A BONA FIDE PURCHASER OF PROPERTY FROM ONE WHO HAS STOLEN OR EMBEZZLED IT acquires no title, unless it consists of negotiable securities. (*O'Herron v. Gray*, 411.)

17. NEGOTIABLE INSTRUMENTS—JUDGMENT BY DEFAULT AGAINST AGENT OF INDORSER.—If a note sued on is indorsed "S. by G." and the action is dismissed as to "S." and judgment taken by default against the makers and "G.," the judgment as to the latter is erroneous. (*Albany etc. Co. v. Merchants' Nat. Bk.*, 178.)

18. NEGOTIABLE INSTRUMENTS—PLEADING.—A complaint on a note signed "J. E. Stafford, Pres., J. Zapf, Mgr., Albany Furniture Co.," alleging that the note sued on is the joint note of the parties, while the note recites that "we promise to pay," states a cause of action against Stafford and Zapf as individuals. (*Albany etc. Co. v. Merchants' Nat. Bk.*, 178.)

See Fraud, 5; Husband and Wife, 13; Mortgage, 2, 4.

NEW TRIAL.

NEW TRIAL—STAY OF PROCEEDINGS.—The entry of a motion for a new trial does not operate as a stay of proceedings during

the time of the pendency of the motion. (Milwaukee B. & M. Assn. v. Niezerowski, 97.)

NON-APPEALABLE ORDER.

See Appeal, 1, 2.

NOTICE.

NOTICE—DEED AS—PURCHASER OF TIMBER.—A recorded deed is notice of the title of the owner of land to one who buys timber standing thereon from another, although the latter is in possession. (Alliance Trust Co. v. Nettleton Hardware Co., 531.)

See Insurance, 14; Lds Pendens, 5.

NUISANCE.

See Municipal Corporations, 1, 2.

OATH.

See Trial, 7, 8.

OFFICERS.

1. OFFICIAL BONDS—LIMIT OF LIABILITY.—If an appointment to office is for a definite period fixed by law, a recital of that term in the officer's bond is not necessary to limit the effect of the general words therein, which in themselves would indicate a continuing liability. (First Nat. Bk. v. Briggs, 922.)

2. OFFICIAL BONDS—LIABILITY—EXTENT OF.—If a definite period of appointment to office is recited in the condition in the officer's official bond, the obligation thereof cannot be extended beyond that period by any subsequent general words. (First Nat. Bk. v. Briggs, 922.)

3. OFFICIAL BONDS—LIABILITY, WHEN TERMINATES.—The bond of a cashier of a bank conditioned for the faithful discharge of his duties as cashier forever, so long as he shall occupy such position, is in force and extends but one year when given soon after his first election, which was for the ensuing year, and he was thereafter re-elected annually, and a by-law of the bank provided that he should be appointed to hold his office during the pleasure of the board of bank directors. (First Nat. Bk. v. Briggs, 922.)

4. OFFICIAL BONDS—WANT OF SEAL—VALIDITY.—An instrument in the form of an official bond, though without a seal, is a valid contract obligation, if executed upon a sufficient consideration and delivered to take effect as security. (First Nat. Bk. v. Briggs, 922.)

5. OFFICERS—DEPUTY CLERK—MINISTERIAL ACT.—The act of a deputy county clerk in taking an affidavit of an applicant, and in granting a marriage license, although he has the right to inquire into the status of the parties and their eligibility to intermarry, is purely ministerial and not judicial in its character. (Harkreader v. State, 40.)

6. OFFICERS—MINOR AS DEPUTY.—Under the Texas statute, the duties of a county clerk and of his deputy are purely ministerial in their nature, and a minor can receive the appointment and perform the duties required of such deputy, including the administering of oaths and the taking of affidavits of like validity as if such acts were performed by the clerk in person. (Harkreader v. State, 40.)

7. OFFICERS—MINOR DEPUTY.—In the absence of constitutional provision or statute prescribing the qualifications of a deputy county clerk, a minor is eligible to appointment to such deputyship, and he is competent to perform all ministerial duties for his prin-

principal, and also to administer oaths and take affidavits, and perform all such like official acts as may be legally performed by his principal in person. (*Harkreader v. State*, 40.)

See Process, 1-6.

OFFICIAL BONDS.

See Officers, 1-4.

PARENT AND CHILD.

PARENT AND CHILD.—A father is not liable for the board of his minor son who voluntarily elects to leave him and to go and live with his mother, who has been divorced from the father; and her second husband cannot maintain an action for such board, where he has not communicated with the father and indicated that he expected to be compensated by him. (*Foss v. Hartwell*, 366.)

PARTIES.

See Assignment for Benefit of Creditors, 2; Executors and Administrators, 8; Judgment, 23; Railroad Companies, 5.

PARTITION.

1. PARTITION — WATERS — IMPROVEMENTS.—Part owners of a water power cannot be compelled to contribute to the building of weirs at great expense, or to making valuable improvements to facilitate the apportionment of the water, and thus enable a partition in kind by allotment of the water. (*Brown v. Cooper*, 190.)

2. PARTITION—WATERS—JURISDICTION.—In a suit to partition water power, it is beyond the power of the court in approving the recommendation of referees to decree the appointment of an inspector or supervisor, to divide the water, keep up weirs, and otherwise superintend the property for the joint benefit of the owners after partition by allotment in kind. If, in such case, partition in kind is impracticable without such decree, the property must be sold and the proceeds divided to effect a partition. (*Brown v. Cooper*, 190.)

3. PARTITION.—The object of partition proceedings is to enable those who own property as joint tenants, coparceners, or tenants in common to put such end to the tenancy as to vest in each tenant a sole estate in specific property or an allotment of the lands or tenements. It contemplates an absolute severance of the individual interests of each joint owner, and, after partition, each has a right to enjoy his estate without supervision, let, or hindrance from the other. Unless this can be accomplished, the joint estate must be sold, and the proceeds divided. (*Brown v. Cooper*, 190.)

See Appeal, 2; Judgment, 15.

PARTNERSHIP.

1. A PARTNERSHIP is a voluntary contract between two or more persons who place their money, effects, labor, and skill, or some or all of them, into lawful commerce or business, with the understanding that there shall be a community of profits between them. (*Carter v. McClure*, 842.)

2. PARTNERSHIP, WHAT IS.—Persons who contribute small sums of money for the purpose of establishing a co-operative store, the main portion of the capital being contributed by a third person, and who expect to share in the profits in proportion to the capital contributed by them, but whose chief object is to obtain the privilege of purchasing at such store for less prices than persons who

do not so contribute, must be deemed partners, though they do not intend to assume liability as such. (*Carter v. McClure*, 842.)

3. **PARTNERSHIP, CHANGE IN MEMBERSHIP, WHEN DOES NOT DISSOLVE.**—If several persons are interested as partners, and a new partner is taken into the business without the objection of any and with the apparent consent of all, or one of the partners dies, the survivors, or those remaining in the business, remain bound as partners, where the partnership agreement provided that the business should be continued for five years, unless two-thirds of the stockholders agreed to discontinue in a shorter time, and there was no such agreement nor any indication of a desire to discontinue until after the insolvency of the firm was ascertained. (*Carter v. McClure*, 842.)

4. **A PARTNERSHIP MAY BE FORMED WITH TRANSFERABLE SHARES,** in which event a transfer of any of such shares to third persons or the death of a shareholder does not dissolve the partnership. (*Carter v. McClure*, 842.)

5. **PARTNER, WHO IS NOT.**—An employé is not a partner because his compensation is measured by the amount of the profits earned by one branch of the business. (*Drovers' etc. Nat. Bk. v. Roller*, 344.)

See Assignment for Benefit of Creditors, 5, 6; Homestead, 7, 8; Joint Stock Companies.

PAYMENT.

PAYMENT—ACCEPTANCE OF A SUM LESS THAN THAT DUE.—The acceptance from the maker by the payee of a note of a sum less than that actually due, with a distinct agreement that such payment is made in full satisfaction of the debt, accompanied by a surrender of the note, extinguishes the entire debt. (*Clayton v. Clark*, 521.)

See Sales, 1.

PERJURY.

1. **PERJURY—EVIDENCE.**—On a prosecution for perjury in falsely swearing to the age of a female minor in order to procure a marriage license, evidence that the father and mother of such minor objected to her marriage with the defendant, is admissible, especially when the false affidavit on which the perjury is based states that there are no legal objections to the marriage, and such affidavit is traversed by the indictment. (*Harkreader v. State*, 40.)

2. **PERJURY—EVIDENCE.**—On a prosecution for perjury in falsely swearing to the age of a female minor in order to procure a marriage license, evidence on behalf of defendant to show that, during his engagement to such minor, he had made her many presents, which she still retained in her possession with the knowledge and consent of her parents, is immaterial and inadmissible to prove that they did not object to the marriage with the defendant, a fact which he in effect stated in the alleged false affidavit, and which is traversed in the indictment, and is an essential element in the perjury charged. (*Harkreader v. State*, 40.)

PERPETUITIES.

See Devise; Wills, 3.

PLEADING.

1. **PLEADING.**—THE HILARY RULES of pleading are not in force in Mississipp. (*Alliance Trust Co. v. Nettleton Hardware Co.*, 531.)

PLEADING—FAILURE TO PLEAD.—Failure by defendant to demur or answer to a complaint, followed by judgment by default is a confession that the complaint is true. (*Albany etc. Co. v. Merchants' Nat. Bk.*, 178.)

3. PLEADING—DECLARATION — AMENDMENT—UNAVAILABLE OBJECTION.—An objection to the amendment of a declaration is of no consequence where the verdict is sustained without the aid of any amendment. (*Whitehouse v. Whitehouse*, 278.)

4. PRACTICE—CODEFENDANTS, RIGHTS OF AS AMONG ONE ANOTHER, WHEN CANNOT BE DETERMINED.—Where, in a suit brought against several defendants by one plaintiff to determine that he has, and the defendants have not, a right to certain water by appropriation, in which each of the defendants denies the plaintiff's claim and sets up his own, the court is not authorized to determine the respective rights of the defendants as between one another, when the trial proceeded on the theory that there was no contention among the codefendants, and no evidence was offered as between them. (*Nevada Ditch Co. v. Bennett*, 777.)

See *Contracts*, 27; *Mechanic's Lien*, 9; *Negotiable Instruments*, 18.

PLEA OF GUILTY.

See *Criminal Law*, 2.

PLEDGE.

1. PLEDGE.—TO MAKE A VALID PLEDGE there must be either an actual or constructive delivery of the property pledged; and good faith does not avail the pledgee, in the absence of delivery and possession, either actual or constructive. (*Geilfuss v. Corrigan*, 143.)

2. PLEDGE—ESSENTIALS OF—POSSESSION.—Possession of property and good faith on the part of the pledgee are both essential and necessary to constitute a valid pledge as against the creditors of the pledgor. (*First Nat. Bk. v. Caperton*, 540.)

3. STORAGE WARRANTS—LIEN AS PLEDGEE AGAINST THIRD PERSONS, ON PROPERTY COVERED.—If a furnace company engaged in smelting ore gives a mining corporation receipts in the form of "storage warrants" on iron stored in its yard, a bank receiving such warrants from the mining company as collateral security, but getting no other possession of the iron represented than by a mere transfer of the warrants, and not even giving notice to the furnace company of its claim to the iron covered by the warrants, but permitting it to dispose of the iron on hand and to substitute other iron in its place, obtains no lien on the iron, against third persons, as pledgee, even if title passed to the mining company, for the reason that there is no delivery of iron to the bank. (*Geilfuss v. Corrigan*, 143.)

4. STORAGE WARRANTS—TRANSFER OF—TITLE TO PROPERTY COVERED.—If a mining corporation and a furnace corporation engaged in smelting iron ore are both owned and controlled by the same person, and the latter company gives the former receipts in the form of "storage warrants" on iron stored in its yard for the purpose of raising money without injuring its credit, but there is no consideration for the transfer, and no delivery of the property except by a transfer of the warrants, it even being understood that they shall be returned whenever they are needed by the furnace company, on account of sales of iron, and no specific iron is ever set apart as covered by the warrants, but other iron is piled in the yard as it is manufactured and indiscriminate shipments made, the min-

ing company acquires no title to the iron as against creditors of the furnace company. (*Geilfuss v. Corrigan*, 143.)

See *Guardian and Ward*, 1.

POLICE POWER.

1. **CONSTITUTIONAL LAW—THE POLICE POWER.**—Laws and regulations necessary for the protection of the lives, morals, and safety of society are strictly within the legitimate exercise of the police powers of the state, if reasonable and not prohibited by either the state or the national constitutions. (*Ford v. State*, 337.)

2. **POLICE POWER OF STATE—TREATMENT OF DRUNKARDS—COUNTY LIABILITY.**—A statute providing that, if any citizen of the state becomes an habitual drunkard, and "is pecuniarily unable to procure and pay for treatment for such disease," he may, by order of the county court, or of the judge thereof, be sent for treatment to some institution in the state for the cure of such disease at the expense of the county in which he resides, is void; and the county is not liable for such treatment. A law of this kind is not an exercise of the police power of the state, and is unconstitutional because it compels the county, without its consent, to tax its citizens for the benefit of private persons and institutions not accountable to the state, and not the legitimate objects of public charity. (*Wisconsin Keeley Co. v. Milwaukee Co.*, 105.)

3. **THE POLICE POWER, ACTION OF THE LEGISLATURE, WHEN NOT CONCLUSIVE.**—A determination by the legislature as to what is a proper exercise of the police power is not final and conclusive, but is subject to the supervision of the courts. The legislature cannot, under the guise of the exercise of this power, provide for the confiscation of private property as a penalty for an invasion or disregard by one person of the property rights of another. (*Colon v. Lisk*, 609.)

4. **CONSTITUTIONAL LAW—RIGHT OF THE LEGISLATURE TO CONFISCATE PROPERTY FOR THE COMMISSION OF A TRESPASS.**—A statute providing that every vessel by aid of which one person shall interfere with the oysters of another planted or cultivated in the waters of the state, or remove any stakes, buoys, or any boundary marks of any planted or cultivated beds may, within one year after its unlawful use, be seized, and thereafter, upon a finding of a justice of the peace that it has been employed in such unlawful use, sold, and the proceeds of the sale turned over to certain officers for the benefit of the state, is unconstitutional. The legislature cannot forfeit the property of one person on the ground that he has interfered with some private right of another without violating the provisions of the national and state constitutions insuring to every person his life, liberty, and property, unless deprived of them through the regular and proper administration of the law according to the rules and forms which have been established for the protection of private rights or the prevention or punishment of public wrongs. Such forfeiture cannot be sustained as an exercise of the police power. (*Colon v. Lisk*, 609.)

See *Boards of Health*, 3; *Lotteries*, 1.

PRESCRIPTION.

See *Adverse Possession*; *Judgment*, 13; *Wills*, 4, 5.

PROCESS.

1. **PROCESS—PROTECTION OF.**—Although a judgment and execution are void, such execution, if regular on its face, is a protection to the officer serving it against an action of trespass by the owner of the property levied upon. (*St. Louis etc. Ry. Co. v. Lowder*, 565.)

2. PROCESS—PROTECTION OF.—If a court has jurisdiction over the subject matter, but not over the person, an execution regular on its face and issued by such court, will protect the officer serving it, and he is not bound to examine into the validity of the judgment upon which such execution is issued. (*St. Louis etc. Ry. Co. v. Lowder*, 565.)

3. THE PROTECTION OF PROCESS CANNOT EXTEND so far as to shield an officer who, from all the circumstances of the case, does not appear to have acted in good faith, and whose conduct shows that his eyes were willfully closed to enable him not to see and know that he was a too ready instrument in the perpetration of a grievous wrong. (*Tellefsen v. Fee*, 379.)

4. PROCESS, WHEN A JUSTIFICATION OF AN OFFICER.—Where process is in due form and comes from a court of general jurisdiction of the subject matter, an officer is justified in acting according to its tenor, even if irregularities making the process voidable have occurred. Where, however, the process is void on its face, the officer is not protected. (*Tellefsen v. Fee*, 379.)

5. AN OFFICER HAVING PROCESS IN HIS HANDS IS BOUND TO KNOW THE LAW, and, if he is informed of facts from which the inference is irresistible that the court issuing the process did not have jurisdiction of the action or of the defendant, he is not justified in executing it. (*Tellefsen v. Fee*, 379.)

6. PROCESS, JUSTIFICATION UNDER.—If an officer is informed of extrinsic facts showing that the court issuing process did not have jurisdiction, he is not justified in proceeding to execute it. Hence, if it is against a captain of a vessel and in favor of a member of his crew claiming wages, and the officer is informed that the vessel belongs to a foreign nation, and that the matter will be adjusted at the consulate of such nation, he must take notice of the treaty giving exclusive jurisdiction of the matter to such consulate, and is liable if he proceeds to make an arrest under such process. (*Tellefsen v. Fee*, 379.)

PROXIMATE CAUSE.

See Insurance, 18; Master and Servant, 4; Shipping, 2.

PUBLIC LANDS.

See Waters and Watercourses, 9, 11.

PUBLIC USE.

See Eminent Domain, 1, 2.

RAILROAD COMPANIES.

1. STREET RAILWAYS, RATE OF SPEED.—There is no negligence, as a matter of law, in the mere fact of running a street railway car at a high rate of speed, but the jury must be permitted to determine whether, under all the attendant circumstances, the rate of speed testified to by the witnesses was excessive and therefore dangerous. (*Bittner v. Crosstown Street Ry. Co.*, 588.)

2. STREET RAILWAYS—NATURE OF FRANCHISE.—A franchise by a city or right given by it to operate a street railway is something more than a mere easement to use the street for the time, in the manner, and under the conditions specified in the ordinance, and something more than a contract between the public, acting through the city council on the one hand, and the railway company on the other, where the ordinance has been accepted and acted upon by the grantee. It is also a grant from the state which, when accepted by the grantee, imposes upon it the duty of serving the pub-

lic, and it cannot lay this burden down at will, nor emancipate itself by merely ceasing to operate its cars. (*Wright v. Milwaukee Electric Ry. etc. Co.*, 74.)

3. STREET RAILWAYS—WHAT NONUSER DOES NOT AMOUNT TO AN ABANDONMENT OF THEIR FRANCHISES.—If a street railway company has a franchise or right to operate a street railway over two certain blocks of a city, but fails to exercise its right for about four years and eight months, during a period of great industrial depression and of extraordinary financial difficulties on the part of its successive owners, during which time the track is taken up with the knowledge and consent of the company, and the street paved, but changes in roadbed at this time are made necessary by the introduction of electricity as a motive power, thus rendering the old track practically worthless and an entire reconstruction necessary, it cannot be held that the nonuser has existed for such a length of time, or under such circumstances, that an abandonment or surrender of the franchise, and acceptance thereof by the public, can be presumed, especially where the company has, by its officials, expressly denied any intention of abandoning its rights in the road, and has expressed an intention to operate the road over such blocks in the near future. (*Wright v. Milwaukee Electric Ry. etc. Co.*, 74.)

4. STREET RAILWAYS—ALIENATION OF FRANCHISE.—A franchise or right to operate a street railway is inalienable, but a sale and transfer thereof may be authorized by statute, and such authority has been granted by the statutes of Wisconsin. (*Wright v. Milwaukee Electric Ry. etc. Co.*, 74.)

5. STREET RAILWAYS—ACTION TO FORFEIT FRANCHISE—PROPER PARTY PLAINTIFF.—The authority of a city to act for the state, and on its behalf, in granting franchises to build and operate street railways, where such authority has been delegated to it, does not include the power to institute and maintain actions to forfeit such franchises for misuse or abuse. They must be brought in the name of the state, and cannot be maintained in the name of the city by a bill in equity. (*Milwaukee etc. Ry. etc. Co. v. Milwaukee*, 81.)

6. HIGHWAYS—RAILROADS—ADDITIONAL SERVITUDE.—The appropriation of a public highway for the purposes of a railroad is the imposition of an additional burden upon the abutting owners, and is, therefore, the taking of private property for public use. (*Chicago etc. Ry. Co. v. Milwaukee etc. Ry. Co.*, 136.)

7. RAILROADS—COMMERCIAL STREET RAILWAY—ADDITIONAL SERVITUDE.—The construction, on a public street, of a commercial street railway, that is, one for the transportation of merchandise, personal baggage, mail and express matter, as well as passengers, is, though operated by electricity, not a mere exercise of the public easement previously acquired by the establishment of such street, but constitutes an additional servitude or burden for which an abutting owner is entitled to compensation, although such owner may be a railroad company whose line is crossed in the street by the tracks of the other company. (*Chicago etc. Ry. Co. v. Milwaukee etc. Ry. Co.*, 136.)

8. RAILROADS—CONNECTING LINES—DUTY AND ASSURANCE AS TO SAFETY OF CARS TRANSFERRED.—If a railroad company, having a traffic arrangement with a connecting line, transfers to it a car to be hauled over the latter's road, it owes the duty, to the employes of the receiving company, of using reasonable care in making an inspection of the car and putting it in safe condition

for their use; and the delivery of the car for that purpose amounts to an invitation to such employes to go upon and handle it, as well as an assurance that they may safely do so. (Penn. R. R. Co. v. Snyder, 700.)

9. RAILROADS—CONNECTING LINES—NEGLIGENCE—DEFECTIVE CAR—LIABILITY FOR INJURY TO EMPLOYEE.—If a railroad company, having a traffic arrangement with a connecting line, transfers to it a car so defective as to be dangerous, to be hauled over the latter's road, without having made a proper inspection thereof, and putting it in a safe condition for transportation, and an employe of the latter company is injured, during the course of his employment, because of a defect in the car, either company, or both, may be held answerable at the election of the injured party. The company receiving the car is negligent because of its omission to have it properly inspected, and hauling it in its defective condition, but the negligence of the delivering company in transferring it without inspection and repair is the primary cause of the injury, and the contributory negligence of the receiving company cannot, with propriety, be said to have broken the connection between the original negligence of the company furnishing the defective car for transportation and the injury resulting from its use. (Penn. R. R. Co. v. Snyder, 700.)

10. RAILWAYS, PERSONS ASSISTING EMPLOYEES OF, WHEN MAY RECOVER IF INJURED BY THEIR CARELESSNESS.—If a person is employed by shippers to load cars, and it becomes necessary to have such cars moved from one point on a track to another, and, at the request of the brakeman, he assists in moving them, and, in doing so, is injured through the negligence of the railway corporation, he is not a mere volunteer, and may recover of it for the injuries so suffered. Nor is it necessary to sustain such a recovery to prove that the corporation did not have a sufficient force to perform the service required. (Railroad v. Ward, 848.)

11. RAILROADS—CONTRIBUTORY NEGLIGENCE—SUDDEN PERIL.—If a railroad employe, while ascending a defective ladder, attached to a car, for the purpose of managing brakes as his duties require, finds himself in a situation of sudden danger, he is not, as a matter of law, guilty of contributory negligence, because he fails to exercise the same deliberate judgment that prudent persons would where no danger is present, or because he fails to make the most judicious choice between hazards, and would have escaped injury if he had chosen differently. The question in such a case is not what a careful person would do under ordinary circumstances, but what would he be likely to do, or might reasonably be expected to do, in the presence of the existing peril, and is one of fact for the jury. (Penn. R. R. Co. v. Snyder, 700.)

12. RAILROADS—EXPULSION OF TRESPASSER.—If the conductor of a passenger train, while acting within the scope of his authority, willfully injures a trespasser while ejecting him from the train, the company is liable therefor in damages. (B. & O. R. R. Co. v. Norris, 166.)

13. RAILROADS—EXPULSION—LIABILITY THOUGH PASSENGER IS FIRST IN WRONG.—The fact that a passenger on a railroad train commits the first wrong by refusing to pay fare does not exonerate the railroad company from its liability for damages for an unlawful expulsion of the passenger from its train. (Lake Shore etc. R. R. Co. v. Orndorff, 716.)

14. RAILROADS—EXPULSION OF PASSENGER—OFFER TO PAY FARE.—If a person gets upon a railroad train without a ticket and without knowing that the train does not stop at the station of his destination, he is entitled, upon payment or tender of sufficient

money, either by himself or a third person, to pay his fare to the next regular stopping place, to remain upon the train as a passenger, and if such payment or tender is refused, and the conductor thereupon expels him from the train, the expulsion is wrongful and the company is liable in damages. (*B. & O. R. R. Co. v. Norris*, 166.)

15. **RAILROADS—EXPULSION OF PASSENGER—PROVOCATION.**—The fact that a passenger, at the time of tendering his fare, accuses the conductor in charge of the train of violating a rule of the company on a former occasion and threatens to report such violation, does not justify the conductor in wrongfully ejecting him from the train, and he is entitled to recover damages therefor. (*B. & O. R. R. Co. v. Norris*, 166.)

16. **RAILROADS—WRONG TRAIN—EXPULSION—LIABILITY FOR TORT.**—If, by the fault of an agent of a railroad company, a passenger takes the wrong train, or is without a ticket, or has one imperfectly or erroneously stamped, and is ejected, for this or any similar reason, by the conductor of a train, in pursuance of the rules of the company, it is liable to him as for a tort. (*P. C. C. & St. L. Ry. Co. v. Reynolds*, 706.)

17. **RAILROADS—WRONG TRAIN—EXPULSION—TORT AND CONTRACT—DAMAGES.**—If a passenger having a railroad ticket which is good only on trains stopping at his destination is, by the fault of the company's station agent, induced to take a wrong train, which does not, under the schedule, stop at such place, and, as a consequence, is ejected by the conductor on calling for his ticket, and before reaching his destination, he may recover damages as for a tort, and is not limited to such damages as would be proper in a mere breach of contract. (*P. C. C. & St. L. Ry. Co. v. Reynolds*, 706.)

18. **RAILROADS—REFUSAL TO PAY FARE OF CHILD—EXPULSION.**—If a mother, with a stopover ticket, boards a railroad train with her little boy, who is old enough to require the payment of fare, she is answerable for his fare, and, upon her refusal to pay, both may be ejected at the next station, but the conductor, if he has canceled the ticket, must first either pay her its unused value over and above the fares of both for the distance already traveled, or give her a stopover check instead of money. If he expels both without doing this, the company is answerable in damages. (*Lake Shore etc. R. R. Co. v. Orndorff*, 716.)

19. **RAILROADS—DUTY TO FURNISH MEDICAL AID FOR EMPLOYEES.**—A railroad corporation is under no different obligation to procure medical and surgical aid for its employé than is any other corporation or person under like circumstances. (*Bedford Belt Ry. Co. v. McDonald*, 172.)

20. **RAILROADS—POWER TO EMPLOY MEDICAL AID FOR EMPLOYEES.**—The general officers of a railroad company have power to employ medical attendance for its employés injured in the performance of duty in the company's service. Otherwise as to subordinate officers, except on an urgent exigency. (*Bedford Belt Ry. Co. v. McDonald*, 172.)

21. **RAILROADS—GENERAL OFFICERS—POWER TO EMPLOY MEDICAL AID FOR EMPLOYEES.**—The president, vice-president, general manager, secretary, and treasurer of a railroad company are general officers, with power to employ medical attendance for railroad employés injured in the performance of services for the company. (*Bedford Belt Ry. Co. v. McDonald*, 172.)

22. **RAILROADS—GENERAL OFFICERS—POWER TO EMPLOY SURGEON.**—The general officers of a railroad company have power to contract for the services of a surgeon for railroad employés injured in the course of their employment, provided he is to receive

compensation only for services actually rendered. Such contract is not against public policy, nor is it an invasion of the rights of injured employes. (*Bedford Belt Ry. Co. v. McDonald*, 172.)

RAILROAD COMPANIES.

See *Eminent Domain*, 2; *Judgment*, 17; *Jurisdiction*, 3; *Municipal Corporations*, 3-5; *Negligence*, 2.

RAILROAD TICKET.

See *Forgery*, 3-5.

RAPE.

1. RAPE—ATTEMPT TO COMMIT—FORCE NECESSARY.—To constitute the crime of attempt to commit rape the same character of force is necessary as is required to constitute rape, or assault with intent to commit rape; and the accused must have intended, at the time, to accomplish his purpose by the use of such force, namely, such force as was reasonably necessary to overcome all resistance on the part of the woman, taking into consideration the relative strength of the parties, and the other circumstances in the case. (*McAdoo v. State*, 61.)

2. RAPE—ATTEMPT TO COMMIT—FORCE NECESSARY.—If the degree or amount of force used is not such as to constitute an assault with intent to rape, but the offense is an endeavor to rape carried beyond mere preparation, then, to constitute the crime of an attempt to rape the accused must have intended to use, if necessary, such force as is necessary in an assault with intent to rape, namely such force as was reasonably calculated to overcome all resistance on the part of the woman, taking into consideration the relative strength of the parties, and the other circumstances in the case. (*McAdoo v. State*, 61.)

3. RAPE—EVIDENCE—COMPLAINT OF PROSECUTRIX.—Unless a party accused of rape attempts to prove that the prosecutrix charged some one else with the crime, or that she said that she did not know who was the guilty party, or that her testimony as to his being the man has been recently fabricated, or that improper influences have been brought to bear upon her, or on any other witness, to accuse him of the crime, it is not competent for the prosecution to prove that soon after the perpetration of the outrage the prosecutrix had complained of and charged the accused as the party who committed the crime. (*Reddick v. State*, 56.)

4. RAPE—EVIDENCE—COMPLAINT OF PROSECUTRIX—IDENTIFICATION.—On a trial for rape, testimony that a sheriff, after the arrest of the accused, placed him and several others in line, and then produced the son of the prosecutrix, who identified and pointed out the accused as the man who had raped his mother, and that the prosecutrix, at the same time and place also identified and pointed out the accused as the man who had raped her, and that she then fainted, is not admissible as original evidence to prove the crime, but only in corroboration of the testimony of the prosecutrix, and, standing alone, is not sufficient to warrant a conviction. (*Reddick v. State*, 56.)

5. RAPE—AGE OF CONSENT—INSTRUCTION.—On the trial of a defendant charged with the rape of the prosecutrix while she was under the age of consent, the court should limit the inquiry of the jury to the time at which she arrived at the age of consent, and an instruction to find the defendant guilty if he had intercourse with the prosecutrix at any time prior to the finding of the

indictment is erroneous, when the accused had been married to the prosecutrix for more than three months prior to the finding of such indictment. (*State v. Evans*, 549.)

6. RAPE—EXPERT EVIDENCE—REMOTENESS.—On a trial for rape, the evidence of a physician that he examined the prosecutrix four months after she arrived at the age of consent, and found her hymen destroyed, is incompetent to prove the crime charged, because too remote. (*State v. Evans*, 549.)

7. RAPE—EVIDENCE—COMPLAINT OF PROSECUTRIX.—On a trial for rape, the prosecution may show by the prosecutrix, or other witnesses, that she made complaint of the outrage recently after its commission, and when, where, and to whom it was made; but the prosecution is not allowed in that way to prove the name of the person charged with the crime, nor the particulars as narrated by the prosecutrix, the practice being merely to ask whether she made the complaint that such an outrage had been perpetrated upon her and to receive in answer only yes or no. Such statement or complaint is admitted only to corroborate her testimony, and is not evidence of the fact upon which the jury can find the accused guilty, and, when she is not a witness in the case, such statement or complaint is wholly inadmissible in evidence. (*Reddick v. State*, 56.)

See Incest, 1; Witnesses, 1.

REAL PROPERTY.

1. REAL PROPERTY.—SAND OR GRAVEL while in its original bed is real estate. (*Glencoe L. & G. Co. v. Hudson Bros. etc. Co.*, 560.)

2. MACHINERY, SHOPKEEPER'S LIABILITY FOR DANGEROUS.—A child of tender years who enters a shop, though for the purpose of buying candy which is there for sale, has no implied invitation to go into another part thereof where a coffee grinder is in operation, and the owner is under no obligation to look out for the child and to see that it does not injure itself by placing its hand or fingers in a part of the grinder, from which it suffers personal harm. Temptation is not always invitation. (*Holbrook v. Aldrich*, 364.)

See Trover, 1.

RECEIVING STOLEN GOODS.

RECEIVING STOLEN PROPERTY.—The bare fact, standing alone, that an accused received stolen property, is not sufficient proof to establish that he knew that the property was stolen when he received it, and does not authorize a conviction for receiving stolen property knowing it to have been stolen. (*Castleberry v. State*, 53.)

REPLEVIN.

See Sales, 1.

RESCISSION.

See Contracts, 26.

RES JUDICATA.

See Judgment.

ROBBERY.

See Indictment, 6.

SALES.

1. CONDITIONAL SALES—FAILURE OF CONSIDERATION—EVIDENCE.—In replevin, the defendant, claiming as vendee under a conditional sale containing an express warranty against latent defects, may defend by proving a failure of consideration resulting

from the fact that the property sold, by reason of latent defects, did not agree with representations made by the vendor at the time of the sale, and such proof is, in legal contemplation, the equivalent of payment. (*McKean v. John Mathews etc. Co.*, 502.)

2. SALES—DELIVERY—POSSESSION BY VENDOR AS BAILLEE—ATTACHMENT.—If cows are sold, without any fraudulent intent, in the presence of a witness, when all the parties are present, the vendor pointing out the cows with the statement, "I deliver you this stock, free from all encumbrance," and the price is paid, and the seller, for a valuable consideration, becomes bailee for the purchaser, the possession of the cows is no longer in the seller as owner. It is thereafter the purchaser's possession. The delivery is actual, though, perhaps, not a strictly manual delivery, and is good against a creditor of the vendor who subsequently attaches the cows before they are removed from the vendor's possession. (*Goodwin v. Goodwin*, 231.)

3. SALES—WHAT DELIVERY IS SUFFICIENT.—As against subsequent bona fide purchasers or attaching creditors without notice, an actual delivery is essential to the validity of a sale, but this may be accomplished, where the parties meditate no fraudulent purpose, by the vendor's relinquishment, and the vendee's assumption, of the ownership, control, and possession of the property without any removal of it. The purchaser may have the legal control and possession of the property while it is in the seller's hands as his agent or bailee, and, where a contract of sale is accompanied by an agreement making the vendor the purchaser's bailee, slight acts are sufficient to prove delivery, if there is no evidence of any fraud. (*Goodwin v. Goodwin*, 231.)

4. CONTRACT, WHEN ONE OF SALE AND NOT OF AGENCY. A writing which purports to constitute certain persons selling factors and provides that all goods consigned to them shall, until sold in the regular course of business to retail customers, remain the property of the consignors; that the consignees shall never purchase the goods on their own account; that they shall sell the goods in their name, but only as factors, and at such prices as the consignors shall dictate from time to time; that the consignees shall guarantee the sale of each consignment and the payment therefor within sixty days from its date, and shall assume all risks of credit, and make collections at their own expense; that they shall remit the full price of each consignment at the end of sixty days, whether the whole be sold or not, or whether the proceeds of the sale be collected or not; that they shall insure the consignors against any decline in prices, and shall be entitled to any advance in prices of unsold goods; that they shall be entitled to certain commissions, specified therein, for cartage and storage, for insuring against fire, for insuring payment, for insuring against decline in prices, and for selling the goods; that the consignors will allow a discount on all advances made to them prior to ten days from each consignment, and interest on advances made to them after such ten days and before the sixty days; that if the consignees neglect to remit within sixty days after any consignment, the consignors will be entitled to draw upon them for the amount of the consignment, after deducting the commissions; and that the consignees will maintain the established prices designated to them by the consignors, constitutes a contract of sale on credit and not a mere agency, and hence the consignors are not entitled to recover moneys due to the consignee for sales of goods made by them. (*Arbuckle v. Kirkpatrick*, 854.)

SCHOOL DISTRICT.

See Negotiable Instruments, 3, 4.

SCHOOLS.

1. ASSAULT—TEACHER AND PUPIL—EVIDENCE OF INTENT.—On the trial of a school teacher for an aggravated assault upon his pupil, evidence of his intent and purpose in inflicting the punishment is admissible in his behalf, and he is competent to testify thereto. (*Kinnard v. State*, 47.)

2. ASSAULT—TEACHER AND PUPIL—RES GESTAE.—Declarations by a school teacher relative to his chastisement of a pupil, made half an hour thereafter, and after he had engaged in other employment, are not *res gestae*, but self-serving and inadmissible. (*Kinnard v. State*, 47.)

3. ASSAULT—TEACHER AND PUPIL—EVIDENCE.—If a school teacher charged with aggravated assault upon one of his pupils defends, on his right to chastise such pupil, evidence that the chastisement was so severe as to cause blood to flow is admissible, to enable the jury to regulate the punishment to be inflicted upon the teacher. (*Kinnard v. State*, 47.)

SEAL.

Officers, 4.

SEDUCTION.

1. SEDUCTION UNDER PROMISE OF MARRIAGE CAN TAKE PLACE BUT ONCE.—Subsequent sexual intercourse between the parties, though brought about by the repetition of the same promise, cannot be deemed seduction where, under the statutory definition of that crime, it is necessary that the female against whom it is committed shall be of previously chaste character. (*People v. Nelson*, 592.)

2. SEDUCTION—CHASTITY.—The thing essential to constitute a woman the subject of seduction is actual chastity, and not reputation for chastity. (*Carroll v. State*, 539.)

3. SEDUCTION—PROOF OF CHASTITY.—It is competent, in an action for seduction, as one of the elements of proof of actual chastity, to show that the prosecutrix had the reputation of being chaste prior to the alleged seduction. (*Carroll v. State*, 539.)

4. SEDUCTION.—A FEMALE CANNOT BE REGARDED AS OF CHASTE CHARACTER who has voluntarily submitted to sexual intercourse, on the ground that at the time she had not reached the age of consent, if her age was such that she might have made a valid contract of marriage. (*People v. Nelson*, 592.)

5. SEDUCTION.—CHASTE CHARACTER, as that term is employed in the statute defining the crime of seduction, does not mean mere reputation for chastity, but actual personal virtue. A female who has been previously seduced, though by promise of marriage, cannot, therefore, be regarded as of chaste character, so that further yielding on her part under the influence of the repetition of the promise can be considered a second seduction. (*People v. Nelson*, 592.)

6. SEDUCTION—AGE OF CONSENT.—An essential element of the crime of seduction is the consent of the female founded upon a contract of marriage. She must be deemed capable of giving consent if old enough to contract to marry, though, if the prosecution were for the crime of rape, her youth was such that her consent would afford no protection to the accused. (*People v. Nelson*, 592.)

7. SEDUCTION—PROSECUTING WITNESS—CONTRADICTION OF.—The prosecuting witness in an action for seduction, who upon being asked if she made a certain declaration, and after an

objection to such question has been sustained, answers, denying having made such declaration, may be contradicted by another witness, if such answer has not been excluded from consideration by the jury. (*Carroll v. State*, 539.)

SELF-DEFENSE.

See Homicide, 5, 6.

SHIPPING.

1. **SHIPPING—TUGBOAT OWNERS—NEGLIGENCE IN TOWING.**—A company owning a steam tug engaged in towing a vessel, is, as to third parties, the active, directing, and responsible agent controlling the movements of the vessel it is undertaking to tow; and, if injury is caused to third parties by its negligence in managing the tow, it is answerable to them for it, even if those upon the vessel, by their fault, contribute to the injury. (*Cumberland Co. v. Central Wharf etc. Co.*, 246.)

2. **SHIPPING—NEGLIGENCE IN TOWING—INJURY TO THIRD PERSON—PROXIMATE CAUSE.**—If the master of a steam tug with a vessel in tow causes injury to a bridge across tide water while towing a vessel, the fact that the bridge owner has not fully complied with the requirements and conditions of his authority to build and maintain the bridge, as by having the draw from fifteen to twenty inches less than the required width, will not prevent him from recovering damages for the injury, where it appears that the variation in the width of the draw was not one of the real and proximate causes of the injury. (*Cumberland Co. v. Central Wharf etc. Co.*, 246.)

3. **SHIPPING—NEGLIGENCE IN TOWING—BAR TO ACTION.**—If the master of a steam tug is negligent while towing a vessel, and injury results therefrom to a third party, a suit against the owner of the tug for such injury is not barred because of an action pending against the owner of the vessel for the same injury, as the plaintiff can recover compensation from either the vessel or the tug, if each has been guilty of a fault causing the injury. (*Cumberland Co. v. Central Wharf etc. Co.*, 246.)

STATUTE OF FRAUDS.

See Contracts.

STATUTES OF LIMITATION.

See Limitations of Actions.

STATUTES.

1. **CRIMINAL LAW—PENAL STATUTES MUST BE STRICTLY CONSTRUED**, and cannot be extended to cases not clearly covered thereby. (*People v. Nelson*, 592.)

2. **TRIAL—CONTINUANCE—CONSTITUTIONAL LAW.**—There is no constitutional objection to a statute which permits a party in a civil suit to defeat his adversary's motion for a continuance on account of an absent witness by admitting that such witness will testify as stated. Such statute deprives no person of life, liberty, or property without due process of law. (*Geary v. Kansas City etc. Ry. Co.*, 555.)

3. **CONSTITUTIONAL LAW—"TORRENS SYSTEM OF LAND TITLES."**—A statute providing for the registration of land titles, and for the determination of adverse interests in land upon notice by publication, without requiring or contemplating that summons or equivalent process shall issue from a court advising those who claim

an interest in the land to be registered that their alleged interest is to be the subject of adjudication in the proceedings before a county recorder, being in effect the "Torrens system of land titles," is unconstitutional and void, because it permits the divesting of vested rights in property without due process of law, and because it permits the taking of private property for a private use without the owner's consent and without compensation, and because it attempts to confer judicial power upon a county recorder who is a purely ministerial officer. (State v. Guilbert, 756.)

See Actions, 5; Costs; Election; Execution, 2; Executors and Administrators, 9; Game Laws; Homestead, 1; Interstate Commerce, 1, 2; Lotteries, 2; Marriage and Divorce, 2, 3, 5; Police Power; Surveys; Trial, 2, 4, 6; Wills, 5, 7.

STAY OF PROCEEDINGS.

See New Trial.

STORAGE WARRANTS.

See Pledge, 3, 4; Warehousemen.

SUNDAY LAWS.

See Contracts, 19, 20.

SURETYSHIP.

1. SURETIES ARE NOT RELEASED by the imposing of additional duties on their principal, when the bond stipulates that the principal is employed for the transaction of such business as the obligees in the bond may intrust to him, and that he will faithfully perform his duties under such employment, or otherwise, and whether under, or in the absence of, any present or future contract, agreement, or understanding or any changes therein, either with or without notice to either of the obligors. (*Singer Mfg. Co. v. Reynolds*, 417.)

2. SURETYSHIP—RELEASE OF DEBTOR RELEASES SURETY—FAILURE TO PRESENT CLAIM AGAINST ESTATE. A voluntary release of the estate of the principal debtor has the effect of releasing his surety from personal liability, and the failure to present a claim against it, within the time fixed for the allowance and presentation of claims, amounts to a release of the claim, where the estate is sufficient to pay all claims against it. (*Siebert v. Quesnel*, 441.)

3. PRINCIPAL AND SURETY—EVIDENCE.—THE ADMIS-SIONS OF A PRINCIPAL are evidence against his sureties to establish liability on the part of the principal for which the sureties are also answerable. (*Singer Mfg. Co. v. Reynolds*, 417.)

4. SURETYSHIP—RIGHT AND RELEASE OF MARRIED WOMAN AS SURETY—FAILURE TO PRESENT CLAIM AGAINST ESTATE.—If a married woman, without consideration to herself, joins with her husband in a mortgage of his land whereby they covenant to pay the mortgage debt, which is evidenced by a note signed by him alone, she becomes a surety and is entitled to all the rights of a surety. Hence, if he dies leaving an estate sufficient to pay all claims against it, and the mortgagee or his assigns fail to present their claim in the probate court for allowance within the period fixed for the presentation and allowance of claims, she is released, as surety, from any further personal liability, because the principal debtor, the husband, has been discharged by the creditors' act. (*Siebert v. Quesnel*, 441.)

5. SURETYSHIP—EXONERATION OF SURETY WITHOUT HIS PAYING DEBT.—A surety may, by an action in equity, compel

his principal to exonerate him from liability by discharging the debt for which both are liable, although the surety has not first paid it. (*Dobie v. Fidelity and Casualty Co.*, 135.)

6. SURETYSHIP—RELEASE OF SURETY ON NOTE BY EXTENDING TIME OF PAYMENT.—After the payee of a promissory note signed by two persons as makers has knowledge that one of them is merely surety for the others, the law does not permit him to enter into a new agreement with the principal debtor to extend the time of payment, or to do any other act to continue the liability of the surety, without his consent; and, if he does so, the surety is discharged. (*Gillett v. Taylor*, 890.)

See Negotiable Instruments, 9, 10.

SURVEYS.

SURVEYS—CONSTITUTIONAL LAW—DUE PROCESS OF LAW.—A statute authorizing a county surveyor to locate section and quarter section corners on the application of resident owners of the section, and assessing the costs of survey on the land, is unconstitutional as depriving landowners of their property without due process of law. It is not an exercise of the power of taxation; and the surveyor is not entitled to pay for his work from the county, although the act provides that he shall be paid by the county, as the work is not done for the county, or pursuant to any contract, express or implied, with it. (*Davis v. County Commrs.*, 475.)

TAXATION.

1. TAXATION OF WATER.—Water is not a distinct subject of taxation. As an element, it is not property any more than air; but, when used, its potential power becomes actual by operating upon real property, thereby giving it value, and that value is the basis for the purposes of taxation. (*Union Water Power Co. v. Auburn*, 240.)

2. TAXATION OF WATER FOR MILL PURPOSES.—Water for mill purposes is not a distinct subject of taxation until so applied. It then becomes the main element of value, not as water, not as power, but as an integral part of the mill itself, and is indirectly the subject of taxation as a part of the mill property. (*Union Water Power Co. v. Auburn*, 240.)

3. TAXATION OF WATER, AND OF LAND EXCLUSIVE OF WATER.—If a corporation owns a dam on a river which runs between two cities, and has its established place of business in one city, where the water power from the dam is applied, its water power in the other city is merely potential, and not taxable, except indirectly in the valuation of mills with which it is used, but the dam and the land upon which it stands in the latter city may be properly taxed there at a reasonable valuation exclusive of the water power created thereby. (*Union Water Power Co. v. Auburn*, 240.)

4. TAXATION—LICENSE TAX—POWER TO IMPOSE.—The state may collect an ad valorem tax on property used in a calling, and at the same time impose a license tax upon the pursuit of that calling, and may delegate such power to a municipal corporation. Such power may be exercised by a city, when delegated to it, either as a police regulation, or for the purpose of raising revenue within constitutional limitations. (*Springfield v. Smith*, 569.)

See Municipal Corporations, 3-5.

TAX TITLE.

See *Lis Pendens*, 3, 4.

TELEGRAM.

See Contracts, 22.

TENANCY BY ENTIRETIES.

See Husband and Wife, 4.

TORRENS SYSTEM OF LAND TITLES.

See Statutes, 3.

TORTS.

See Contracts, 25; Master and Servant, 17.

TRADEMARKS.

1. TRADE NAME, USE OF, WHEN WILL NOT BE ENJOINED.—If a person organizes and manages an orchestra, giving it a name by which it becomes well and favorably known, and subsequently sells all of his interest in the organization with the right to use such name, the assignee will not be protected in the use of the name, when the other members of the orchestra no longer remain part of it. (*Messer v. The Fadettes*, 371.)

2. TRADE NAMES.—A PERSON WILL NOT BE PROTECTED by a court of equity in the use of a trade name, when such use would only be to mislead and defraud the public by falsely implying that the persons who originally used such name and gained a good reputation therein were the persons now using it. (*Messer v. The Fadettes*, 371.)

3. TRADE PACKAGES—ENJOINING USE OF.—One who has been a manufacturer of awls for several years and has put them up in a distinctive package, consisting of a bronze colored box having a brown label on the top and one side, with printed inscriptions, and tied with an orange string, is entitled to an injunction against the use by a rival of a package indistinguishable in every particular except the use of the rival's name at the bottom of the package in place of the complainant's. Nor is his right to relief negatived by a finding that the defendant did not intend to deceive the public by passing off his goods as the complainant's, where it is admitted that the goods in such packages were put up for dealers who would or might try to deceive the public. (*N. E. Awl etc. Co. v. Marlborough Awl etc. Co.*, 377.)

TRADE NAMES.

See Trademarks, 2.

TRADE PACKAGES.

See Trademarks, 3.

TREATIES.

TRANSITORY ACTIONS, TREATIES TAKING AWAY JURISDICTION OF STATE COURTS OVER.—A provision in a treaty between the United States and a foreign nation to the effect that the consuls, vice-consuls, and other designated officers of the nation named therein shall have the right to sit as judges and arbitrators in such differences as may arise between the captains and crews of vessels belonging to such nation deprives the courts of the state of jurisdiction of an action brought against the captain of a vessel of such nation by a member of his crew for wages alleged to be due. It is not material whether the plaintiff remained a member of the crew or had been discharged therefrom. In either event the question of his wages remains, and no tribunals other than those specified in the treaty have jurisdiction of it. (*Tellefsen v. Fee*, 379.)

TRESPASS.

TRESPASS.—PLEA OF NOT GUILTY DOES NOT ADMIT the possession in trespass, nor does it admit plaintiff's title in trespass de bonis asportatis or in trover. (*Alliance Trust Co. v. Nettleton Hardware Co.*, 531.)

See Injunction, 6-8; Judgment, 21; Trover, 2.

TRIAL.

1. JURY TRIAL, CASES IN WHICH PARTIES ARE ENTITLED TO.—The provision in the constitution of New York respecting trial by jury does not limit the right thereto to those cases in which it had existed before the adoption of the constitution, but further extends it to such new cases of like nature as may afterward arise. (*Colon v. Lisk*, 609.)

2. JURY TRIAL—STATUTES VOID FOR NOT ALLOWING.—A statute providing that interference by one person with oysters or other shellfish belonging to another is a misdemeanor, fixing as a penalty therefor the ordinary punishment and a further penalty of one hundred dollars for each offense, and that certain officers may summarily seize any vessel found violating the statute, and, upon six days' notice, a justice of the peace may take evidence whether the vessel was used in violation of the statute, and, if he shall determine it so, then that he must order it to be sold and the net proceeds paid to the commissioners of fisheries, game, and forestry, but making no provision for a trial by jury, it is unconstitutional, both for such denial of the right to trial by jury and for authorizing the taking of property, however valuable, and arbitrarily transferring it to the state, irrespective of the damage inflicted and where the trespass may be insignificant and the person committing it guiltless of intentional wrong. (*Colon v. Lisk*, 609.)

3. JURY AND JURORS—QUALIFICATIONS.—If a juror on his voir dire examination in a criminal case states that he has formed an opinion with reference to the guilt or innocence of the accused from general talk and rumor, and that he has also talked with a witness in the case, but that he could give the accused as fair and impartial a trial as if he had never heard of the case, he is competent, in the absence of a showing that the witness talked with was a material one in the case and that the conversation was a factor in the opinion formed. (*Wade v. State*, 31.)

4. CONSTITUTIONAL LAW—SPECIAL OR STRUCK JURIES.—A statute providing for struck juries is not obnoxious as "class legislation," is not in violation of a constitutional provision that "every person ought to obtain justice freely and without purchase," and does not infringe a constitutional mandate that "the right of trial by jury shall remain inviolate." (*Lommen v. Minneapolis Gaslight Co.*, 450.)

5. TRIAL BY JURY—DEFINITION—METHOD OF SELECTION—LEGISLATURE.—Constitutions do not define "trial by jury," but the essential and substantive attributes or elements of jury trial are, and always have been, impartiality and unanimity. The jury must consist of twelve; they must be impartial and indifferent between the parties; and their verdict must be unanimous. So long as the fundamental requisite of impartiality is not violated, the method of selection is entirely within the control of the legislature. (*Lommen v. Minneapolis Gaslight Co.*, 450.)

6. TRIAL—CONTINUANCE—CONSTITUTIONAL LAW.—If an application for a continuance of a civil case, made by the defendant on the ground of the absence of a witness, is denied under authority of a statute, because plaintiff admits that such witness if

present would testify to the facts set out in the application, such action of the court is proper, but the question of the constitutionality of such statute is properly raised by an exception to the action of the court in denying the application for a continuance upon the authority of the statute. (*Geary v. Kansas City etc. Ry. Co.*, 555.)

7. INDICTMENT—OATH TO GRAND JURY—SECRECY—PRESENCE OF STENOGRAPHER.—An oath to a grand jury to keep the "state's counsel" is substantially the same as an oath to observe and keep "the secrets of the cause," and relates to the persons accused and the witnesses, who they are, and what they testify. This injunction of secrecy cannot be waived by the prosecuting attorney or nullified by the court. It is, therefore, not competent for the court to order a stenographer to be present, before the jury, during their deliberations, and take down the testimony of witnesses, where his presence is not authorized by statute or custom. (*State v. Bowman*, 266.)

8. AN OATH NOT AUTHORIZED BY LAW is extrajudicial and of no binding force. (*State v. Bowman*, 266.)

See Contempt, 2; Statutes, 2.

TROVER.

1. TROVER TO RECOVER REALTY.—An action of trover, or its equivalent under the statute, lies only for the conversion of personalty, and not for the conversion of sand or gravel while in its original bed, or, in other words, while it is part of the realty. (*Glencoe L. & G. Co. v. Hudson Bros. etc. Co.*, 560.)

2. TROVER OR TRESPASS FOR REMOVING TIMBER.—The owner of land who has been disseised may, after re-entry, maintain trover or trespass de bonis asportatis against the disseisor, his vendee, or strangers for timber cut from his land while he was out of possession. (*Alliance Trust Co. v. Nettleton Hardware Co.*, 531.)

TRUSTS.

1. TRUSTS—ENFORCEMENT OF IMPERFECT TRUST INSTRUMENT AS A CONTRACT.—If an agreement is entered into for a valuable and legal consideration, and a trust is intended, the mere form of the instrument is not very material, for if the trust is not perfectly executed or created by the instrument, a court of equity may enforce it as a contract. (*Whitehouse v. Whitehouse*, 278.)

2. TRUSTS—CONTRACT—CHECK TO BE DELIVERED AFTER MAKER'S DEATH.—If a widower agrees with a woman, much younger than he, that if she will renew an engagement of marriage with him which he has broken, after an engagement of many years, without good cause, he will, if he dies without consummating the marriage, provide her at his decease with enough property for her support for the rest of her life without labor, and some time afterward, not having married her, and being in failing health, he considers the sum of five thousand dollars equal to the provision promised her, and writes his check for that amount, putting it in his office safe, in a sealed envelope, addressed to an uncle of hers in trust for her benefit, after which he says to the uncle, in the office containing the safe, "There is a sealed package in my safe assigned to you, placed there for safekeeping, and that package I deliver to you in trust for Dora M. Whitehouse [the niece to which he was engaged]; I have not named her in my will for the reason that what that package contains belongs to her; my brother knows all about this, and at my death he will open the safe and give the package to you, and I intrust you to give the package to her for the contents belong to her"; to which arrangement the uncle assents, and also

the niece when informed of it, the transaction exhibits not only a declaration of trust, founded upon a valuable consideration, with a symbolical or constructive delivery of the package and its contents, but a contract as well as a trust, such contract being a subsisting obligation during the life of the promisor. The check is, therefore, valid, though it does not come to the payee's hands during the life of the drawer, and it is not material that its date, whether by design or mistake, is several months later than the maker's death. (*Whitehouse v. Whitehouse*, 278.)

3. TRUST MONEYS, LIEN CREATED BY MISAPPROPRIATION OF.—If a person holding moneys as a fiduciary mingles them with his own and applies them to the satisfaction of his own obligations, so that they can no longer be traced, no lien is thereby created against his general assets, and the beneficiary cannot, on the insolvency of the trustee, maintain a claim to be paid out of the general assets in preference to other creditors. (*Drovers etc. Nat. Bk. v. Roller*, 344.)

4. TRUST, WHEN NOT IMPOSED ON MONEYS COLLECTED. If persons into whose possession goods are given to be sold sell them and collect the proceeds, but do not keep them separate from their other moneys, and expend and use them in their business, and, then becoming insolvent, make an assignment, there can be no trust imposed upon the funds in their assignee's hands, whether in making such sales they acted as agents of the owners of the goods sold, or had first purchased them and were indebted for the purchase price. (*Arbuckle v. Kirkpatrick*, 854.)

5. TRUST MONEYS, RIGHT TO FOLLOW AFTER THEIR IDENTITY HAS BEEN LOST.—If money held by a person in a fiduciary capacity has been paid by him to his account at his bankers' and mixed with his own money, and he afterward draws checks in the ordinary manner, he is presumed to have drawn out his own, rather than the trust money. (*Drovers' etc. Nat. Bk. v. Roller*, 344.)

ULTRA VIRES.

See Corporations, 3.

VACCINATION.

See Boards of Health, 3, 4.

VENDOR AND PURCHASER.

DAMAGES—FRAUD IN EXCHANGE OF REAL ESTATE—OFFER, IN OPEN COURT, TO SELL AND CONVEY BACK.—If two parties agree to exchange lands, but one is deceived by the false representations of the other as to the value, location, and rentals of the property he receives in exchange, and which he has not examined, and sues to recover damages for the fraud and deceit, an offer by defendant, in open court, to sell and convey back to the plaintiff the property received of him, for less than one-fifth of the damages claimed, and for less than one-sixth of its value as originally agreed upon, an offer in open court to tender a deed for the same on payment of the money, and an offer to give time on stated payments, should not be allowed to stand, as it is not a method recognized by law for proving value, and it is error for the court to permit it to stand. The right of damages, in such a case, is absolute upon the happening of the wrong, and nothing but the act of the injured party can release it. Such an offer might well prejudice the plaintiff before the jury: and, besides this, where no fraud or deceit is alleged, in the pleadings, as to the lands received of the plaintiff, the value of that land is not in issue, so far as it affects the question of damages. The plaintiff is, therefore, entitled to the

benefit of his bargain, and the jury has no right to fix a new price on the plaintiff's land, where it has already, without deception, been fixed by the parties. (*Hecht v. Metzler*, 906.)

VOLUNTEERS.

See Master and Servant, 15, 16; Railroad Companies, 10.

WAREHOUSEMEN.

STORAGE WARRANTS—WAREHOUSE RECEIPTS—CHATTEL MORTGAGES.—Although a corporation engaged in smelting ore issues so-called "storage warrants" on iron in its yard, the title to, and constructive possession of, the property covered thereby does not pass by their transfer and indorsement as in the case of negotiable warehouse receipts. To have the effect of warehouse receipts they must be issued by a warehouseman, or one openly engaged in the business of storing property for others for a compensation. Hence, the surreptitious issuance of false "storage warrants," or receipts, by such a corporation, does not constitute it a warehousing corporation. Neither are such warrants valid as chattel mortgages upon the iron named in them. (*Gellfuss v. Corrigan*, 143.)

WAREHOUSE RECEIPTS.

See Warehousemen.

WATERS AND WATERCOURSES.

1. WATERS.—TO THE VALID APPROPRIATION OF WATER THREE ELEMENTS MUST EXIST: 1. Intent to appropriate it to some beneficial use existing at the time or contemplated in the future; 2. A diversion from the natural channel by means of a ditch, canal, or other structure; 3. The application of it within a reasonable time to some useful industry. (*Nevada Ditch Co. v. Bennett*, 777.)

2. WATERS.—THE APPROPRIATION OF WATER IS NOT CONSUMMATED until it has been actually applied to some beneficial purpose or useful industry. The right acquired prior to that time amounts simply to a claim of the appropriator. Therefore, the actual user for a beneficial purpose is the true and only final test touching the question whether the party's claim has ripened into a valid appropriation. (*Nevada Ditch Co. v. Bennett*, 777.)

3. WATERS.—THE AMOUNT OF AN APPROPRIATION OF water is in every instance limited to the uses for which it was made, and restricted to the quantity needed for the purpose. (*Nevada Ditch Co. v. Bennett*, 777.)

4. WATERS—APPROPRIATION, TIME ALLOWED TO APPLY TO A BENEFICIAL USE.—A claimant is entitled to a reasonable time after he has diverted and carried water to the place of use in which to make the actual application to the contemplated useful purpose, the prime requirement being that he must be reasonably diligent in making the application, the attendant circumstances to be considered. (*Nevada Ditch Co. v. Bennett*, 777.)

5. WATERS, APPROPRIATION OF, TO WHAT TIME RELATES.—Where there is a custom that persons desiring to appropriate water shall post a notice at the point of diversion stating the amount of water claimed and the purposes to which it is to be applied, the names of the appropriators, the direction and terminals of the ditch, and that such notice shall be immediately recorded, and the work is prosecuted with due diligence, the appropriation relates back to the first step. (*Nevada Ditch Co. v. Bennett*, 777.)

6. WATER—APPROPRIATION BEGUN BY ONE PERSON MAY BE COMPLETED BY ANOTHER.—If one claims water for use upon lands owned by him or of which he has the possessory

title, and initiates an appropriation, and, before completing it, sells his lands or possessory title to another, the latter may proceed to complete the appropriation. (Nevada Ditch Co. v. Bennett, 777.)

7. WATERS, APPROPRIATION OF FOR USE BY OTHERS.—It is not necessary that the person who appropriates water should use or intend to use it himself or on his own land. He must intend that it shall be applied to a beneficial use, but that use may be accomplished by others to whom he furnishes it for use upon their lands or in their mines or mills. (Nevada Ditch Co. v. Bennett, 777.)

8. WATER—APPROPRIATION FOR FUTURE BENEFICIAL USE.—Persons who commence an appropriation for their use and that of other persons who are reasonably expected to settle in that part of the country, and who begin and construct the appliances necessary to the diversion and conveyance of the water to the place of use with due and reasonable diligence, and who subsequently divide their appropriation with persons who use such water, must be regarded as appropriating it for a beneficial use to the extent of their actual appropriation and diversion. (Nevada Ditch Co. v. Bennett, 777.)

9. WATERS, APPROPRIATION OF BY THE GOVERNMENT. The appropriation and diversion of waters by the government for use of an Indian reservation is not equivalent to their appropriation and diversion by a private individual, and when the reservation is discontinued, and the lands which constituted it are sold and patented by the government to private individuals, they do not acquire thereby any rights to the water before then so used by the government. (Nevada Ditch Co. v. Bennett, 777.)

10. WATERS, DILIGENCE IN EFFECTING APPROPRIATION OF.—When a notice of appropriation was posted in 1881, and work was commenced in the same year, and about two miles of ditch excavated and a dam constructed, and a diversion made, and this section completed in the spring of the following year, and in the fall of the year 1892 the way was cleared for the second section, and during the next spring the excavation and construction were continued until the time of irrigation, but after that time were stopped to permit the use of the water for irrigation, and in the fall of 1883 the construction was resumed and practically completed in the spring of 1884, due diligence was exercised in the construction and completion of the ditches and appliances. (Nevada Ditch Co. v. Bennett, 777.)

11. WATERS—TITLE OF PURCHASERS OF PUBLIC LANDS IS SUBJECT TO PRIOR APPROPRIATION OF.—A patent issued by the United States, and which purports to be subject to any vested and accrued water rights which may be recognized and acknowledged by the local laws, customs, and decisions of the court, passes title subject to the rights of any prior appropriators. (Nevada Ditch Co. v. Bennett, 777.)

See Partition, 1, 2; Pleading, 4; Taxation, 1-3.

WILLS.

1. WILL, WHEN NOT REVOKED BY SUBSEQUENT MARRIAGE.—If a married woman makes a valid will, after which her husband dies and she contracts a second marriage, her will is not thereby revoked. (Matter of McLarney, 664.)

2. WILLS, NOT SUBSCRIBED AT THE END THEREOF.—If a will is drawn upon a printed blank covering but one page and containing clauses numbered first and second, at the end of which the testator and the witnesses sign, and such page directs attention to an annexed slip, and there is annexed, fastened by metal staples,

another page containing further clauses, numbered third and fourth, such will is not subscribed at the end as required by statute, and cannot be admitted to probate. (*Matter of Whitney*, 616.)

3. **PERPETUITIES.—BEFORE THE RULE AGAINST PERPETUITIES WILL BE APPLIED**, it must be clear that a perpetuity exists. When language is fairly capable of two constructions, one of which will produce a lawful result, and the other one that is bad for remoteness, the former should be adopted rather than the latter. (*In re Stickney's Will*, 308.)

4. **WILLS—CHILD OMITTED—REBUTTABLE PRESUMPTION—PAROL EVIDENCE.**—The presumption raised by a statute, that the omission by a testator to provide for any of his children was not intentional, may be rebutted by extrinsic evidence, whether of declarations of the testator, or collateral facts showing the intention of the testator to have been that which the language of the will expresses. (*In re Atwood*, 878.)

5. **WILLS—CHILD OMITTED—STATUTE—PRESUMPTION.**—If a statute declares that, when a testator omits to provide in his will for any of his children, such child must have the same share of the estate of the testator as if he had died intestate, unless it appears that such omission was intentional, and he does fail to provide in his will for one of his children, the presumption under such statute is, that the omission was not intentional. (*In re Atwood*, 878.)

6. **CONDITIONS PRECEDENT AND SUBSEQUENT—CONSTRUCTION.**—Courts are adverse to construing conditions to be precedent where they may defeat the vesting of an estate by a will. (*In re Stickney's Will*, 308.)

7. **EVIDENCE—CONTENTIONS BETWEEN HEIRS—STATUTE—DISQUALIFICATION.**—Under a statute disqualifying heirs, legatees, and devisees, in contentions between themselves, from testifying as to statements of the deceased, unless called as witnesses by the adverse party, the heirs, devisees, and legatees under a will are not, in a proceeding to establish the rights of a child omitted from the will, competent witnesses to testify as to certain conversations before and after the will was executed, in which the testator stated that the child omitted was not his child, and that he did not intend to provide for her in his will. They not only belong to the class of persons named by the statute as disqualified, but appear to come within the reason of the rule of exclusion established by the statute, because such testimony is of statements of a deceased person in their favor, and is not allowable, especially where there is no other means of showing what the testator did say, or of contradicting the witnesses. (*In re Atwood*, 878.)

See Corporations, 4.

WITHDRAWAL OF ANSWER.

See Insolvency, 2.

WITNESSES.

1. **WITNESSES—WIFE AGAINST HUSBAND—RAPE.**—A wife is not a competent witness against her husband in a prosecution against him for a rape committed on her prior to their marriage. (*State v. Evans*, 549.)

2. **WITNESSES—EXPERTS—DEFECTS IN CAR-WHEELS.**—One who has been engaged in building railroad cars for ten years, and during that time has given particular attention to carwheels and their construction, is competent to give an opinion on the value of the hammer test as a means of detecting breaks in car wheels. (*Pittsburgh etc. Ry. Co. v. Sheppard*, 732.)

3. WITNESS, LIVING, WHEN PERMITTED TO TESTIFY AGAINST DECEDENT.—If, upon a trial of an action against the estate of a decedent, the holder of a note given by him is called upon to produce it, which she does, and admits the signature to be genuine, she is not competent, as a witness in her own behalf, to testify to the consideration for which the note was made, for the purpose of rebutting the presumption that all pre-existing accounts and demands between them had been settled by such note. (Matter of Callister, 620.)

See Seduction, 7; Wills, 7.

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